

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



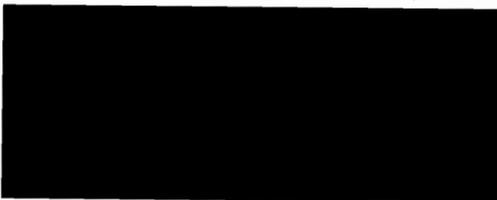
B6

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAY 22 2007
LIN 05 168 51581

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 Acting Director, Nebraska 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 dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental laboratory technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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 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 October 23, 2000. The proffered wage as stated on the Form ETA 750 is \$14.74 per hour, which equals \$30,659.20 per year.

The Form I-140 petition in this matter was submitted on May 9, 2005. On the petition, the petitioner stated that it was established during 1990 and that it employs two workers. The petition states that the petitioner's gross annual income is \$221,289 and that its net annual income is \$165,637.¹

¹ Reference to the petitioner's 2004 tax return shows that \$165,637 is the amount of its Line 20, Total Deductions, rather than its profit. The petitioner declared a loss during that year.

On the Form ETA 750, Part B, signed by the beneficiary, 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 Colorado Springs, Colorado.

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.²

In the instant case the record contains (1) the petitioner's 1999, 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's unaudited financial statements for September 30, 2005, (3) the joint 1998 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, and (4) the first pages of the petitioner's owner's and owner's spouse's joint 2003 and 2004 Form 1040 U.S. Individual Income Tax Return. 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 petitioner's tax returns show that it is a corporation, that it incorporated on January 1, 1999, and that it reports taxes pursuant to cash convention accounting and the calendar year.

A Schedule C, Profit or Loss from Business attached to the 1998 personal tax return shows that prior to its incorporation the petitioner's owner held the petitioning dental laboratory as a sole proprietorship. During 1999 the petitioner declared ordinary income of \$46,742. At the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date of the instant petition is October 23, 2000 evidence of its finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2000 the petitioner declared ordinary income³ of \$38,117. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2001 the petitioner declared ordinary income of \$57,886. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared ordinary income of \$36,781. At the end of that year the petitioner declared neither current assets nor current liabilities, which yields net current assets of \$0.

During 2003 the petitioner declared a loss of \$38,601 as its ordinary income. At the end of that year the petitioner's current liabilities exceeded its current assets.

² 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).

³ Ordinary income is located at Line 21 of Form 1120S, U.S. Income Tax Return for an S Corporation. It is analogous to net income and is utilized as such in the computations pertinent to a subchapter S corporation's continuing ability to pay the proffered wage beginning on the priority date.

During 2004 the petitioner declared a loss of \$3,938 as its ordinary income. At the end of that year the petitioner had current assets of \$1,404 and current liabilities of -\$2,792,⁴ which yields net current assets of \$4,196.

The acting director denied the petition on September 27, 2005.

On appeal, counsel noted that during 2003 the petitioner submitted a previous petition for the beneficiary, which the service center apparently misplaced. Counsel asserted that, had this previous petition been timely adjudicated, the petitioner's 2003 and 2004 tax returns would not have been available or required, and the petitioner's previous tax returns would have demonstrated its ability to pay the proffered wage. Counsel asserts that, therefore, CIS should approve the petition notwithstanding that the petitioner might be unable to demonstrate its ability to pay the proffered wage during 2003 and 2004.

Counsel further asserted that the service center was obliged to issue a request for evidence or notice of intent to deny before denying the visa petition. Counsel cited the petitioner's gross receipts, gross profit, net income, and total assets as evidence of its continuing ability to pay the proffered wage beginning on the priority date. Counsel also cited the petitioner's unaudited financial statements as evidence that its business greatly improved during 2005.

Counsel noted that the petitioner is located near U.S. military installations and asserted that the drop in the petitioner's business during 2003 and 2004 was due to the decrease in the nearby population due to the initiation of war in Iraq. Counsel provided no evidence in support of that proposition.

The proposition counsel intended to support with the first page of the petitioner's owner's and owner's spouse's 2003 and 2004 personal tax returns is unclear. Counsel appeared to assert on appeal, however, that those returns show that the petitioner's owner was able to provide additional funds as necessary to support the petitioner's operations during lean years, or to pay the proffered wage.

The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

The regulation at 8 C.F.R. § 204.5(g)(2) does not require the petitioner merely to show its ability to pay the proffered wage up to the date the Form I-140 petition is submitted, nor until some date when the petition arguably ought to have been adjudicated. The petitioner is obliged to show the ability to pay the proffered

⁴ No explanation for how a taxpayer could have negative current liabilities readily occurs to this office and none was offered. The negative current asset is listed on Schedule L, Line 18, Other current assets. That line item indicates that if the taxpayer declared "other current liabilities" it should attach an explanatory schedule itemizing those liabilities. No such schedule was provided. In addition to failing to explain the entry, this also demonstrates that the tax return provided to CIS is incomplete.

wage through approval of the Form I-140 petition and approval of the Form I-485 Application for Adjustment of Status. Counsel's argument that the petitioner should not be obliged to show its ability to pay the proffered wage during 2003 and 2004 is unconvincing. That the service center apparently lost the initial petition for this beneficiary is regrettable, but it does not obviate the petitioner's obligations under the regulations.

Counsel's assertion that the service center was obliged to issue a request for evidence or a notice of intent to deny is similarly unconvincing. The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted a tax return for each salient year. The acting director found that the tax return had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence if issuance of such a request were required. Counsel submitted no such evidence and the appeal will be adjudicated based on the evidence in the record.

Counsel asserted that the petitioner's business suffered as a result of the current Iraqi war. Counsel, however, submitted no evidence in support of that proposition. The assertions of counsel 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.

Counsel's reliance on unaudited financial records is 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. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel's reliance on the petitioner's gross receipts and gross profit is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), 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.

Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages. Counsel's reliance on the petitioner's gross profits as an index of the petitioner's ability to pay the proffered wage is misplaced.

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 did not establish that it employed and paid the beneficiary.

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

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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). 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, and counsel's citation of them as an index of the petitioner's ability to pay the proffered wage is therefore unconvincing. 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.

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 \$30,659.20 per year. The priority date is October 23, 2000.

During 2000 the petitioner declared ordinary income of \$38,117. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$57,886. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$36,781. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

During 2003 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 profit during that year. At the end of that year the petitioner

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

had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2003 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 declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2004 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 May 9, 2005. On that date the petitioner's 2005 tax return was unavailable. No evidence pertinent to that year was subsequently requested. 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 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 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.