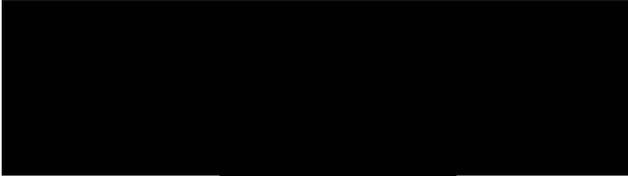


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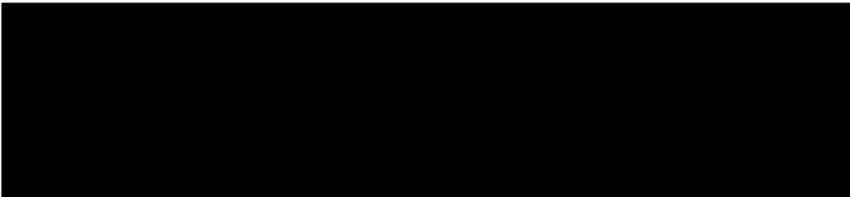
JUL 25 2007

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:
SRC 05 073 50315

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 23, 2002. The proffered wage as stated on the Form ETA 750 is \$48,985 per year.

The Form I-140 petition in this matter was submitted on January 18, 2005. On the petition, the petitioner stated that it was established on June 5, 1992 and that it employs four workers. The petition states that the petitioner's gross annual income is \$178,406. The petitioner left blank the space reserved for it to report its net annual income. On the Form ETA 750, Part B, signed by the beneficiary on December 17, 2002, the beneficiary did not claim to have worked for the petitioner. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Hollywood, Florida. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Aventura, Florida.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) photocopies of the petitioner's 2002, 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a photocopy of a 2002 Form W-2 Wage and Tax Statement, (3) copies of 2003 and 2004 Form 1099 Miscellaneous Income statements, (4) photocopies of 2002 pay stubs, (5) unaudited 2003 and 2005 financial statements, and (6) photocopies of monthly statements pertinent to the petitioner's bank account. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on June 5, 1992, and that it reports taxes pursuant to the calendar year and a hybrid of cash and accrual convention accounting.

During 2002 the petitioner declared Schedule K, Line 23 Income of \$21,926. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$13,553. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared Schedule K, Line 23 Income of \$37,228. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2005 the petitioner declared Schedule K, Line 23 Income of \$87,646. At the end of that year the petitioner had current assets of \$46,587 and current liabilities of \$11,340, which yields \$35,247 in net current assets.

The 2002 W-2 form submitted shows that the petitioner paid the beneficiary wages of \$45,000 during that year. The pay stubs show that during 2002 and early 2003 the petitioner paid the beneficiary gross pay of \$1,875 twice per month, which is consistent with an annual salary of \$45,000 per year. The December 31, 2002 check shows year-to-date gross wages of \$45,000.

The 2003 and 2004 1099 forms show that during the petitioner paid the beneficiary nonemployee compensation of \$8,686.99 and \$8,575 during those years, respectively.

The director denied the petition on January 12, 2006. On appeal, counsel asserted that he would submit argument or additional evidence within 30 days. Subsequently, the petitioner, rather than counsel, submitted a letter that argued that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner also submitted a copy of a letter counsel

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

previously submitted in response to the director's request for evidence dated December 9, 2005. This office considers that the petitioner has renewed those arguments on appeal.

In a previous letter dated December 14, 2004 counsel argued that sum of the wages paid to the beneficiary, the petitioner's net income, its depreciation deduction, and its total assets is the correct calculation to determine the funds available to the petitioner to pay additional wages in a given year.

In a letter dated May 12, 2005 counsel noted that a May 4, 2004 memorandum from the Associate Director of Operations of CIS indicated that a petitioner has shown the ability to pay the proffered wage if it is currently paying the proffered wage to the beneficiary. From that premise counsel argued that the petitioner in the instant case has shown the ability to pay the proffered wage because the wages it paid to the beneficiary, the petitioner's revenues, and the petitioner's assets, added together, exceeded the annual amount of the proffered wage during each of the salient years.

In a letter dated January 4, 2006 counsel argued that the sum of the wages paid to the beneficiary, the petitioner's net income, and the petitioner's net current assets is the correct calculation pertinent to funds available to the petitioner to pay additional wages. Counsel argued, in the alternative, that the calculation might be the sum of the beneficiary's wages, the petitioner's net income, its depreciation deduction, and its end-of-year cash on hand.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year taken. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.² Counsel appears to be asserting that the real cost of long-term

² Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part. The petitioner's end-of-year cash is included, however, in the calculation of its net current assets, which calculation is detailed below. The petitioner's end-of-year cash will be considered in that context, but not in conjunction with its net profit.

Further, this office rejects counsel's suggestion that net current assets may appropriately be added to net profit. This is, in part, because net current assets include cash on hand and, again, the calculation would be duplicative, as explained above. An additional, but related, reason exists that net current assets may not appropriately be added to net profits in determining the funds available to the petitioner to pay additional wages.

Net current assets are the difference between a corporation's current assets and current liabilities and may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with the petitioner's net income and the wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on unaudited financial records is misplaced. 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 financial statements themselves note that they are for management use only, and not intended to be relied upon by others. The unaudited financial statements will not be considered.

Counsel's reliance on the bank statements in this case is similarly 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. 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.³ 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 reported on its tax returns.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 paid the beneficiary \$45,000 during 2002, \$8,686.99 during 2003, and \$8,575 during 2004.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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, 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

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 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.

Notwithstanding counsel's suggestion to the contrary, the petitioner's total assets 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 typically⁴ 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 \$48,985 per year. The priority date is December 23, 2002.

The petitioner paid the beneficiary \$45,000 during 2002. The remaining balance of the proffered wage is \$3,985. During 2002 the petitioner declared Schedule K, Line 23 Income of \$21,926. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$8,686.99 during 2003 and is obliged to show the ability to pay the remaining \$40,258.01 balance of the proffered wage during that year. During 2003 the petitioner declared Schedule K, Line 23 Income of \$13,553. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year the petitioner had negative 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 to demonstrate that any other funds were available to it during 2003 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner paid the beneficiary \$8,575 during 2004 and is obliged to show the ability to pay the remaining \$40,410 balance of the proffered wage during that year. During 2004 the petitioner declared Schedule K, Line 23 Income of \$37,228. That amount is insufficient to pay the remaining balance of the proffered wage.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

At the end of that year the petitioner had negative 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 to demonstrate that any other funds were available to it during 2004 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 2005 and must show the ability to pay the entire amount of the proffered wage during that year. During 2005 the petitioner declared Schedule K, Line 23 Income of \$87,646. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on January 18, 2005. On that date the petitioner's 2006 tax return was unavailable. On February 19, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return remained unavailable. On December 9, 2005 the service center issued a notice of intent to deny in this matter, again requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2003 and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue that was not addressed in the decision of denial. The Form ETA 750 relied upon in this case states that the petitioner would employ the beneficiary in Aventura, Florida, which is in Miami-Dade County. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Hollywood, Florida, which is in Broward County. Because the decision of denial did not discuss this issue, and the petitioner has not been accorded an opportunity to respond to it, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion it should address whether a labor certification issued for use in Miami-Dade County is valid for employment in Broward County.

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.