

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY

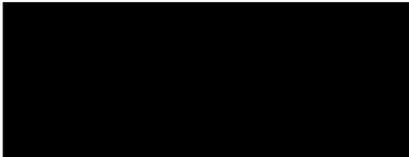


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 23 2007
WAC 04 014 54628

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, Chief
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 is a commercial cleaning company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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. 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 shows that the appeal is properly filed, timely and makes 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 May 18, 2005, 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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, 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 U.S. Department of Labor. 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 the U.S. Department of Labor 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 16, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360.00 per year). The Form ETA 750 states that the position requires a Bachelor's Degree in any field as well as two years of experience in the proffered position or two years of experience in management.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). 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 1120-A tax returns for 2001, 2002 and 2003; the beneficiary's W-2 Wage and Tax statements from the petitioner for 2001 and 2002;³ a form 1099-MISC stating compensation paid by Coverall North America Inc.⁴ to the beneficiary in the amount of \$93,930.59 in 2003; a letter from the petitioner dated October 13, 2003; explanatory letters from counsel dated September 9, 2004, and January 6, 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.⁵

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1989, and, incorporated 2000 according to the tax returns submitted. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar

¹ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the 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 IRS Form 1099-MISC statements from the petitioner issued to the beneficiary were submitted for years 1999 and 2000. Since the priority date is April 16, 2001, this evidence has no probative value to determine the ability to pay the proffered wage from the priority date.

⁴ Beyond the decision of the director, according to counsel's explanatory letter dated January 6, 2005, the petitioner changed its corporate name to Coverall North America Inc. The federal employer identification number (FEIN) for this entity is [REDACTED] and for the petitioner is [REDACTED] (the FEIN numbers are obscured for privacy purposes). No documents were submitted to support this statement nor any explanation why the FEIN number changed when the name changed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore we cannot accept stating compensation paid by Coverall North America Inc. to the beneficiary in the amount of \$93,930.59 in 2003 as compensation from the petitioner. If this matter is pursued, proof is required of this issue.

⁵ Although counsel stated in an evidence submittal that the beneficiary's U.S. Internal Revenue Service Form 1040 tax returns for 2001 and 2002 were submitted, no such returns are in evidence.

year. According to a letter from the petitioner dated September 16, 2004, the petitioner stated that the beneficiary worked for the petitioner from September 1999 to present (i.e. September 16, 2004).

According to counsel's explanatory letter dated January 6, 2005, and upon appeal, counsel asserts that if net income, depreciation and cash available at years' end are added to "totals on the beneficiary's 1099-MISC forms," this would be evidence of the ability to pay the proffered wage.

Further counsel contends that wages paid to the beneficiary, net income, assets and bank balances are evidence of the ability to pay the proffered wage.

Counsel asserts that since the priority date is April 16, 2001, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2001 from April 16th. If this were the rule, then the petitioner's yearly net income would also have to be prorated which would eliminate the presumed benefits of pro-ration. Since Citizenship and Immigration Services (CIS) is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure income earned over a different and longer period of time against the wages earned for the shorter period of time. Further, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel refers to a decision issued by the AAO concerning proration, 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).

Counsel asserts that the bank statements submitted and the funds they state are evidence of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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 return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents (evidence already submitted is not herein mentioned again): approximately 31 banking statements; and, a list of equipment with 11 color photographs equipment;

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 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (BIA 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. The beneficiary's W-2 Wage and Tax Statements for 2001 and 2002 state wages paid by the petitioner of \$8,536.18 and \$20,243.95 respectively for those years. Since the proffered wage is \$35,360.00 per year, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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, contrary to counsel's assertions. 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). Reliance on the petitioner's gross sales and profits 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 appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

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

- In 2001, the Form 1120-A stated net income⁶ of \$4,675.00.
- In 2002, the Form 1120-A stated net income of \$1,438.00.
- In 2003, the Form 1120 stated net income⁷ of \$20,374.00.

Since the proffered wage is \$35,360.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for years 2001, 2002 and 2003 or the difference between wages actually paid and the proffered wage.

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. Further, counsel asserts that the value of its equipment used in its business is evidence of the ability to pay the proffered wage.

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, but not the cash available at years' end added to net profits since this would be duplicative of the petitioner's finances.

IRS form 1120-A

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.⁸ The petitioner's year-end current assets and liabilities are shown on Part III of the return. A corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 13 and 14. 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.

IRS form 1120

Net current assets are the difference between the petitioner's current assets and current liabilities. A 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.

⁶ Net income herein refers to "taxable income before net operating loss deduction and special deductions."

⁷ IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

⁸ 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.

- The petitioner's net current assets during 2001, 2002 and 2003 were <\$467.00>, <\$467.00>, and \$12,908.00.

Therefore, for the period examined, the petitioner did not have sufficient net current assets to pay the proffered wage, or, the difference between wages actually paid and the proffered wage.

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 had the continuing ability to pay 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 advocates combining the petitioner's net income with its cash, which is its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

The evidence submitted fails to establish that the petitioner has 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.