

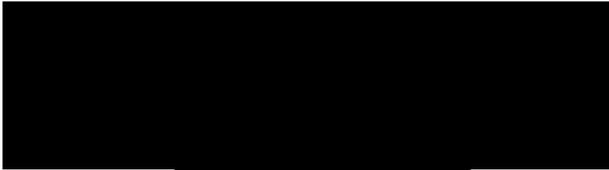


U.S. Citizenship
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Services

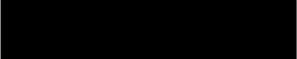
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **AUG 21 2007**

WAC 05 150 53457

IN RE:

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a construction contractor. It seeks to employ the beneficiary permanently in the United States as a construction manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The director also noted that the evidence appeared to show that although the beneficiary's stated duties include supervising estimators and drafters, the petitioner appears to have no need for a supervisor for estimators and drafters. The director further noted that evidence provided showed that during 2004 the petitioner had paid an amount to contractors that exceeded its gross receipts, but declared a profit during that same year. The director found that this apparent discrepancy called into question the reliability of the petitioner's evidence. Finally, the director noted that the beneficiary's address as shown on tax documents is the same address shown on the petitioner's checking account statements, which the director found raised additional questions about the reliability of the evidence.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 2, 2001. The proffered wage as stated on the Form ETA 750 is \$35.75 per hour, which equals \$74,360 per year.

The Form I-140 petition in this matter was submitted on April 29, 2005. It indicates that the beneficiary's home address is [REDACTED]. On the petition, the petitioner stated that it was established during 1991 and that it employs four workers. The spaces reserved for the petitioner to report its gross annual income and its net annual income were left blank. On the Form ETA 750, Part B, signed by the beneficiary on August 22, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Los Angeles, California.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's owner's² 2001, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, (2) twelve 2004 Form 1099 Miscellaneous Income statements, (3) a 2004 Form 1096 Annual Transmittal, (4) a spreadsheet of the petitioner's owner's personal expenses during November and December of 2001, (5) spreadsheets of the petitioner's owner's personal expenses during 2002, 2003, 2004, and 2005, segregated by month, (6) a list of the petitioner's owner's average monthly personal expenses for the years 2001 – 2003, (7) a list of the petitioner's owner's average monthly personal expenses for the year 2004, (8) copies of monthly statements pertinent to the petitioner's bank account, (9) IRS printouts showing line item entries on the petitioner's owner's 2003 Form 1040 U.S. Individual Income Tax Return, (10) the beneficiary's 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Return tax returns, (11) IRS printouts showing the line item entries on the beneficiary's 2001 and 2003 Form 1040 U.S. Individual Income Tax Returns, (12) a grant deed that is described in more detail below, (13) a full reconveyance that is described in more detail below, and (14) a mortgage statement that is described in more detail below. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

A letter from counsel, dated December 2, 2005, lists the petitioner's employees and their duties. The eleven employees include a plumber, a welder, a mason, two stucco masons, a cabinet maker, a framing carpenter, an electrician, a painter, an HVAC mechanic, and an employee whose job description is "Purchase/Order Materials and run errands." That letter does not indicate that the petitioner employs any estimators or drafters.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The tax returns are the joint returns of [REDACTED] schedules C attached to those returns show that [REDACTED] owns the petitioner as a sole proprietorship.

The tax returns provided show that the petitioner's owner and owner's spouse had one dependent during each of the salient years.

During 2001 the petitioner reported gross receipts of \$23,256 and net profit of \$3,772. The petitioner's owner and owner's spouse declared adjusted gross income of \$989, including the petitioner's profit offset by deductions.

During 2002 the petitioner reported gross receipts of \$52,820 and net profit of \$10,052. The petitioner's owner and owner's spouse declared adjusted gross income of \$9,910, including the petitioner's profit offset by deductions.

During 2003 the petitioner reported gross receipts of \$35,604 and net profit of \$11,443. The petitioner's owner and owner's spouse declared adjusted gross income of \$13,179, including the petitioner's profit.

During 2004 the petitioner reported gross receipts of \$49,384 and a net profit of \$12,001. The petitioner's owner and owner's spouse declared adjusted gross income of \$13,316, including the petitioner's profit.

One of the 2004 Form 1099 Miscellaneous Income statements submitted shows that the petitioner paid the beneficiary \$32,000 in non-wage compensation. That Form 1099 shows the beneficiary's address at that time as [REDACTED], in Los Angeles, California.

All 12 of the 2004 Form 1099 Miscellaneous Income statements submitted, taken together, show that the petitioner paid non-wage compensation of \$290,162 during that year. The Form 1096 Annual Transmittal submitted, however, shows that the petitioner paid total wages of only \$266,182 during that same year. This office notes that the purpose of the Form 1096 transmittal is to report the sum of the amounts shown on all of the Form 1099 statements and some other forms not relevant here. The Form 1096 indicates that the total report is taken from twelve forms and the record contains twelve 2004 Form 1099 statements. The total shown on the Form 1096 should equal the sum of the payments shown on the Form 1099 statements, but does not. This casts doubt on the reliability of the evidence submitted.

Further, neither the sum of the contractor payments shown on the Form 1099 statements nor the amount shown on the Form 1096 is shown on the Schedule C reporting the petitioner's receipts and expenses. If the petitioner paid either of those amounts, then the amount it paid should be shown on that schedule. Further still, this office notes that although both of the two competing amounts that the petitioner claims to have paid to contractors during 2004 exceed its gross receipts, the petitioner reported a profit.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The budget spreadsheet for November and December 2001 shows that the petitioner's owner has personal expenses of \$3,244.37 during those months.

The budget for 2002 shows that the petitioner's owner had total personal expenses of \$8,396.88 during that year.

The budget for 2003 shows that the petitioner's owner had total personal expenses of \$18,370.05 during that year.

The budget for 2004 shows that the petitioner's owner had total personal expenses of \$19,314.07 during that year.

The budget for 2005 shows that the petitioner's owner had total personal expenses of \$19,081.67 during that year.

The budget for 2001 – 2003 shows that the petitioner's owner had average monthly personal expenses of \$1,418 during those years, which equals \$17,016 per year. The budget for 2004 shows that the petitioner's owner's average monthly personal expenses were \$1,881.78, which equals \$22,581.36 per year.

The address given on the petitioner's bank statement, that listed as the petitioner's and to which the statements were sent, is [REDACTED], Los Angeles, California.

The tax returns and IRS printouts for the beneficiary indicate that the beneficiary filed a Schedule C Profit or Loss from Business during 2001, 2002, and 2003, and declared gross receipts of \$24,001, \$37,000, and \$42,003 during those years, respectively. The printouts do not indicate who paid those amounts to the beneficiary. The beneficiary's address as shown on those tax returns is [REDACTED] Los Angeles, California.

The grant deed submitted shows that the petitioner's owner and the owner's spouse took title to a parcel of land in Los Angeles on May 10, 1979.

The full reconveyance shows that on March 25, 2002 the trustee of a deed of trust dated October 30, 1986 extinguished that deed of trust, fully reconveying its interest to the petitioner's owner, the owner's spouse, and a third person. As the deed of trust was recorded in the land records of Los Angeles, California this office presumes that the property that was the subject of that deed of trust and reconveyance is in Los Angeles.

The mortgage statement shows that, on December 22, 2005 the petitioner's owner and owner's spouse owed \$33,844.25 on the property at [REDACTED] California, which the Form I-140 and the Form ETA 740 state is the petitioner's address and the location at which the beneficiary would be employed. The monthly payment on that mortgage loan is \$416.01.

The director denied the petition on February 15, 2006. On appeal, counsel asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Those bank statements do, however, raise an additional issue. As the director noted in the decision of denial, the address shown on the petitioner's bank statements, [REDACTED] Los Angeles, California, is the same address shown on the Form 1099 issued to the beneficiary. The beneficiary's Form 1040 U.S. Individual Income Tax Return tax returns show the same address during 2001, 2002, and 2003. On a Form G-325A Biographic Information form submitted with the beneficiary's Form I-485 Application to Adjust Status, and signed on March 9, 2005 the beneficiary stated that she had lived at that address since February 1996. The Form I-140 petition, submitted on April 29, 2005, indicated that she continued to live at that address. The director noted that, if she is merely an employee of the petitioner, it is suspicious that the petitioner's bank statements go to the beneficiary's address.

Although it was raised in the decision of denial, counsel did not address this issue. That the petitioner's bank statements are sent to the beneficiary's home address, left unexplained, is an additional reason to question the reliability of the evidence submitted in this matter.

The director also noted that, although the beneficiary's job description, as shown on the Form I-140, includes, "supervise and coordinate drafters and estimators," the petitioner does not appear to employ any drafters or estimators. Although this apparent discrepancy was raised in the decision of denial, counsel did not address it on appeal. This discrepancy, left unexplained, is another reason to question the reliability of the evidence submitted in support of the instant petition.

Although counsel made no such argument explicitly, the submission of documents related to real property implies that counsel views them as an index of the petitioner's ability to pay the proffered wage.

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The record does not reliably demonstrate the value of the petitioner's owner's real property. Further, the record does not show that the value of that property, or the owner's equity in it, if any, is available to pay wages.

A reliable, disinterested real estate appraisal would typically be performed by a licensed or certified real estate appraiser. Here the record does not include any such disinterested valuation.

The amount by which the property is encumbered is insufficiently demonstrated. Although the record contains evidence of one mortgage loan that was extinguished and evidence that another mortgage was placed on a property,⁴ it contains no indication of the total of all encumbrances currently on the petitioner's owner's property.

Even if the value of the property or properties and the amount of all encumbrances were sufficiently demonstrated, that would be insufficient to show that the difference, the amount of the petitioner's owner's equity, was available to pay wages. The petitioner's owner will not necessarily realize the value of that property in cash in the near future and that value has not, therefore, been shown to be available to pay wages.

The petitioner's owner could secure a home equity loan with whatever equity he has in his home. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of the petitioner's owner's equity in real property owned will not be considered in evaluating the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2004 Form 1099 Miscellaneous Income statements show that the petitioner paid non-wage compensation of \$290,162. The 2004 Form 1096 Annual Transmittal submitted shows that the petitioner paid total wages of \$266,182. Those forms conflict.

Further, the 2004 Schedule C shows that the petitioner had gross receipts of \$49,384. No figure on that form exceeds that amount, and the petitioner declared a profit. Yet the petitioner claims to have paid either \$290,162 or \$266,182 in compensation during that year. This is a very serious discrepancy. It renders not just the tax returns, the Form 1099, and the Form 1096 unreliable, but also all of the evidence submitted in this case in support of the visa petition.

The petitioner must establish, with reliable evidence, that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm.

⁴ Whether the evidence pertinent to real property all relates to the same property is unclear.

1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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, a 2004 Form 1099 Miscellaneous Income indicates that the petitioner paid the beneficiary \$32,000 in non-wage compensation during that year. In view of the many discrepancies in the evidence pertinent to the petitioner's tax documents and the other evidence submitted, and particularly the discrepancy between the 2004 Form 1099, the 2004 Form 1096, and the 2004 Schedule C, this office finds that the evidence submitted is not reliable and not, therefore, persuasive. The petitioner did not establish that it employed and paid the beneficiary during 2004 or any other year.⁵

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d

⁵ Even if the 2004 Form 1099 were deemed acceptable evidence, it would not show the ability to pay any wages during any other year. The petitioner submitted no evidence, reliable or otherwise, that it paid any wages to the beneficiary during previous years.

571 (7th Cir. 1983).

The proffered wage is \$74,360 per year. The priority date is November 2, 2001.

Because the evidence submitted is manifestly unreliable, it does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal. The remainder of the analysis pertinent to ability to pay the proffered wage is hypothetical. That is; it is an examination of the evidence presented by the petitioner.

During 2001 the petitioner's owner and owner's spouse declared adjusted gross income of \$989. That amount is insufficient to pay the proffered wage. The evidence, even if deemed reliable, is insufficient to show that the petitioner was able to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$9,910. That amount is insufficient to pay the proffered wage. The evidence, even if deemed reliable, is insufficient to show that the petitioner was able to pay the proffered wage during 2002.

During 2003 the petitioner's owner and owner's spouse declared adjusted gross income of \$11,443. That amount is insufficient to pay the proffered wage. The evidence, even if deemed reliable, is insufficient to show that the petitioner was able to pay the proffered wage during 2003.

The petitioner submitted a 2004 Form 1099 showing that it paid the beneficiary \$32,000 during that year. If that evidence were deemed reliable, the petitioner would be obliged to show the ability to pay only the remaining \$42,360 balance of the proffered wage during that year. During 2004 the petitioner's owner and owner's spouse declared adjusted gross income of \$13,316. That amount is insufficient to pay the remaining balance of the proffered wage. Even if the evidence were deemed reliable, is insufficient to show that the petitioner was able to pay the proffered wage during 2004.

The petition in this matter was submitted on April 29, 2005. On that date the petitioner's 2005 tax return was unavailable. On November 2, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Having failed to demonstrate its ability to pay the proffered wage during all of the salient years the petitioner has not established that it had the continuing ability to pay the proffered 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.