

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

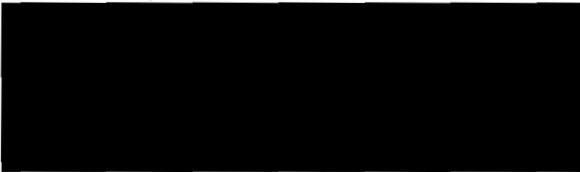
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:

Office: NEBRASKA SERVICE CENTER

Date:

LIN 03 151 53497

MAR 01 2007

IN RE:

Petitioner:

Beneficiary:



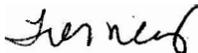
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a custom log home construction business. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a senior carpenter. The director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion 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.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel asserted new facts and provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied a specific provision within the law.

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 or seasonal nature, for which qualified workers are unavailable 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$27.54 per hour, which equals \$57,283.20 per year.

The instant visa petition was submitted on April 4, 2003. On the petition, the petitioner stated that it was established on September 9, 2000 and that it employs five workers. The petition states that the petitioner's gross annual income is \$543,034 and that its net annual income is \$105,746.¹

On the Form ETA 750, Part B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since November 2000. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Sequim, Washington. The AAO reviews *de novo* issues raised in decisions challenged 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.²

In the instant case the record contains (1) the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 2001 and 2002 Form 1099 Miscellaneous Income statements, (3) copies of monthly statements pertinent to the petitioner's bank account, (4) a list of the petitioner's recent projects, (5) unaudited financial statements, (6) a letter from the petitioner's owner dated March 31, 2003, (7) a letter dated October 30, 2003 from the petitioner's vice president, (8) an undated letter from the petitioner's president that he submitted in response to a request for evidence issued in this matter, (9) documents pertinent to credit extended to the petitioner's owner and his spouse, who is the petitioner's vice president, and (10) a promissory note from the petitioner to the petitioner's owner in exchange for a loan. 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 September 29, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year.

¹ The income tax returns subsequently provided do not support those figures.

² 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).

The petitioner's 2001 return shows that it reported ordinary income of \$14,985 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 return shows that it reported a loss of \$1,797 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$33,710 and current liabilities of \$32,854, which yields net current assets of \$856.

The petitioner's 2003 return shows that the petitioner declared ordinary income of \$66,281 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$27,782 and current liabilities of \$26,070, which yields net current assets of \$1,712.

The miscellaneous income statements show that the petitioner paid the beneficiary \$26,513 and \$20,611.55 during 2001 and 2002, respectively. The petitioner's owner's March 31, 2003 letter states that the petitioner has sufficient demand that it could employ five additional workers in the proffered position. The petitioner's vice president's October 30, 2003 letter states that from January 1, 2003 to September 30, 2003 the petitioner paid the beneficiary \$41,057 for his carpentry work.

The director denied the petition on March 20, 2004. The petitioner appealed. This office dismissed the appeal on August 12, 2005.

On appeal, counsel asserted that the proceeds of the loan that the petitioner's owner made to the petitioner should be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In his submissions with the motion counsel stated, that "the petitioner clearly stated that the amounts on the 1099 were for the period during which the beneficiary had ceased working as an employee, i.e. after the filing of the labor certification application," and "the petitioner's statement in support of the petition clearly demonstrated that the petitioner company had clients eager to have custom homes built for them in 2001 and 2002 far in excess of its ability to build them, due to a shortage of qualified workers."

Counsel asserted that the petitioner's owner's loan to his company enabled the company to cover its wage expense and other expenses during the period between incurring those expenses and receiving payment and "while the beneficiary receives around \$30.00 per hour for his work for the petitioner, the petitioner receives \$60.00 or more for each hour the beneficiary works."

Counsel asserted that the amount of the proffered wage that the petitioner should be required to show the ability to pay during 2001 should be prorated to reflect the portion of the year that remained on the priority date. Counsel further asserted, "For 2002, the AAO acknowledged that the petitioner was not required to pay the offered wage during the entire year, but only during the period following the filing of the petitioner's labor certification application in April 2001."

This office is unable to follow counsel's argument. All of 2002, rather than merely some portion of it, was after the April 26, 2001 priority date. If the year "2002" is assumed to be a typographical error, and the

argument interpreted as an assertion that this office agreed to prorate the amount of the proffered wage the petitioner must show the ability to pay during 2001, then the statement is still incorrect. This office specifically stated, in the August 12, 2005 decision, that it would not so prorate the proffered wage.

The reasoning underlying the refusal to prorate the proffered wage was stated as follows,

We will not . . . consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period) [the record contains no such evidence.]

This office continues to find the logic of the decision on that issue compelling and, absent convincing evidence that the amount shown on the 2001 Form 1099 was paid exclusively for employment after the priority date, will not prorate the proffered wage.

The petitioner's owner's representation that the amounts shown on the Forms 1099 are for the period after the priority date is not as clear as counsel represented it to be. The petitioner's owner stated,

In April 2002, we contacted an attorney who told us how to make the application for labor certification and if it was approved, for his employment(-)based immigrant status. When we learned that Mr. [REDACTED] did not have a valid Social Security number, he decided to obtain a business license and work for us as a subcontractor. Prior to April 2001, we did pay him as an employee, ranging from 35 – 60 hours per week. We are attaching copies of his time cards during that period to this letter.

The chronology urged by the petitioner's owner is unclear. First, he appears to indicate that his company first sought to obtain a labor certification no earlier than April 2002, but the petitioner applied for the labor certification in this case during April of 2001. He indicates that the company ceased to utilize the beneficiary as an employee when it learned that he had no valid social security number, but does not indicate when that was. He indicates that he is providing time cards to demonstrate that the beneficiary was an actual employee of his company prior to April of 2001, rather than working as a subcontractor. Those time cards might possibly have sufficed to demonstrate the change from employee to contractor, depending on the information they contained. No such time cards, however, were submitted. The record contains no convincing evidence to demonstrate that the amount shown on the 2001 Form 1099 Miscellaneous Income statement was paid exclusively for employment after the priority date, and absent any such evidence this office will make no such conclusion.)

This office has sought to find some support in the record for counsel's assertion that the petitioner receives at least \$60 for each hour of the beneficiary's labor. This office is unable to find any support for counsel's assertion in the record. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Counsel's statement that the petitioner had orders for houses beyond its capacity to build them has, in fact, some evidentiary support. In his undated letter the petitioner's president stated as much. The petitioner is obliged, however, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. A mere statement by the petitioner's owner that the petitioner would be able to pay the proffered wage, absent some support for that assertion on the petitioner's copies of annual reports, federal tax returns, or audited financial statements, is insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The funds lent to the petitioner by its owner, or by some other entity, is not a factor in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date. A line of credit, or any other indication of available credit, or any amount already borrowed, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner and the funds it has borrowed are not part of the calculation of the funds available to pay the proffered wage.

Counsel's reliance on the unaudited financial records³ submitted 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 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.⁴

³ The financial statements are not accompanied by the accountant's report that should accompany any financial statements when they are presented for any purpose. Further, each page of those statements is captioned, "For Internal Use Only," indicating that they were not produced pursuant to an audit.

⁴ 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

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.

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 \$26,513 during 2001 and \$20,611.55 during 2002.

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 is insufficient. Similarly, showing that the petitioner paid total 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, 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 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 net of 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

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.

typically⁵ 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 \$57,283.20 per year. The priority date is April 26, 2001

The petitioner showed that it paid the beneficiary \$26,513 during 2001 and must demonstrate the ability to pay the remaining \$30,770.20 balance of the annual amount of the proffered wage. During that year the petitioner reported ordinary income of \$14,985. That amount is insufficient to pay the 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 of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

The petitioner showed that it paid the beneficiary \$20,611.55 during 2002 and must demonstrate the ability to pay the remaining \$36,671.65 balance of the annual amount of the proffered wage. During that year the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$856. 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 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

The petitioner did not demonstrate that it paid any wages to the beneficiary during 2003 and must show that it was able to pay the entire annual amount of the proffered wage during that year. During that year the petitioner declared ordinary income of \$66,281. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The visa petition in this matter was submitted on April 4, 2003. On that date the petitioner's 2004 tax return was unavailable. The service center issued a request for evidence on August 11, 2003 asking that the petitioner provide additional evidence of its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 tax return was still unavailable. 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 and 2002. 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 that basis, which has not been overcome on appeal.

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.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

ORDER: The motion is granted. The AAO's decision of August 12, 2005 is affirmed. The petition is denied.