

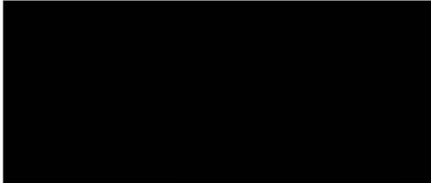
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U.S. Department of Homeland Security
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**U.S. Citizenship
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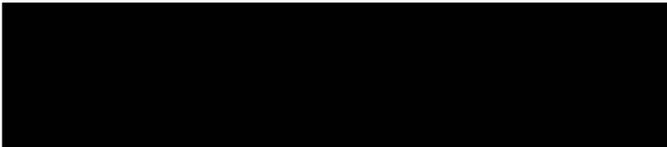
Office: NEBRASKA SERVICE CENTER

Date: DEC 03 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 preference visa petition was denied by the Director, Nebraska Service Center. The matter 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 welder. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director, examining the petitioner's combined net income and net current assets for tax years 2001 through 2004, 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 July 19, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 the granting of 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 1, 2001. The proffered wage as stated on the Form ETA 750 is \$15.50 per hour (\$32,240 per year).¹ The Form ETA 750 states that the position requires two years and six months of experience in the proffered position.

¹ The record reflects that the petitioner submitted an additional form ETA Part B, when it substituted the

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits three W-2 forms for tax years 2002 to 2004, and a Form 1099-MISC for tax year 2001. The forms identify the petitioner as the employer, and the beneficiary as the employee or being compensated by the petitioner as a nonemployee.³ Other relevant evidence in the record includes the petitioner's Forms 1120S, corporate income tax returns for tax years 2001 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 1, "08", and did not indicate its current number of workers, its gross annual income or its annual net income. On the Form ETA 750B, signed by the substituted beneficiary on May 12, 2004, the beneficiary did not claim to have worked for the petitioner.⁴

On the Form I-290B, counsel states that Citizenship and Immigration Services (CIS) ignores the manifest weight of the evidence in concluding that the petitioner did not have the ability to pay the proffered wage. Counsel submits without any further comment, the petitioner's three W-2 forms and one Form 1099-MISC that identify the beneficiary as the petitioner's employee.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, 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 Songawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

It is noted that the director in her decision combined the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage for tax years 2001 to 2004. The director determined that the combined figures were not sufficient to pay the proffered wage. However, this approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in

current beneficiary for the original beneficiary, [REDACTED]

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ In tax year 2001, the Form 1099 indicates the beneficiary received non-employee compensation, thus he was apparently working for the petitioner as contract labor.

⁴ On Part B of the ETA 750, the beneficiary indicated he worked for Custom Build Home Improvement, Inc. from November 1997 to January 2003.

nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with the director that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. The AAO will examine further in these proceedings both the petitioner's net income and its net current assets, and whether either figure is sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. Thus, contrary to the director's assertion with regard to wages, the actual wages paid to a beneficiary by a petition can play a pivotal part in establishing the petitioner's ability to pay the proffered wage.

In the instant case, on appeal, the petitioner submits four documents to establish that it paid the beneficiary non-employee compensation or wages in tax years 2001 to 2004. As the director did not request any such evidence in his request for further evidence, the AAO views the submission of these documents on appeal as appropriate. However, these documents directly contradict the statements made by the beneficiary on Part B, Form ETA Form 750 that he had worked for another company from January 1997 to October 2003. The record contains a letter from this employer identified on Part B, of the Form ETA 750 as Custom Build Home Improvement, Inc, Chicago, Illinois. The letter is signed by [REDACTED] the unknown, and states that the beneficiary was employed from November 1997 to January 2003. In addition, Form G-325, Biographic Form, that accompanies a Form I-485 submitted to the record and signed by the beneficiary indicates that the beneficiary was self-employed as a construction welder from January 1992 to January 10, 2003, the date the beneficiary signed the G-325. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Neither the petitioner nor counsel provided any further explanation of the evidence submitted on appeal, or of the above described employment documentation previously submitted to the record.

Furthermore the record reflects further discrepancies with regard to the compensation and wages paid to the beneficiary based on his W-2 forms and Form 1099-MISC and documented paid non-employee compensation or wages indicated on the petitioner's corporate tax returns. For example, in tax year 2001, the beneficiary's Form 1099-MISC reflects he was paid \$36,390 in non-employee compensation, while the petitioner's Form 1120S reflects no payments to outside labor. For tax year 2002, the beneficiary's W-2 Form reflects \$36,400 in wages, while the petitioner's corporate tax return only reflects \$8,364 paid in wages. For tax year 2003, the beneficiary's W-2 Form indicates the beneficiary earned \$36,400, while the petitioner's IRS Form 1120S shows zero wages. Finally, for tax year 2004, the beneficiary's W-2 Form indicates the petitioner paid the beneficiary \$44,161.04, while the petitioner's Form 1120S indicates no wages or salaries paid by the petitioner. See *Ho*.

Thus, the AAO cannot determine whether these documents reflect the beneficiary's actual non-employee compensation or wages earned while employed by the petitioner. Without further clarification, the AAO will give no evidentiary weight to these documents. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. The petitioner, thus, has the obligation to establish its ability to pay the entire proffered wage as of the 2001 priority date and to the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend th depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,240 per year from the priority date:

- In 2001, the Form 1120S stated net income⁵ of \$14,167.
- In 2002, the Form 1120S stated net income of \$25,227.
- In 2003, the Form 1120S stated net income of \$24,457.
- In 2004, the Form 1120S stated net income of -\$6,902.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the proffered wage.

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$6,600.
- The petitioner's net current assets during 2002 were \$2,974.
- The petitioner's net current assets during 2003 were \$3,883.
- The petitioner's net current assets during 2004 were \$3,266.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Although counsel asserts on appeal that CIS has ignored evidence submitted to the record, he provides no further explanation of any such oversight. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor and continuing until the beneficiary obtains permanent residency.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO also notes that the record contains discrepancies in the various I-140 petitions found in the record

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

with regard to the beneficiary's actual arrival date into the United States. An earlier I-140 petition submitted for the beneficiary (LIN 98 148 52527) states that the beneficiary arrived in the United States in June 1990, while the instant I-140 states the beneficiary arrived in the United States in December 1990. These 1990 arrival dates call into question the authenticity of the previous letter of work verification submitted with the earlier I-140 which states the beneficiary worked for the Erg Research and Development Center as stonecutter from January 2, 1986 to March 1, 1991. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.