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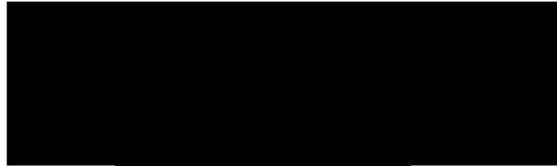
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20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



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Office: VERMONT SERVICE CENTER

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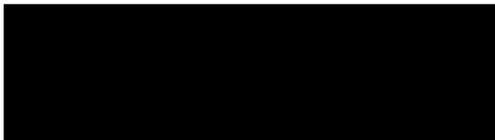
Petitioner:

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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction contractor. It seeks to employ the beneficiary permanently in the United States as a stucco mason. 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, makes a specific allegation of error in law or fact, and was accompanied by new evidence. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27.91 per hour, which equals \$58,052.80 per year.

The Form I-140 petition in this matter was submitted on September 27, 2004. On the petition, the petitioner stated that it was established on April 5, 2000 and that it employs five workers. The petition states that the petitioner's gross annual income is \$1,889,325 and that its net annual income is \$394,161.<sup>1</sup> On the Form

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<sup>1</sup> Reference to the petitioner's 2003 tax return shows that those figures represent its gross receipts and its total income, rather than its gross receipts and net income. Total income is the difference between the petitioner's

ETA 750, Part B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Brooklyn, New York.

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.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, (2) a portion of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, (3) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (4) a letter dated July 26, 2004 from the petitioner's president, (5) 2001, 2002, and 2003 Form 1099 Miscellaneous Income statements, and (6) letters dated January 11, 2005 and January 13, 2005 from a bank. 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 April 5, 2000, and that it reports taxes pursuant to accrual convention accounting. Those returns also show that the petitioner reports pursuant to a fiscal year, rather than a calendar year, but conflict as to whether the petitioner's fiscal year begins on April 1 or May 1.

The petitioner's 2001 tax return, which states that it covers the fiscal year from April 1, 2001 to March 31, 2002, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,790 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 tax return, which states that it covers the fiscal year from May 1, 2002 to April 30, 2003,<sup>3</sup> shows that the petitioner declared a loss of \$721 as its taxable income before net operating loss deductions and special deductions 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 2003 tax return, which states that it covers the fiscal year from May 1, 2003 to April 30, 2004, shows that the petitioner declared ordinary income of \$2,879 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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gross receipts and its cost of goods sold, before subtraction of salary and wage expenses, depreciation, and all of the petitioner's other expenses, which subsequent subtraction would yield net income.

<sup>2</sup> 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).

<sup>3</sup> Neither of those returns purports to cover April of 2002.

The petitioner's president's July 26, 2004 letter states that the beneficiary has worked for the petitioner through subcontractors since 2001 and refers to the 1099 Forms as support for that assertion. The 1099 forms submitted were issued to the beneficiary, but were not issued by the petitioner. Those forms indicate that the beneficiary received non-wage compensation of \$10,840 and \$11,120 from the Toran Construction Company of Brooklyn, New York during 2001 and 2002, respectively, and \$16,830 from the Beton Construction Company, also of Brooklyn, during 2003.

The bank's January 11, 2005 and January 13, 2005 letters state the petitioner's bank balances at the end of 2001, 2002, 2003, and 2004.

The director denied the petition on December 13, 2004. On appeal,<sup>4</sup> counsel asserted that the petitioner's bank balances and its total wage expenses demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank balances is misplaced. First, bank statements and other evidence of historical bank balances 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 and similar evidence show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>5</sup> Third, no evidence was submitted to demonstrate that the bank balances reported somehow reflect additional available funds that were not reported on its tax returns.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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 expenses<sup>6</sup> or otherwise increased its net income,<sup>7</sup> the petitioner is obliged to show

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<sup>4</sup> The appeal was initially summarily denied on March 29, 2005 as untimely filed. Upon the petitioner's motion the matter was reopened, based upon a finding that the filing was timely.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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 income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The 1099 forms submitted show that the beneficiary received non-wage compensation, but do not show that any portion of it came from the petitioner, either directly or indirectly. The July 26, 2004 letter from the petitioner's president implies that the petitioner employed the beneficiary through those other companies. No evidence was provided, however, of any amounts the petitioner paid to those companies. If such evidence had been submitted, it would have been the petitioner's burden to show what portion of the payments to those other companies were for work performed by the beneficiary. Further, the amounts the other companies paid to the beneficiary, \$10,840, \$11,120, and \$16,830 during 2001, 2002, and 2003, respectively, do not even approach the annual amount of the proffered wage. Even if those amounts shown as paid by those other companies had been considered amounts somehow available to the petitioner to pay additional wages, they would not have been sufficient to show that the petitioner was able to pay the proffered wage during those years.

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 did not establish that it employed and paid the beneficiary.

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. *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 typically<sup>8</sup> 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 \$58,052.80. The priority date is April 30, 2001.

During its 2001 fiscal year, which the petitioner's tax return states ran from April 1, 2001 to March 31, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,790. That amount is insufficient to pay 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 its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

None of the petitioner's tax returns purport to cover April of 2002. The petitioner submitted no other evidence pertinent to April of 2002. The petitioner has not demonstrated its ability to pay the proffered wage during April of 2002.

During its 2002 fiscal year, which the petitioner's tax return states ran from May 1, 2002 to April 30, 2003, 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 profits during that year. 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 its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

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<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During its 2003 fiscal year, which the petitioner's tax return states ran from May 1, 2003 to April 30, 2004, the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,879. That amount is insufficient to pay 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 its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The petition in this matter was submitted on September 27, 2004. On that date the petitioner's fiscal year 2004 tax return was unavailable. No additional evidence was subsequently requested. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during its 2004 fiscal year and later fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2001 fiscal year, during April of 2002, during its 2002 fiscal year, or during its 2003 fiscal year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.