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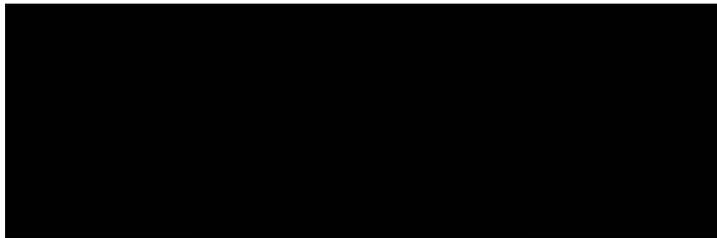
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Office: VERMONT SERVICE CENTER

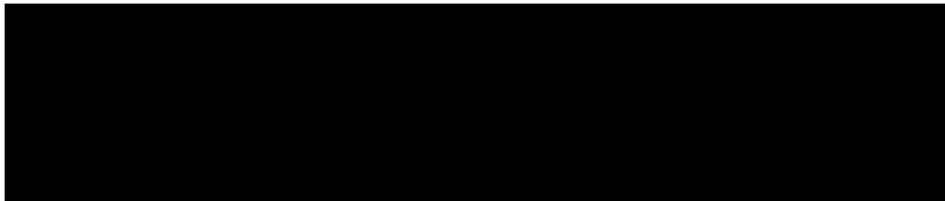
Date: DEC 03 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 sells ceramic building materials. It seeks to employ the beneficiary permanently in the United States as a stonecutter. 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 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.

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 either 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 Application for Alien Employment Certification 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.06 per hour, which equals \$35,484.80 per year.¹

¹ On the request for evidence issued in this matter the service center indicated that the annual amount of the proffered wage is \$48,791.60. This office notes that the petitioner stated on the Form ETA 750 that it would employ the beneficiary for 40 hours per week at the base rate and ten hours per week at one and a half times that amount. Those amounts for those hours, extrapolated over a year, would equal \$48,791.60. The policy of this office, however, is that the petitioner must demonstrate the ability to employ the beneficiary full-time, but not beyond 40 hours per week. This office will require the petitioner to demonstrate the ability to pay the beneficiary's salary based only on a 40-hour week at base pay. The proffered wage of \$17.06 per hour x 40 hours per week x 52 weeks per year = \$35,484.80 per year.

The Form I-140 petition in this matter was submitted on November 7, 2008. On the petition, the petitioner stated that it was established during 1992 and that it employs 27 workers. On the Form ETA 750, Part B, signed by the beneficiary on September 24, 2002, the beneficiary claimed to have worked for the petitioner since September 2000. The Form ETA 750 labor certification states that the petitioner would employ the beneficiary in Bridgeport, Connecticut and the Form I-140 visa petition indicates that the petitioner would employ the beneficiary in Norwalk, Connecticut.²

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. 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.³ In the instant case the record contains (1) the first page of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, (2) 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary, (3) copies of the petitioner's reviewed, unaudited, balance sheet and compiled, unaudited, profit and loss statement for 2001, (4) copies of what appear to be internally produced, unaudited, profit and loss statements and internally produced, unaudited, balance sheets for 2002 and 2003, (5) copies of what appear to be an internally produced, unaudited, cash flow statement for the first seven months of 2004 and an internally produced, unaudited, balance sheet at the end of that period, (6) a letter dated September 9, 2003 from the petitioner's owner, (7) a letter dated September 13, 2004 from counsel,⁴ and (8) a copy of the petitioner's Dun & Bradstreet report. 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.

The first page of the petitioner's 2000 income tax return shows that that it is a corporation, that it incorporated on January 1, 1992, and that it reports taxes pursuant to the calendar year. During 2000 the petitioner declared a loss of \$677,992 as its taxable income before net operating loss deduction and special deductions during that year. Because the corresponding Schedule L was not provided this office is unable to compute the petitioner's end-of-year net current assets.

The petitioner's owner's September 9, 2003 letter states that the petitioner's 2000 tax return demonstrates its continuing ability to pay the proffered wage beginning on the priority date. This office notes, however, that as the priority date of the instant petition is April 30, 2001, evidence pertinent to the petitioner's performance

² As both of those towns are in Fairfield County the labor certification issued for employment in Bridgeport is valid for employment in Norwalk.

³ 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).

⁴ Counsel's letter is not truly evidence, but argument from the evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Copies of the beneficiary's 2002 and 2003 tax returns were also provided. The proposition counsel intended to support with them is unknown.

during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The W-2 forms submitted indicate that the petitioner paid the beneficiary \$23,092.26, \$23,945.93, \$24,441.73, and \$26,855.13 during 2001, 2002, 2003, and 2004, respectively.

In his September 9, 2004 letter counsel states that the gross income, net income, and "Current Assets, minus currently Habilities,"⁵ as shown on the unaudited financial statements, show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The director denied the petition on January 26, 2005. The director noted that the independent accountant's report that accompanied the compiled income statement and reviewed balance sheet for 2001 stated, "As discussed in Note 1 to the financial statements, the [petitioner] has a net capital deficiency that raises substantial doubt about its ability to continue as a going concern."

Note 1 to the financial statements reads,

The accompanying financial statements have been prepared on the basis that the Company is a going concern, which contemplates the realization of assets and the satisfaction of liabilities, except as otherwise disclosed, in the normal course of business. However, because of the Company's significant receivable from its parent, the collectibility of which is questionable, such realization of assets and the satisfaction of related liabilities is subject to significant uncertainty. The Company's overall stability is highly dependent on its ability to collect the amounts owed by its parent. The Company believes that its parent, or the ultimate shareholders of the parent, has sufficient economic means to repay the amounts owed, however, there can be no assurance that the Company will be successful in its collection efforts.

On appeal, counsel asserted that the petitioner is able to pay the proffered wage, but offered no additional argument. Counsel did not explain how the evidence provided supports his position. Counsel did not address the note to the petitioner's financial statements that indicates that it may be unable to continue in business.

Even if they favored his cause, counsel's reliance on the unaudited financial records submitted would be misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. Although a request for evidence the service center issued on July 16, 2004 appears to imply that reviewed financial statements are sufficient, the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.⁶ The unaudited financial statements will not be considered.

⁵ This office believes that counsel meant to refer to the petitioner's current assets minus its current liabilities, which is the formula for net current assets.

⁶ Even if, pursuant to the regulations, reviewed financial statements were sufficient evidence, the only reviewed financial statement submitted in the instant case is the petitioner's balance sheet for the end of 2001.

Although counsel provided information pertinent to the petitioner from [REDACTED] offered no argument to show that the information supports the proposition that the petitioner is able to pay the proffered wage. Further, the report indicates that [REDACTED] was able to gather virtually no information pertinent to the petitioner's financial position. This office does not perceive that [REDACTED] report supports counsel's position.

Counsel's statements in his September 23, 2004 letter pertinent to the petitioner's performance during 2001, its gross and net income and its net current assets, conflict with the figures on the financial statements pertinent to those years. Counsel stated that the petitioner's "Current Assets, minus currently Habilities" was \$424000 in 2001, \$1,768,000 in 2002, and \$1,338,000 in 2003, whereas the unaudited balance sheets show that the petitioner had net current assets in the amount of negative \$423,371 at the end of 2001, negative \$1,767,374.87 at the end of 2002, and negative \$1,438,689.67 at the end of 2003. Counsel's figures for gross and net income are also unsupported by the financial statements or other evidence in the record and, as was noted above, are not, in themselves, evidence. As such, counsel's assertions will be disregarded.

The petitioner must establish 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. 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, the petitioner established that it paid the beneficiary \$23,092.26, \$23,945.93, \$24,441.73, and \$26,855.13 during 2001, 2002, 2003, and 2004, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years.

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.

The remainder of the financial statements were either compiled or internally produced without review or audit. That 2001 balance sheet shows that the petitioner's end-of-year 2001 current liabilities exceeded its current assets. Based on the figures provided, the petitioner's 2001 end-of-year net current assets were negative. Even if the reviewed 2001 balance sheet were reliable evidence, it would not support the proposition that the petitioner was able to pay the proffered wage during that year.

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 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. 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'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 that 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$35,484.80 per year. The priority date is April 30, 2001.

During 2001 the petitioner paid the beneficiary \$23,092.26. The petitioner is obliged to show the ability to pay the remaining \$12,392.54 balance of the proffered wage during that year. The petitioner submitted no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of 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 2001.

During 2002 the petitioner paid the beneficiary \$23,945.93. The petitioner is obliged to show the ability to pay the remaining \$11,538.87 balance of the proffered wage during that year. The petitioner submitted no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

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 \$24,441.73. The petitioner is obliged to show the ability to pay the remaining \$11,043.07 balance of the proffered wage during that year. The petitioner submitted no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of 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 2003.

During 2004 the petitioner paid the beneficiary \$26,855.13. The petitioner is obliged to show the ability to pay the remaining \$8,629.67 balance of the proffered wage during that year. The petitioner submitted no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of 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 2004.

The petition in this matter was submitted on November 7, 2003. On that date the petitioner's 2005 tax return was unavailable. On July 16, 2004 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. CIS received counsel's response to that request on September 15, 2004, and the record is deemed to have closed on that 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. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue that was not addressed in the decision of denial.

In the July 16, 2004 request for evidence the service center requested that the petitioner provide Federal tax returns with all schedules and attachments for 2001, 2002, and 2003, or, in the alternative, annual reports for 2001, 2002, and 2003 accompanied by audited or reviewed financial statements. The petitioner did not provide its tax returns, nor any part of them, for any of those three years. The petitioner provided its reviewed balance sheet for 2001, but no other reviewed financial statements.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).



The petition will be denied for both of the above stated reasons, with each considered as an independent and alternative basis for denial.

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.