U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 22 2005

EAC 04 010 54703

IN RE: Petitioner:
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:

[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 Acting Director, Vermont 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 general contractor. It seeks to employ the beneficiary permanently in the United States as a wood carver. 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.

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 25, 2001. The proffered wage as stated on the Form ETA 750 is $18.75 per hour, which equals $39,000 per year.

On the petition, the petitioner stated that it was established during April 1998 and that it employs two workers. The petition states that the petitioner's gross annual income is $551,710. The petitioner did not state its net annual income in the space provided for that purpose. On the Form ETA 750B, 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 will employ the beneficiary in Maplewood, New Jersey.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. That return shows that the petitioner is a partnership, that began business on April 14, 1998, and that it reports taxes pursuant to the calendar year and cash accounting. That return also shows that

during that year the petitioner declared ordinary income of $211. The corresponding Schedule L shows no current assets and no current liabilities, which yields net current assets of $0.[1]

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 January 21, 2004, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001, it provide a copy of the Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary during that year.

In response, counsel submitted (1) a letter, dated April 13, 2004, from the petitioner's accountant, (2) a letter, dated April 15, 2004, from the petitioner's bank, (3) copies of monthly statements pertinent to the petitioner's bank account during 2001, 2003, and 2004, (4) copies of invoices dated 2001, 2003, and 2004 showing purchases from a lumber company,[2] and (5) copies of proposals for the purchase of cabinets, vanities, and countertops from another company. The petitioner provided no W-2 forms.

The accountant's letter states the accountant's opinion that the petitioner is able to pay the proffered wage. The petitioner's banks letter states that the petitioner has been its customer since 2001, has maintained a balance in the high four figures, have not defaulted on any checks, and have no outstanding loans from the bank. Counsel did not state why no bank statements were submitted pertinent to 2002.

In a cover letter dated April 14, 2004 counsel states that the invoices represent the purchase of cabinets and that the beneficiary is a skilled cabinetmaker.[3] Counsel further asserts that the amount the petitioner spent on cabinets and other fixtures was $42,464.86 during 2001, $41,811.71 during 2003, and $12,309.89 thus far during 2004. Counsel did not state why he omitted costs pertinent to 2002. Counsel stated that the beneficiary would be able to build those cabinets at a significant savings that would surpass the proffered wage.

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 June 25, 2004, denied the petition.

On appeal, counsel reiterates his argument that the amount saved by hiring the beneficiary would exceed the amount of the proffered wage. Counsel states that "The total expense of these cabinets and the labor costs to install them are undoubtedly significantly more than [the proffered wage]," but without offering any evidence

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[1] Because the petitioner's tax return is prepared pursuant to cash-convention accounting it is not obliged to report its current asset and current liabilities on its tax returns.

[2] Although those invoices are in the name of Distinctive Renovations, they are sent to the attention of one of the petitioner's owners at the petitioner's address. This office infers that the petitioner does business as Distinctive Renovations.

[3] The Form ETA 750 labor certification is approved for a wood carver, rather than a cabinetmaker. Further, the ETA 750 does not list cabinetmaking among the duties of the proffered position.

in support of that argument. Counsel further argues that the petitioner's bank statements show its continuing ability to pay the proffered wage beginning on the priority date. Counsel does not explain why no bank statements for 2002 were submitted.

In addition, counsel cites non-precedent decisions for the proposition that monthly bank balances in excess of the monthly amount of the proffered wage demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel argues that the fact that the regulations explicitly permit the submission of other evidence indicates that those non-precedent decisions have been accorded weight.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. The petitioner may rely upon the wording of the regulations, but may not extend that language with non-precedent decisions.

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.[4] 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 assertion that the amount of expense hiring the beneficiary will obviate exceeds the amount of the proffered wage is unsupported except by counsel's assertion. 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.

Further, counsel is including in that unspecified amount all of the expenses of cabinetmaking and installation. The Form ETA 750 labor certification was approved, however, for a wood carver. It is not approved for a cabinetmaker or a cabinet installer. Neither are cabinetmaking and installing typically included in the job description of a wood carver. Even with evidence of their amounts, this office would not include amounts paid to cabinetmakers and cabinet installers in the computation of the amounts that hiring the beneficiary would obviate.

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,

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[4] 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.

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 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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. 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 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 $39,000 per year. The priority date is April 25, 2001.

During 2001 the petitioner earned ordinary income of $211. That amount is insufficient to pay the proffered wage. The petitioner reported no year-end net current assets on its tax return. The petitioner cannot, therefore, show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage during 2001. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this ground.

The record contains an additional issue that was not addressed in the decision of denial. The Service Center issued a Request for Evidence on January 21, 2004. The Service Center requested that the petitioner, in accordance with 8 C.F.R. § 204.5(g)(2), demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. Although the petitioner's 2002 tax returns should have been available on that date, counsel did not submit them, nor audited financial statements, nor annual reports, and gave no reason for that omission. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional ground.

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.