

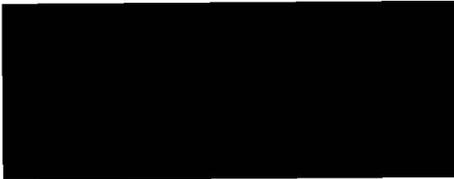
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 06 124 50708

Office: VERMONT SERVICE CENTER

Date: **SEP 29 2008**

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is construction and property management. The petitioner seeks to employ the beneficiary permanently in the United States as a property manager/operations manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated November 9, 2006, 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 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, 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 DOL. See 8 C.F.R. § 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 DOL 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 April 13, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$67,683.00 per year.

¹ It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, 2003, and 2004; a letter from counsel dated September 20, 2006; the biographic page from the beneficiary's country of Jamaica passport; the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2004 and 2005; W-2 Wage and Tax Statements issued by the petitioner to the beneficiary in 2001, 2002, 2003 and 2004; a letter from the petitioner's accountant dated September 25, 2006; the petitioner's accountant's report statement dated March 14, 2002, with compiled financial statements for the period ending December 31, 2001; two pages from a legal immigration publication concerning three alternative tests of the ability to pay; a W-2 Wage and Tax Statement summary for 2005 issued by the petitioner to the beneficiary; the beneficiary's custodial IRA payment statement for 2004; six pay statements from the petitioner to the beneficiary from January 4, 2006 to February 15, 2006 stating year-to-date wages paid of \$6,370.00; the beneficiary's bank checking statements for the periods December 15, 2005 to January 17, 2006, and January 18, 2006 to February 14, 2006; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 in 2000 and to currently employ 35 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual and gross annual incomes stated on the petition were \$50,000.00 (2005) and \$3,400,000.00 respectively. On the Form ETA 750, signed by the beneficiary on April 10, 2001, the beneficiary did claim to have worked for the petitioner since September 2000.

On appeal counsel refers to a decision issued by the AAO concerning account receivables and the net current assets test but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Accompanying the appeal, counsel has submitted a legal brief dated January 8, 2007, and the following relevant evidence: a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; "Minutes" of the Vermont Service Center liaison committee meeting of September 22, 2005;³

application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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 *See* "AILA/VSC Liaison Minutes," September 22, 2005, published on AILA InfoNet at Document No.

the petitioner's accountant's review report dated January 8, 2007, for the periods ending December 31, 2001, December 31, 2002, December 31, 2003, December 31, 2004, and December 31, 2005; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, 2003, and 2004; a letter from Drew Elliot, president of the petitioner dated February 22, 2006, stating that the beneficiary is employed at the annual salary of \$40,759.00 and will be employed at the proffered wage when the beneficiary obtains permanent residency; the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax return for 2005; and W-2 Wage and Tax Statements (Box 3) issued by the petitioner to the beneficiary in 2001, 2002, 2003, 2004 and 2005 stating wages paid of \$24,477.70, \$44,257.07, \$42,860.16, \$44,485.54 and \$43,318.26 respectively.

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, 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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel has submitted W-2 Wage and Tax Statements issued by the petitioner to the beneficiary in 2001, 2002, 2003, 2004 and 2005 stating wages paid of (Box 3) \$24,477.70, \$44,257.07, \$42,860.16, \$44,485.54, and \$43,318.26 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$67,683.00 per year, the petitioner must establish that it can pay the beneficiary the differences between wages actually paid and the proffered wage, which for years 2001, 2002, 2003, 2004 and 2005 are \$43,205.30, \$23,425.93, \$24,822.84, \$23,197.46 and \$24,364.74 respectively.

Counsel also submitted a W-2 Wage and Tax Statement summary for 2005 issued by the petitioner to the beneficiary in the amount of \$40,759.00, and six pay statements from the petitioner to the beneficiary from January 4, 2006 to February 15, 2006 stating year-to-date wages paid of \$6,370.00.

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 supported by federal case law. *See 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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns⁴ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income (Schedule K, line 23) of \$33,688.00.
- In 2002, the Form 1120S stated net income (Schedule K, line 23) of \$25,562.00.
- In 2003, the Form 1120S stated net income (Schedule K, line 23) of <\$42,805.00>.⁵
- In 2004, the Form 1120S stated net income (Schedule K, line 17(e)) of \$22,778.00.

Since the proffered wage is \$67,683.00 per year, based upon the tax returns and W-2 statements submitted, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2003 and 2004.

Since the petitioner paid the beneficiary wages in the amount of \$43,318.26 in 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in that year. We note that the petitioner has not submitted its tax return for 2005 although there was ample time to do so.

If the net income the petitioner demonstrates it had available during the 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. 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

⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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, 2002, 2003, and 2004 were \$164.00, \$1,726.00, <\$48,673.00> and <\$29,592.00>.

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 paid 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As stated, counsel has submitted the petitioner's accountant's compiled reports dated March 14, 2002, and January 8, 2007 with financial statements for the periods ending December 31, 2001, December 31, 2002, December 31, 2003, December 31, 2004, and December 31, 2005. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.⁸

⁶ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ 8 C.F.R. § 204.5(g)(2).

⁸ The financial reports are also described as "reviewed." The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserts that the director's decision "contravenes" a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that details "tests" for establishing the ability to pay including the "net current assets" test.

Counsel's interpretation of the language in that memorandum is overly broad and it does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 13, 2001.

Counsel asserts that an unpublished case of the AAO allows "the inclusion of Accounts Receivable within the Net Current Assets test." Also, counsel has submitted a letter from Keith Haber, the petitioner's accountant dated September 25, 2006, that stated that the petitioner's tax returns were prepared on the cash basis but had accounts receivable in the amount of \$89,605.00 at the end of that tax year which were collected and reported as income in 2002. According to counsel as stated in his explanatory letter dated September 20, 2006, since the petitioner's current assets include receivables, they should be included in the current net asset calculation for 2001. Counsel's assertion must be qualified.

The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage for years 2001, 2003 and 2004.

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.