U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: SRC 03 103 53685 Office: TEXAS SERVICE CENTER Date: MAR 25 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Director, Texas 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 masonry contractor. 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 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 statement 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $19.80 per hour, which equals $41,184 per year.

On the petition, the petitioner stated that it was established during 1973 and that it employs 54 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1999. The petition states that the petitioner will employ the beneficiary at various sites in South Carolina, Virginia, and Florida. The Form ETA 750 states that the petitioner will employ the beneficiary statewide, but primarily in the counties of Charleston and Horry.

The petitioner's statements regarding the locations where it would employ the beneficiary are contradictory. The Form ETA 750 states that the beneficiary will work "statewide," but predominantly in Charleston and Horry Counties. Because Charleston and Horry Counties are in South Carolina this office infers that, by "statewide" the petitioner meant throughout, but limited to, South Carolina. The Form I-140 petition states that the petitioner would also employ the beneficiary in Virginia and Florida. This amendment of the work location, as will be discussed below, renders the labor certification invalid with respect to the instant petition.

In support of the petition, counsel submitted a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid $18,660 in wages to Daniel Sauciuc during that year. Counsel also provided a 2001 W-3 transmittal statement showing the petitioner paid $1,173,877.15 in wages during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on July 14, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center noted that the petitioner had filed ten alien worker petitions and noted that the petitioner must show the ability to pay the wages proffered to all ten workers. The Service Center also specifically requested copies of the petitioner's 2001 and 2002 corporate tax returns and a copy of the beneficiary's 2002 W-2 form.

In response, counsel submitted a copy of a 2002 W-2 form showing that the petitioner paid Daniel Sauciuc $18,660 during that year. Counsel submitted bank statements showing the balance in the petitioner's account at various times.

Finally, counsel submitted a letter, dated October 13, 2003, in which he stated, but provided no evidence to demonstrate, that the petitioner's accountant had not yet completed the petitioner's 2001 and 2002 tax returns. In his letter counsel stated that the evidence demonstrates the petitioner's ability to pay the proffered wage.

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 November 4, 2003, denied the petition. The director noted that, consistent with 8 C.F.R. § 204.5(g)(2), the evidence in support of the petitioner's continuing ability to pay the proffered wage beginning on the priority date must include copies of annual reports, federal tax returns, or audited financial statements.

The appeal in this matter was filed on December 3, 2003. With the appeal counsel provides additional bank statements. Counsel states, "These financial statements of [the petitioner] show the financial stability of this successful construction company and they demonstrate its ability to pay the proffered salary."

In a statement on appeal counsel asserts that the petitioner still has not filed its 2001 or 2002 tax returns, but submits no application for an extension of filing time or other evidence in support of that assertion. Counsel states, "This delay is often common with U.S. corporations."

Counsel notes that the petitioner's 2001 W-3 form shows that it paid wages in excess of $1 million during that year. Counsel states that the evidence submitted is sufficient to show the petitioner's ability to pay the proffered wage. Counsel states that some of the petitioner's other employees have left his employ. Counsel provides no evidence, however, that those ex-employees were masons or even evidence that any employees have left.

Counsel further states, "Moreover, without a doubt, the I.R.S. W-3 Form of the Petitioner is a significant financial statement akin to a federal tax return, in as far as demonstrating the Petitioner's ability to pay the proffered salary."

Finally, counsel states that more financial documentation should be forthcoming within thirty days. No further information, argument, or documentation has been submitted.

The regulation at 8 C.F.R. § 204.5(g)(2) stipulates that the evidence in support of the petitioner's continuing ability to pay the proffered wage beginning on the priority date shall include copies of annual reports, federal tax returns, or audited financial statements. The failure to provide the requisite evidence is not excused by the provision of any other evidence or by the asserted, and undemonstrated, unavailability of the petitioner's 2001 and 2002 tax returns. If, as counsel asserts, those returns were unavailable, then the petitioner was obliged to provide copies of annual reports or audited financial statements covering those years. As will be demonstrated below, the failure of the petitioner to provide any of the three acceptable types of evidence prevents the petitioner from demonstrating its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner'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. Bank statements are not audited financial statements. 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. 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 reflected on its tax returns.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Therefore, the petitioner's 2001 W-3 transmittal is not an acceptable substitute for the petitioner's tax returns. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] 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. That remainder is the petitioner's net income.

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.

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[1] The petitioner might be able to show, for instance, that the beneficiary would replace another specific 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.