

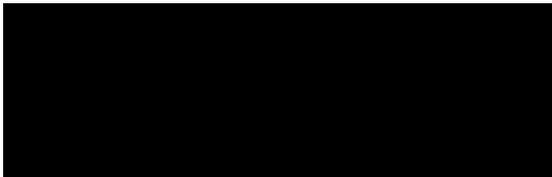
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U.S. Citizenship
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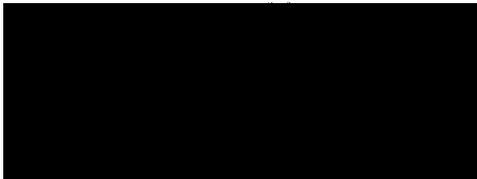
B6

FILE: WAC-01-282-57977 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2005

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, Director
Administrative Appeals Office

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

The petitioner cultivates wheat, barley, alfalfa, etc. It seeks to employ the beneficiary permanently in the United States as a farm machinery set-up mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, counsel submits a brief and additional evidence.

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 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 Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 1, 1997. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1993.

On the petition, the petitioner claimed to have been established in 1996 and to currently employ thirteen workers. In support of the petition, the petitioner submitted no evidence of its ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 7, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner's counsel submitted a letter stating that the petitioner is a "multi-billion dollar privately held corporation [and] its annual reports, federal tax returns, or audited financial statements are private and confidential information." Counsel offered his representation as evidence that the petitioner has the continuing ability to pay the proffered wage and current employs tens of thousands of employees, including the beneficiary. No corroborating evidence was presented, but counsel suggested that Citizenship and Immigration Services (CIS) could visit the petitioner's website at www.hearstcorp.com for a partial list of its assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 4, 2002, denied the petition.

On appeal, counsel asserts that the petitioner is a Delaware corporation, "employs thousands of people and has billions of dollar in assets," and thus, can "meet the payroll obligations for [the beneficiary]." The petitioner submits a declaration from [REDACTED] and Livestock Division, and an Assistant Secretary to The Hearst Corporation, that states the following:

I am thoroughly familiar with the current assets and financial standing of [the petitioner] and am qualified to make this declaration of its behalf.

The [beneficiary] is and has been employed by [the petitioner], Sunical Land and Livestock Division, at the [REDACTED] in Cholame, California, since 1992.

The [petitioner] is fully capable of meeting all payroll obligations for [the beneficiary].

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 did not establish that it employed and paid the beneficiary the full proffered wage in 1997, 1998, 1999, 2000, 2001, or 2002. No wage statement, such as a Form W-2, Wage and Tax Statement, or Form 1099, Miscellaneous Income, paystubs, payroll records, state or federal quarterly wage reports, or even the beneficiary's individual income tax returns were presented to corroborate [REDACTED] and counsel's assertion that the beneficiary is and has been employed by the petitioner since 1992¹.

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). 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 petitioner has provided no information concerning its net income so no assessment can be made. No document required by the regulations has been submitted into the record of proceeding.

¹ Or 1993, as the beneficiary indicated on his Form ETA 750B.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. 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.² 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 a corporation's end-of-year 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 petitioner's net current assets are unknown since no information or regulatory-prescribed evidence was submitted into the record of proceeding.

Although the burden of proof is on the petitioner to provide evidence that substantiates counsel's assertions, the AAO did visit Hearst Corporation's website. Hearst Corporation's website contains much information concerning its multimedia businesses but nothing concerning its Sunical division or agricultural holdings. Such a nexus is critical to this case. No regulatory-prescribed document, such as an annual report, tax return, or audited financial statement is contained within the website's content. See 8 C.F.R. § 204.5(g)(2). These items are required by the regulations for a petitioning entity to prove its continuing ability to pay the proffered wage yet the petitioner failed to provide CIS with any of them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, the director provided the petitioner with an opportunity to present such evidence to prove its case. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of any regulatory-prescribed document that may have demonstrated the amount of taxable income or net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Additionally, the petitioner's letter submitted on appeal fails to meet the regulatory requirements for a company that employs 100 or more employees because [REDACTED] does not declare that it does in fact employ over one hundred employees. Even if it did, however, CIS is within its discretionary authority to seek independent corroborative evidence of that factual assertion. In general, 8 C.F.R. 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "In a case where the prospective United States employer employs 100 or more workers,

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the director *may* accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.) The use of the word "may" does not require CIS to accept such a letter. Additionally, no corroborating evidence was presented to prove that the beneficiary is and was actually employed and paid by the petitioner. See *Matter of Treasure Craft of California*, 14 I&N at 190.

In any event, if the petitioner employs thousands of employees, then its declaration that it only has thirteen employees on its visa petition is an unexplained inconsistency. It may be that Sunical Land & Livestock division employs only 13 employees but there is scant information in the record of proceeding that would indicate this. *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." Counsel's letters adds little to the record of proceeding. 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).

The petitioner has not demonstrated that it paid any wages to the beneficiary for any relevant year under consideration. There is no evidence of net income or net current assets or other evidence of the petitioner's continuing ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1997 or subsequent years. 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 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.