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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



U.S. Citizenship  
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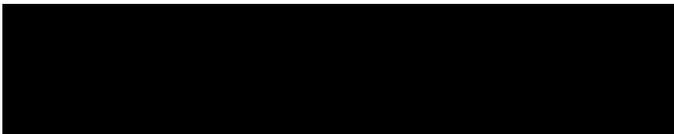


AG

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 16 2005**  
WAC 03 008 54692  
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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a masonry/construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer. 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.

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 the granting of 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$27.46 per hour, which amounts to \$57,116 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 1997, 1998, 1999, 2000, and 2001, as well as unaudited financial statements for the years 1998 to 2002. The petitioner also submitted quarterly state of California wage reports from the third quarter of 2001 to the second quarter of 2002. In addition, the petitioner submitted W2 forms for the beneficiary from 1997, 1998, under the name [REDACTED] along with an Employment Authorization Document (EAD) under the name [REDACTED] Number of [REDACTED]. The petitioner submitted a certificate from Petros Dimopolous, American Masonry, Reseda, California, that stated the beneficiary had worked there from August 1988 to November 1990. The petitioner's accountant also submitted a letter that stated the beneficiary had worked by the petitioner during the

period of time in question and gave the beneficiary's social security number provided at the time of his employment. Finally the petitioner provided IRS computer-generated printouts of wages received by the beneficiary from the petitioner.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 30, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, originals of signed federal tax returns, with all accompanying schedules, statements and attachments, or audited financial statements to demonstrate its continuing ability to pay the proffered wage as of January 14, 1998. The director also requested copies of the petitioner's Form DE-6 Quarterly Wage Report for the last four quarters, and requested all the schedules and tables for the submitted tax returns. In addition, the director requested further evidence with regard to the beneficiary's previous work experience. In particular, the director requested a letter on letterhead from the beneficiary's former employer that verified the name and title of the person verifying the beneficiary's employment as well as the beneficiary's title, duties, and dates of employment, and number of hours worked per week. To further establish this employment, the director requested IRS W2 printouts for the beneficiary or the beneficiary's pay stubs.

In response, the petitioner resubmitted the letter from [REDACTED] dated July 1, 2002, without any further documentation of the weekly hours worked or any proof of payment, as well as the petitioner's federal income tax returns for 1998, 1999, 2000, and 2001. Counsel examined the net income figures on these returns and stated that the petitioner's net income for the relevant years was lower than the proffered wage, but that this was not an indication the petitioner was not able to pay the proffered wage. Counsel cited a previous AAO decision, identified as [REDACTED] to support the idea that as long as the employer is actually paying the proffered wage when the priority date is established, the petition should not be denied for lack of financial ability to pay the proffered wage. Counsel asserted that the beneficiary had worked for the petitioner from 1991 to the present time and that when the petitioner determined that the petitioner's work authorization had expired in 1999, it removed him from its payroll but continued to pay him on a cash basis. Counsel maintained that for this reason W2 forms were unavailable for the years 1999, 2000, and 2001. According to counsel, the beneficiary filed his individual income tax returns for these years (1999, 2000, and 2001) to declare the income he received from the petitioner. Counsel submitted the beneficiary's income tax returns from 1998, 1999, 2000, and 2001.

Counsel also submitted a copy of the December bank statement for the petitioner's savings account with the Bank of America for the years 1998, 1999, 2000, and 2001. Counsel noted that the petitioner's available cash in the bank for these years was \$54,296, \$23,934.55, \$52,438.77, and \$105,143.82. Counsel asserted that the petitioner's cash in bank as shown by the bank statements and its cash on hand as shown in Schedule L of the petitioner's income tax returns were additional financial resources that were adequate to cover the payment of the proffered salary to the beneficiary. Counsel stated that the petitioner's net income plus the cash available for every year during the relevant period of time was substantially more than the difference between the proffered wage and the actual wage received by the beneficiary during this time period. Finally counsel stated that the petitioner had been in business for over 25 years and that there is no evidence that it would not continue to operate its business for many more years.

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 May 23, 2003, denied the petition. The director stated that an examination of the petitioner's net current assets during the years 1998 to 2001 indicated negative net current assets for each year. The director noted the petitioner's net income for these years, and stated that the beneficiary's personal income tax returns for these years showed earnings significantly less than the proffered wage. In sum, the director did not give any weight to the bank statements with regard to the petitioner's ability to pay the proffered wage, and found the petitioner's net income and net current assets insufficient to establish the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts the CIS erred in its decision that was solely based on subjective reasoning and unwillingness to accept other forms of evidence. Counsel cites to *Matter of E-M-* with regard to the burden of proof to be established by the petitioner, Counsel also cites to 8 C.F.R. 204.5(g)(2) and states that this regulation unequivocally specifies bank statements as an acceptable form of evidence in establishing ability to pay. Counsel also states that the denial of the immigrant petition will result in hardship to the petitioner, as the U.S. Department of Labor has determined that there are no U.S. workers available for the position of bricklayer, and the employment of the beneficiary is a vital component of the petitioner's present operations and its long-term plans for expansion. Counsel again cites to an unpublished AAO decision and to *Matter of Quintero-Martinez* and states that as long as the employer is actually paying the proffered wage when the priority date is established, the petition should not be denied for lack of financial ability to pay the proffered wage. Counsel points out that the beneficiary has been receiving compensation from the petitioner since 1991 to the present. Counsel asserts that the petitioner possesses abundant financial resources (liquid assets) readily available to cover the deficit between the proffered wage and the actual wage received by the beneficiary during the years 1998 to 2001.

Counsel, in its response to the director's request for further evidence, submitted the petitioner's year-end balances on its checking account for the period of time in question. On appeal, counsel submits checking account monthly balances from the petitioner's checking account from December 2002 to January 2002. Counsel's reliance on the yearly or monthly balances in the petitioner's bank account 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), namely, audited financial reports, federal income tax returns, or annual reports, 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 returns.

On appeal, counsel asserts that the denial of the immigrant petition would adversely affect the petitioner's operations. Counsel offers evidence of recruitment requirement underlying the DOL certification procedures in determining that there are no available U.S. workers who were eligible for the certified position. Counsel's assertion of hardship to the petitioner as a ground for approving the instant petition is not persuasive. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed U.S. domestic workers does not impact the jurisdiction of CIS to review whether a petitioner is making a realistic job offer to the beneficiary or whether the beneficiary is qualified to fill the certified job. Similarly, there are no statutory or regulatory provisions that allow consideration of a petitioner's hardship in determining the eligibility of an employment-based visa petition filed under section 203(b)(3) of the Act.

In addition, the petitioner in its petition submitted unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from December 1991 to the present, the petitioner only has to establish that it paid the beneficiary the proffered wage as of the priority date, January 14, 1998 to the present. The petitioner established that it paid the beneficiary \$17,262 in 1998, or less than the proffered salary. In a notarized statement, dated March 13, 2003, the beneficiary claimed that he worked for the petitioner after his work authorization expired although he did not receive a W2 form. The beneficiary presented his own income tax returns as evidence that the beneficiary employed him in 1999, 2000 and 2001. Based on the beneficiary's tax returns, he was paid \$20,800 in 1999, \$19,680 in 2000, and \$21,105 in 2001. All of these wages are less than the proffered wage of \$57,116. Therefore, the petitioner cannot establish that it paid the beneficiary the proffered wage as of the priority date and onward. Although counsel on appeal cites to *Matter of Quintero-Martinez* and to an unpublished AAO decision, the facts of the instant petition are not analogous to these cases. In the instant petition, as previously stated, the petitioner was not paying the proffered wage of \$57,116 as of 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.<sup>1</sup> 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 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, now CIS, should have considered income before expenses were paid rather than net income. With regard to the petitioner's net income from 1998 to 2001, the petitioner's federal income tax returns reflect the following net incomes: \$19,819 in 1998; \$10,784 in 1999; \$23,262 in 2000; \$5,327 in 2001; and \$19,386 in 2002. None of these figures are sufficient to make up the difference between the proffered wage of \$57,116 and the actual wages received by the beneficiary during the years in question. Thus the petitioner cannot establish its ability to pay the difference between the proffered wage and the actual wages paid to the beneficiary through its net income.

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<sup>1</sup> The petitioner's net income is identified as taxable income before net operating loss deduction and special deductions, page one, line 28, of Form 1120.

However, 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. In addition, 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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 tax returns reflect the following information for the following years:

	1998	1999	2000
Taxable income	\$ 19,819	\$ 10,784	\$ 23,263
Current Assets	\$ 15,300	\$ 27,228	\$ 11,299
Current Liabilities	\$ 39,021	\$ 51,945	\$ 123,212
Net current assets	\$ -23,721	\$ -24,717	\$ -111,913
	2001	2002	
Taxable income	\$ 5,327	\$ 19,386	
Current Assets	\$ 22,578	\$ 8,531	
Current Liabilities	\$ 145,992	\$ 106,858	
Net current assets	\$ -123,414	\$ -98,327	

The petitioner had negative net current assets in each of the years from 1998 to 2002. Although the petitioner demonstrated that it paid wages to the beneficiary from 1998 to the present time, it has not established its ability to pay the full proffered wage to the beneficiary from its net current assets during any of these years. Although counsel asserted that the petitioner had other liquid assets with which to pay the proffered wage in 2001, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998 onward.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Therefore, the director's decision shall stand, and the petition shall be denied.

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.