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

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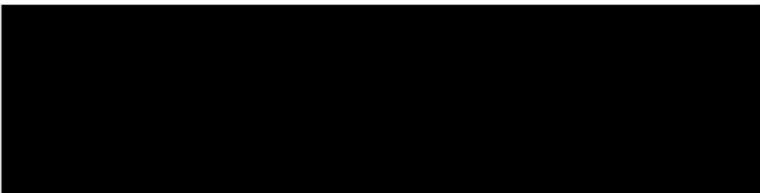
Office: VERMONT SERVICE CENTER

Date: APR 14 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an abatement and removal of hazardous waste business. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$23.15 per hour or \$48,152 per year.

With the petition, the petitioner, through counsel, submitted a copy of its 2001 compiled financial statements, and an illegible copy of its 2000 Form 1120, U.S. Corporation Income Tax Return. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions, its net income, of -\$174,300 and net current assets of -\$478,497.¹ The 2001 compiled financial statement

¹ The 2000 tax return is before the priority date of April 30, 2001; and, therefore, has limited merit in determining the petitioner's ability to pay the proffered wage from the priority date and continuing until

reflected revenues of \$1,642,462 and a net income of \$315,185.² The director determined that the documentation was insufficient to establish the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. Therefore, on October 17, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested a list of all the beneficiaries petitioned for with their EAC numbers, position hired for, and proof of salary paid. The director also requested copies of the petitioner's 2001 and 2002 federal income tax returns, copies of Forms W-2, Wage and Tax Statements, Forms 1099-Misc., Miscellaneous Income, and Forms W-3/1096, Transmittal of Wage and Tax Statements, copies of the petitioner's 2001 bank statements, and, if applicable, a copy of the beneficiary's 2001 Form W-2.

In response, counsel provided a list of companies and addresses where the beneficiary has worked, copies of the petitioner's 2001 and 2002 Forms W-3, an additional copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, and a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. The 2001 and 2002 Forms W-3 reflected wages paid of \$418,527.45 and \$259,272.59, respectively. It is noted that in 2001, the petitioner issued 140 Forms W-2; however, in 2002, it only issued 71 Forms W-2. The 2002 tax return reflected a taxable income before net operating loss deduction and special deductions, or net income of \$104,230 and net current assets of -\$372,478.

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. On August 16, 2004, the director denied the petition.

On appeal, counsel provides previously submitted documentation, copies of the petitioner's 2000 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, and copies of the petitioner's 2002 and 2003 bank statements. The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions, or net income, of \$11,078 and net current assets of -\$490,452. The 2003 tax return

the beneficiary obtains lawful permanent residence. Therefore, the 2000 tax return will not be considered when determining the petitioner's ability to pay the proffered wage.

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

reflects a taxable income before net operating loss deduction and special deductions, or net income, of \$20,374 and net current assets of -\$356,434. The petitioner's 2002 and 2003 bank statements reflect balances ranging from a low of \$201.71 to a high of \$203,252.98. Counsel argues that the petitioner has demonstrated its ability to pay the proffered wage in that its tax returns show a yearly increase in gross income and a decrease in liabilities. Counsel also contends that the petitions filed for sixteen beneficiaries are not for new employees, but replacements for sixteen employees that left the company who were paid by the petitioner as illustrated by the Forms W-3. Further, counsel asserts that the petitioner's bank statements establish the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 through 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, 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. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 petitioner's net current assets during 2001 through 2003 were -\$490,452, -\$372,478 and -\$356,434, respectively. The petitioner could not have paid the proffered wage from its net current assets in 2001 through 2003.

Counsel claims that the petitioner's 2002 and 2003 bank statements establish the petitioner's ability to pay the proffered wage. However, 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.

Counsel contends that sixteen of the petitions filed for additional beneficiaries are not for new workers but replacements for the sixteen employees that left the company and who were being paid by company as demonstrated by the Forms W-3. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, while the decrease in the number of Forms W-2 issued in 2002 suggests that the petitioner did compensate a smaller number of employees in 2002 than it did in 2001, this fact, in and of itself, doesn't show the petitioner's ability to pay the proffered wage.

The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. In addition, the petitioner must show that it had sufficient income to pay all the wages of the beneficiaries petitioned for at the priority date.

Counsel argues that the petitioner has demonstrated its ability to pay the proffered wage in that its tax returns show a yearly increase in gross income and a decrease in liabilities. However, merely showing an increase in gross income is not sufficient for establishing the ability to pay the proffered wage. Any

³ 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.

increase in revenues or gross income must be considered in combination with the cost of producing that increase. In this case, the resulting net income in 2001 and 2003 was not sufficient to cover the beneficiary's proffered wage, much less an additional sixteen employees. Again, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has only provided tax returns for four years, 2000 through 2003, with only one year, 2002, demonstrating that the petitioner had the ability to pay the proffered wage for this beneficiary (but not for the additional sixteen) which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions, or net income, of \$11,078 and net current assets of -\$490,452. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2001.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions, or net income, of \$104,230 and net current assets of -\$372,478. The petitioner could have paid the proffered wage from its net income in 2002 for this one beneficiary, but not for the additional sixteen beneficiaries.

The petitioner's 2003 federal tax return reflects a taxable income before net operating loss deduction and special deductions, or net income, of \$20,374 and net current assets of -\$356,434. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2003.

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.