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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 03 103 54013 Office: TEXAS SERVICE CENTER Date: MAR 2 5 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 January 2001. 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 two 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 discussed below, renders the labor certification invalid with respect to this particular petition.

In support of the petition, counsel submitted a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid $17,740.50 in wages to the beneficiary 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 the beneficiary $13,761 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."

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

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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.

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 and paid him $17,740.50 during 2001 and $13,761 during 2002. Having established that it paid those amounts the petitioner must demonstrate that it was able to pay the balance of the proffered wage during those years.

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).

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 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, audited financial statements, or annual reports, 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 $41,184 per year. The priority date is April 30, 2001.

The petitioner demonstrated that it paid the beneficiary $17,740.50 during 2001 and must show that it was able to pay the $23,443.50 balance of the proffered wage during that year. The petitioner, however, submitted no reliable evidence of its net income during that year and no evidence of its net current assets at the end of that year. The petitioner, therefore, provided no reliable evidence of its ability to pay any additional wages during that year. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2001.

The petitioner demonstrated that it paid the beneficiary $13,761 during 2002 and must show that it was able to pay the $27,423 balance of the proffered wage during that year. The petitioner, however, submitted no reliable evidence of its net income during that year and no evidence of its net current assets at the end of that year. The petitioner provided no reliable evidence, therefore, of its ability to pay any additional wages during that year. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2002.

The above analysis does not include the wages proffered to the other nine aliens for whom the petitioner has petitioned. The petitioner would be obliged to show the ability to pay the proffered wages of all ten beneficiaries before this petition could be approved. Because the petitioner has failed to demonstrate the ability to pay even the wages of the instant beneficiary, however, this decision need not include the other nine proffered wages in its analysis.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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.

An additional issue exists in this case that was not addressed in the decision of denial. As was noted above the Form ETA 750 labor certification in this case was approved for employment in South Carolina. The Form I-140 petition in this matter, however, is for employment in South Carolina, Virginia, and Florida.

A labor certification involving a specific job offer, however, is valid only for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). The instant petition is not supported by a valid labor certification and the petition should have been denied for that additional reason. Further, no appeal is available in the case of a petition denied as not supported by a valid labor certification. *See* 8 C.F.R. § 103.1(f)(3)(iii)(B).

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.

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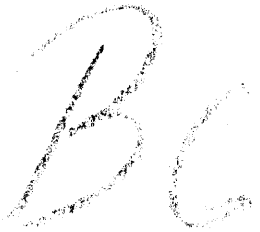

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