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U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 001 53568 Office: VERMONT SERVICE CENTER Date: **JUL 20 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 Acting 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 is a construction company. It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor 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.

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 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 Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 15, 1999. The proffered wage as stated on the Form ETA 750 is \$25.38 per hour for 35 hours per week, which equals \$46,191.60 per year.

On the petition, the petitioner stated that it was established on May 18, 1982 and that it employs three workers. The petition states that the petitioner's gross annual income is \$166,000 and that its net annual income is \$10,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1993. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Westchester County, New York.

In support of the petition, counsel submitted a letter, dated August 3, 2002, from the petitioner's president. That letter states that the petitioner has employed the beneficiary since June 1993 at a wage of \$25.38 for 35 hours per week.

Counsel also provided a letter, dated August 9, 2002, from the petitioner's accountant. That letter states various figures from the petitioner's 1998, 1999, 2000, and 2001 tax returns. Counsel did not then provide copies of those returns.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 1, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested copies of the petitioner's 1999, 2000, and 2001 tax returns and copies of the Form W-2 Wage and Tax Statements showing wages it paid to the beneficiary during those years.

In response, counsel submitted a letter, dated September 23, 2003, from the petitioner's bank's branch manager. That letter states the petitioner's bank balance.

Counsel also submitted copies of the petitioner's 1999, 2000, 2001, and 2002 Form 1120-A U.S. Corporation Short Form Income Tax Returns. Those returns show that the petitioner reports taxes pursuant to the calendar year.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$816.76 during that year. The balance sheet on Page 2 of that return shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$919.05 during that year. The balance sheet on Page 2 of that return shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,019.58 during that year. The balance sheet on Page 2 of that return shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$8,956.60 during that year. The balance sheet on Page 2 of that return shows that at the end of that year the petitioner had no current assets.

Counsel provided copies of 1999, 2000, 2001, and 2002 W-2 forms showing that the petitioner paid the beneficiary \$7,370, \$14,505, \$19,135, and \$22,775 during those years, respectively.

This office notes that those W-2 forms do not support the petitioner's president's assertion, made in his August 3, 2002 letter, that the petitioner has employed the beneficiary since June 1993 at a wage of \$25.38 for 35 hours per week.

Counsel also provided copies of checks drawn by the petitioner to the beneficiary, each in the amount of \$350, and dated August 7, August 22, August 29, September 5, September 19, and September 26, 2003. This office notes that, if those checks represent wage payments, they do not support the petitioner's president's

assertion, made in his August 3, 2002 letter, that the petitioner has employed the beneficiary since June 1993 at a wage of \$25.38 for 35 hours per week.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Further still, counsel provided copies of monthly statements of a bank account belonging to the petitioner. In a letter dated October 10, 2003, counsel states that the evidence demonstrates that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The Acting 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 February 9, 2004, denied the petition.

On appeal, counsel submits additional copies of evidence already provided in response to the Request For Evidence. Counsel urges that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel notes that the annual amount of the proffered wage was incorrectly computed in the decision of denial.

Counsel emphasizes the amounts shown on the petitioner's bank accounts, asserting that those amounts represent funds available to pay wages. Counsel also asserts that the amount of the petitioner's depreciation deduction during each of the salient years and states that this amount could have been declared as profit pursuant to a different depreciation schedule.

Counsel observes that the W-2 forms submitted show that the amount the petitioner paid to the beneficiary during each of the salient years has increased each year. Counsel notes that the petitioner is not obliged to pay the full amount of the proffered wage to the beneficiary until the petition is approved. Counsel does not address the petitioner's president's assertion, made in his August 3, 2002 letter, that the petitioner has been paying the beneficiary the full amount of the proffered wage since June 1993, which assertion is contradicted by the W-2 forms.

Finally, counsel notes that the petitioner has been in business since 1982 and states that the petitioner has been able to meet its financial obligations. Counsel provides no evidence, however, that the petitioner has never failed to meet its obligations. The assertions of counsel on appeal 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).

Even if counsel had demonstrated, rather than merely asserting, that the petitioner has paid all of its just debts and obligations since its incorporation, that would be insufficient to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Unless the petitioner can show that hiring the beneficiary

would somehow have reduced its expenses¹ or otherwise increased its net income,² 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. On a Form 1120-A return, that remainder is the petitioner's taxable income before net operating loss deduction and special deductions. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1084 (S.D.N.Y. 1985), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (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.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's argument that the petitioner's depreciation deductions, or some portion of them, should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The

¹ 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.

² 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.

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

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 employed and paid the beneficiary \$7,370 during 1999, \$14,505 during 2000, \$19,135 during 2001, and \$22,775 during 2002.

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, 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. 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).

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 the 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, those expected to be 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.

The proffered wage is \$46,191.60 per year. The priority date is March 15, 1999.

Having demonstrated that it paid the beneficiary \$7,370 during 1999 the petitioner must demonstrate the ability to pay the \$38,821.60 balance of the proffered wage during that year. During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$816.76. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to indicate that any other funds were available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

Having demonstrated that it paid the beneficiary \$14,505 during 2000 the petitioner must demonstrate the ability to pay the \$31,686.60 balance of the proffered wage during that year. During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of \$919.05. That amount

is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to indicate that any other funds were available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

Having demonstrated that it paid the beneficiary \$19,135 during 2001 the petitioner must demonstrate the ability to pay the \$27,056.60 balance of the proffered wage during that year. During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,019.58. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to indicate that any other funds were available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$22,775 during 2002 the petitioner must demonstrate the ability to pay the \$23,416.60 balance of the proffered wage during that year. During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$8,956.80. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to indicate that any other funds were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, 2001, and 2002. 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.