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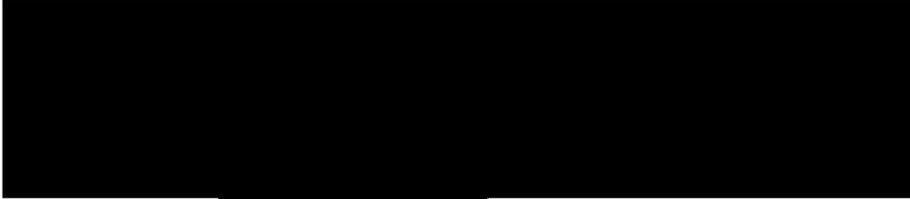
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:



EAC 04 154 52233

Office: VERMONT SERVICE CENTER

Date: DEC 06 2006

IN RE:

Petitioner:

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

Some of the submissions in the record were provided by a self-styled immigration consultant, [REDACTED]. The record, however, contains no Form G-28 Notice of Appearance of Counsel or Representative executed by the petitioner recognizing that individual as its representative. Further, the record contains no evidence that the individual is an attorney and [REDACTED] name does not appear on the roster of accredited representatives maintained by CIS. Further, in a letter dated April 28, 2005 the petitioner's president stated that [REDACTED] no longer represents the petitioner. For all of these reasons [REDACTED] is not recognized as the petitioner's representative of record. All representations in the record will be considered, but the decision in this matter will only be provided to the petitioner.

The petitioner is a construction general contractor. It seeks to employ the beneficiary permanently in the United States as a sales representative or business services sales agent. 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 the petitioner submitted a letter 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.

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, 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

April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$1,209.60 per week, which equals \$62,889.20 per year.

The Form I-140 petition in this matter was submitted on April 24, 2004. On the petition, the petitioner stated that it was established on June 15, 1998 and that it employs two workers. The petition states that the petitioner's gross annual income is \$278,711.53 and that its net annual income is \$21,991.15. On the Form ETA 750, Part B, signed by the beneficiary on April 11, 2001, the beneficiary claimed to have worked for the petitioner since October 2000. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Union New Jersey. The Form I-140 petition indicates that the petitioner would employ the beneficiary on Staten Island, New York.

In support of the petition, the petitioner submitted its 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns. The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on June 15, 1998, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$634 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner had current assets of \$10,578 and no current liabilities, which yields net current assets of \$10,578.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$1,976. At the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

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 November 23, 2004, requested additional evidence pertinent to that ability. The service center also specifically requested that, if the petitioner employed the beneficiary during 2001, it submit the Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary during that year. The service center also requested that the petitioner state whether the proffered position is a new position and, if not, state how long the position has existed, identify the incumbent in the position, and demonstrate the amount of wage paid to the incumbent.

In response, the petitioner submitted (1) a 2001 W-2 form, (2) the beneficiary's 2001 Form 1040 U.S. Individual Income Tax Return, (3) a list of contracts upon which the petitioner successfully bid during 2002 and other evidence of pending contracts, (4) an unaudited 2003 income statement, (5) a letter dated April 15, 2004 from the petitioner's accountant, (6) a letter dated January 5, 2005 from the petitioner's president/owner, and (7) a letter dated February 7, 2003 from the petitioner's ostensible representative, Vernon Dutton.

The 2001 W-2 form shows that the petitioner paid the beneficiary \$18,548 during that year. The beneficiary's 2001 tax return shows that amount was the beneficiary's entire income during that year.

The income statement submitted, while prepared by an accountant, is not an audited statement. The income statement indicates that the petitioner's 2003 net income was \$21,991.15, an amount less than the proffered wage.

The petitioner's owner's January 5, 2005 letter cites the petitioner's "*major new clients*" as evidence of its ability to pay the proffered wage. [Emphasis in the original.] The petitioner's owner also notes that the beneficiary recently secured Minority Business Enterprise and Small Business Enterprise certifications for the petitioner.

In response to the questions on the request for evidence the petitioner stated that the proffered position is not a new position, but was created in October of 2000 and has been filled since then by the beneficiary. The petitioner stated that it has paid the beneficiary \$31,000 per year. This office notes that the beneficiary's 2001 personal income tax return appears to contradict that assertion.

In his February 7, 2003 letter the petitioner's ostensible representative, [REDACTED] stated that the petitioner had been paying the beneficiary \$600 per week prior to submission of the Form ETA 750 in this matter. [REDACTED] notes that the petitioner was not then required to pay the beneficiary the full amount of the wage proffered in this case. [REDACTED] cites the accountant's letter, the evidence of bids awarded to the petitioner and the petitioner's gross receipts, gross profits, compensation of officers, and alleged payments of \$30,319 to subcontractors as indices of 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 April 4, 2005, denied the petition.

On appeal, the petitioner submitted a balance sheet, a statement of cash flows, a statement of income and retained earnings, and an accountant's report. The petitioner also submitted a letter dated April 28, 2005 from its president.

The petitioner's president's April 28, 2005 letter explains that the 2001 W-2 form submitted shows only \$18,548 paid to the beneficiary because the petitioner took the beneficiary off of its payroll after four months of that year and after that employed her services as a consultant.

That letter also states that "[The petitioner] brought an independent Accounting Firm to audit our year 2001 & 2002 records and compile the result of their findings in Financial Statement." [sic] The letter cites that audit or compilation as evidence of the petitioner's ability to pay the proffered wage.

The financial statements purport to show the petitioner's performance during 2002 and its financial position as of December 31, 2001 and December 31, 2002. The accountant's report that accompanied that financial statement asserted, "I have compiled the accompanying balance sheets . . . in accordance to [sic] standards established by the America [sic] Institute of Certified Public Accountants," and "I have audited the accompanying statement of revenues and expenses accordingly."

Neither the petitioner's president's letter nor the accountant's report makes clear whether the financial statements provided are the product of a compilation or an audit, or for that matter a review. However the accountant's report, although inconsistently worded, appears to indicate that the accountant compiled, rather than audited the balance sheet. Further, the Balance Sheet and the Statement of Income and Retained Earnings both indicate that they were prepared pursuant to a compilation and the Cash Flow Statement

indicates that it was prepared pursuant to a review. None of those financial statements was produced pursuant to an audit.

The record also contains a letter dated April 15, 2004 from a different accountant. That letter accompanied the 2003 Income Statement submitted in response to the request for evidence. It does not state, nor does the Income Statement itself state, that the Income Statement was produced pursuant to an audit.

The petitioner's reliance on unaudited financial statements is misplaced. Neither a review nor a compilation is the equivalent of an audit. The figures in both are the representations of management.

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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner states that the instant visa category does not require that it pay the proffered wage to the beneficiary prior to the beneficiary receiving LPR status and that the petition should not have been denied on that basis. The petitioner appears to misunderstand the basis of the decision of denial.

The petition was not denied because the petitioner failed to pay the beneficiary the proffered wage *per se*. Rather, the petition was denied because the petitioner failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date in accordance with 8 C.F.R. § 204.5(g)(2).

The petitioner may present evidence that it **actually paid** the beneficiary some or all of the proffered wage to support the proposition that it was **able to pay** some or all of the proffered wage. In the instant case the petitioner provided evidence that it paid the beneficiary \$18,548 during 2001. Payment of that amount during that year demonstrates that the petitioner was able to pay that amount during that year. It does not demonstrate that the petitioner was able to pay the balance of the proffered wage during that year or that it was able to pay any portion of the proffered wage during any other year.

The petitioner also states that the beneficiary received some payments as a subcontractor/consultant, but provides no corroborating evidence. In fact, the beneficiary's personal income tax return clearly indicates that she declared no other income. Had the petitioner provided convincing evidence of those additional payments – the beneficiary's Form 1099 Miscellaneous Income statements, for example – this office could have considered those payments as evidence of the petitioner's ability to pay additional wages. The mere assertion that the petitioner paid the beneficiary some additional amount not shown on the W-2 form provided, however, is insufficient to show the petitioner's ability to pay the proffered wage.

Evidence that the petitioner has recently been awarded contracts is not, in itself, evidence that it will be able to pay the proffered wage. That it was awarded contracts supports the proposition that it will have gross receipts during one or more future years. Whether it will have a profit sufficient to pay the proffered wage during any of those years hinges largely on the amount of the expenses it incurs in generating those gross receipts. The evidence that the petitioner has been awarded contracts does not demonstrate that the

petitioner's future profits will be sufficient to pay the proffered wage nor that it will enjoy any profits at all. Further, those contracts cannot show that the petitioner was able to pay the proffered wage during any of the previous salient years.

In his February 7, 2005 letter [REDACTED] stated that the petitioner paid \$30,319 to contractors during 2001 and \$83,474 during 2003 and indicated those amounts should be considered in assessing the petitioner's ability to pay the proffered wage.

This office is unable to find any reference to \$30,319 paid to subcontractors during 2001 on that year's tax return. This office notes that the petitioner's 2001 tax return shows no Schedule A, Line 3, Cost of Labor. Further, even if the amount of that payment were demonstrated that would not demonstrate that the petitioner had \$30,319 available to it during 2001 to pay the beneficiary's wages. In order to show that amount was available to pay the proffered wage the petitioner would be obliged to show that the petitioner paid that amount to subcontractors for performance of the duties of the proffered position, sales representative/business services sales agent. If those subcontractor payments were payment for various construction services, for instance, then they were not available to pay additional wages for the proffered position.

[REDACTED] further urged that the petitioner paid Compensation of Officers of \$57,001 during 2001. This office notes that the petitioner's Form 1120 shows, at Line 12 of page one, no Compensation of Officers.

Further even if the record demonstrated that that amount was paid, no documents were provided to support [REDACTED] implied assertion that those funds were available to pay additional wages. The record contains no evidence to support the supposition that the petitioner's officers were able and willing to forego their compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers, if any, has not, therefore, been shown to have been available to pay wages.

[REDACTED] assertion that the petitioner's gross receipts and gross profits are indices of the ability to pay additional wages is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ 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 *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, rather than the petitioner's gross receipts. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

¹ The petitioner might be able to show, for instance, that the beneficiary would replace another 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 to the petitioner's net income the amount of the proffered wage or more.

The petitioner's gross profit is its gross receipts minus cost of goods sold but before subtraction of its other (operating) expenses. This interim figure is not an index of ability to pay additional wages as is explained further below. It does not represent additional funds available after payment of all expenses.

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, 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 \$18,548 during 2001. The petitioner is obliged to show the ability to pay the balance of the proffered wage during that year as well as the entire amount of the proffered wage during each of the other salient years.

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). See also 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. See *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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically³ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$62,889.20 per year. The priority date is April 23, 2001.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Having demonstrated that it paid the beneficiary \$18,548 during 2001 the petitioner is obliged to show the ability to pay the remaining \$44,341.20 balance of the proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income or profit during that year. At the end of that year the petitioner had net current assets of \$10,578. That amount is insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 and must show the ability to pay the entire proffered wage during that year. During 2002 the petitioner declared taxable or net income before net operating loss deductions and special deductions of \$1,976. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2002.

The request for evidence in this matter was issued on November 23, 2004 and asked that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2003 tax return should have been available. Although [REDACTED] stated, in his February 7, 2005 letter, that the petitioner received an extension of time to file its 2003 return he provided no evidence in support of that assertion and the return was not subsequently provided. Absent evidence of the extension the petitioner was obliged to provide evidence of its ability to pay the proffered wage during 2003. The petitioner did not do so and has failed to demonstrate its ability to pay the proffered wage during 2003.

Because the petitioner's 2004 tax return was unavailable when the request for evidence was issued the petitioner is excused from its obligation to demonstrate its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. 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 basis and the petitioner has not overcome that basis for denial.

The record suggests an additional issue that was not addressed in the decision of denial. The Form ETA 750 in this matter states that the petitioner would employ the beneficiary in Union, New Jersey. The Form I-140 petition states that the petitioner would employ the beneficiary on Staten Island, New York. Because this issue was not raised in the decision of denial and the petitioner was not accorded an opportunity to address it, it forms no part of the basis for today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should explain why it considers a labor certification issued for employment in Union, New Jersey to be valid for employment on Staten Island, New York.



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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.