

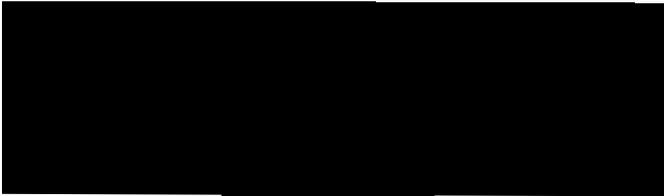
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Office: VERMONT SERVICE CENTER

Date: **MAR 29 2006**

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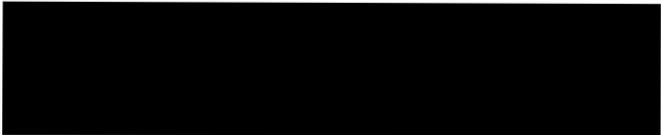
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a stone specialist/monument manufacturer. It seeks to employ the beneficiary permanently in the United States as a sandblaster/stone assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 21, 1997. The proffered wage as stated on the Form ETA 750 is \$28.50 per hour, which equals \$59,280 per year.

The first petition in this matter was submitted on November 8, 1999. On that petition, the petitioner stated that it was established on June 22, 1989. In the space on the petition reserved for the petitioner to report the number of workers it employs the petitioner entered "Family owned & operated business one employee." On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary stated that, from September 1995 until February 10, 1997, the date on which he signed that form, he had worked for Prowse Memorials in Flushing, New York. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Lindenhurst, New York.

In support of that petition, counsel submitted a copy of the petitioner's 1997 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on June 22, 1989, that [REDACTED] owns 100% of the company stock, and that the petitioner reports taxes

pursuant to the calendar year and accrual convention. That return also shows that the petitioner declared a loss of \$4,806 during 1997. At the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 12, 2000, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested copies of the petitioner's 1998 and 1999 tax returns.

In response, counsel submitted (1) copies of the petitioner's 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) copies of the petitioner's compiled 1997 financial statements, and (3) a letter dated September 7, 2000.

The petitioner's 1998 return shows that it declared ordinary income of \$14,981 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 1999 return shows that it declared ordinary income of \$35,717 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In his letter counsel stated that examination of the petitioner's tax returns "inarguably demonstrates . . . [the] established ability to meet financial obligations."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on December 12, 2000, denied the petition. In that decision the director indicated that a petitioner's depreciation deduction is correctly considered a fund available to pay the proffered wage.

On May 8, 2001 the petitioner submitted a second petition, the instant petition, for the same beneficiary and based on the same approved Form ETA 750 labor certification.

The petitioner's 2000 tax return shows that the petitioner declared ordinary income of \$87,907 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$59,929 and current liabilities of \$44,629, which yields \$15,300 in net current assets.

The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$48,714 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$112,495 and current liabilities of \$51,615, which yields \$60,880 in net current assets.

Because the evidence submitted still did not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Vermont Service Center, on March 22, 2004 issued another request for evidence of that ability. The service center specifically requested, *inter alia*, the petitioner's 2002, and

2003 tax returns and, if it had employed the beneficiary during 1996 or 1997, W-2 Wage and Tax Statements showing the wages it paid to the beneficiary during those years.

In response counsel submitted copies of the petitioner's 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, and copies of 1996, 1997, and 2003 W-2 Wage and Tax Statements.

The petitioner's 2002 tax return shows that the petitioner declared a loss of \$53,876 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of \$128,229 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-2 forms submitted show that the petitioner paid the beneficiary \$18,235.95, \$26,235.46, and \$41,889.19 during 1996, 1997, and 2003, respectively.

The director again found that the evidence submitted did not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date and denied the second petition.

On appeal, counsel submits a photocopy of a paycheck and stub, a letter from the petitioner's president and owner dated October 5, 2004, and a brief.

The paycheck and stub submitted show that the petitioner's paid the beneficiary \$1,729.70 for work performed during the two-week pay period from September 24, 2004 to October 7, 2004. That payment was for 40 hours of work at \$17.65 plus 12 hours of overtime. The paycheck also shows that the petitioner had paid year-to-date wages of \$30,649.24 during that year.

The petitioner's owner's letter notes that the petitioner had paid the beneficiary \$30,649 during 2004 to October 5, 2004, the date of that letter. That letter further states that the beneficiary's annual salary during that year would be \$46,000.

The paycheck and stub submitted indicate that the beneficiary is, at least occasionally, paid extra for overtime work. This office finds, therefore, that the statement of the amount the beneficiary would be paid by the end of 2004 was a projection or estimate. Further, this office notes that only three months of that year remained, during which time the petitioner urges that the beneficiary will earn an additional \$15,351, an average of \$5,117 per month. During the previous nine months of that year, however, the beneficiary had earned an average of only approximately \$3,400 per month. No explanation is given for the size of the estimate, which appears excessive in light of the amount the beneficiary previously earned.

The accountant's letter stated that the amount available to the petitioner to pay additional wages during the salient years includes its annual income, the amount of officer compensation over \$75,000, the amount of the petitioner's profit sharing plan contribution, the wages actually paid to the beneficiary, and the amount of dividend distributions during 1997, 2000, and 2003.

The accountant states that reasonable compensation for the petitioner's owner would be \$75,000 annually. This office notes that the average compensation paid to the petitioner's owner exceeded \$100,000 and that the annual amount paid was less than \$100,000 during only one year. The record contains no evidence that the petitioner's owner was willing and able to accept a lesser amount. No amount of the petitioner's officer compensation has been shown to be available to pay additional wages. The same is true of the petitioner's dividend distributions. The record does not demonstrate that the petitioner's owner was willing and able to forego the dividend distributions paid to him.

Similarly, the accountant states that the petitioner's profit sharing plan contributions are discretionary, but submits no evidence in support of that assertion. The accountant's statement implies that those payments are not necessary to retain skilled employees and that the contributions are essentially a gift. Although this may be true it has not been shown to be. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. No amount of the petitioner's profit sharing plan contributions has been demonstrated to be available to pay additional wages.

The petitioner's reliance on the financial statements submitted is misplaced. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that if a petitioner supports its ability to pay the proffered wage with financial statements those statements must be audited. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In the December 12, 2000 denial of the first petition in this matter the director indicated that a petitioner's depreciation deduction should be included in the calculations pertinent to its ability to pay additional wages. This office does not concur.

Depreciation is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. That expense may not now be shifted to some other year nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the director declines to charge them against income according to their depreciation schedule, he does not offer

any alternative allocation of those costs.¹ That approach to depreciation asserts that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.²

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the W-2 forms submitted show that the petitioner employed the beneficiary during 1997 and 2003³ and paid him \$26,235.46 and \$41,889.19 during those years, respectively. In addition, the pay stub submitted shows that the petitioner paid the beneficiary \$30,649.24 during 2004 through October 7 of that year.

Although the petitioner's accountant asserts that the petitioner paid the beneficiary \$29,575, \$27,418, \$29,523, \$40,190, and \$38,758 during 1998, 1999, 2000, 2001, and 2002, respectively, the record contains no evidence in support of that assertion. Those amounts will not be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

¹ That decision does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

² Neither counsel nor the petitioner's accountant argued that the petitioner's depreciation deduction should be considered available to pay wages.

³ A 1996 W-2 form was also submitted. Because the priority date is February 21, 1997, however, evidence pertinent to the payments during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The amount the petitioner paid to the beneficiary during 1996 will not be further addressed.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$59,280 per year. The priority date is February 21, 1997.

During 1997 the petitioner paid the beneficiary wages of \$26,235.46. The petitioner must show the ability to pay the \$33,044.54 balance of the proffered wage during that year. During that year the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998 and must show the ability to pay the entire proffered wage during that year. During that year the petitioner declared ordinary income of \$14,981. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999 and must show the ability to pay the entire proffered wage during that year. During that year the petitioner declared ordinary income of \$35,717. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared ordinary income of \$87,907. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$48,714. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$60,880. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 and must show the ability to pay the entire proffered wage during that year. During that year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary wages of \$41,889.19. The petitioner must show the ability to pay the \$17,390.81 balance of the proffered wage during that year. During that year the petitioner declared ordinary income of \$128,229. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary \$30,649.24 during 2004. Although the petitioner submitted no evidence of its ability to pay the balance of the proffered wage this office notes that the more recent request for evidence was issued on March 22, 2004, when the petitioner's 2004 income tax return was unavailable. When the appeal in this matter was submitted, on October 14, 2004, that return was still unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2004.

The evidence raises an additional issue that was not addressed in the decision of denial. On the Form ETA 750B the beneficiary stated that he worked full-time for Prowse Memorials in Flushing, New York from September 1995 to at least February 10, 1997, the date he signed that form. Further, the beneficiary did not state that he had ever worked for the petitioner, although the instructions to that form request that he "*List all jobs within the last three (3) years . . . [and] any other jobs related to the occupation for which the alien is seeking certification.*" [Emphasis in the original.]

Notwithstanding that the beneficiary indicated he had never worked for the petitioner prior to February 10, 1997, and that he worked full-time for Prowse Memorials from September 1995 to at least February 10, 1997, the petitioner submitted, without explanation, 1996 and 1997 W-2 forms showing that it had employed the beneficiary during both of those years. This discrepancy could cast doubt both on the beneficiary's claimed employment history and on the veracity of the W-2 forms submitted. Because this issue was not raised in the decision of denial, and the petitioner has not been accorded an opportunity to address it, this issue forms no part of the basis of today's decision. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered



Page 9

wage beginning on the priority date. The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.