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

**PUBLIC COPY**



bc

FILE:

EAC 05 070 53146

Office: VERMONT SERVICE CENTER

Date: **MAY 22 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the instant preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 20, 2002. The proffered wage as stated on the Form ETA 750 is \$22.59 per hour, which equals \$46,987.20 annually.

The Form I-140 petition in this matter was submitted on January 12, 2005. On the petition, the petitioner stated that it was established on January 1, 1985 and that it employs three workers. The petition states that the petitioner's gross annual income is \$200,116 and that its net annual income is \$52,338.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on January 13, 2003, the beneficiary claimed to have worked for the petitioner as an electrician's assistant from April 2000 to September 2002, and to have worked for the

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<sup>1</sup> The evidence subsequently submitted does not support the assertion that the petitioner returns net income of \$52,338 per year. Rather, the evidence shows that the petitioner's net annual income ranged from \$16,623 to \$29,563 during the salient years. The petitioner's finances are discussed more thoroughly below.

petitioner as an electrician since September 2002. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Silver Spring, Maryland.

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.<sup>2</sup>

In the instant case the record contains (1) unaudited expense worksheets for 2002 and 2003, (2) the petitioner's owner's 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, (3) the petitioner's 2001 Schedule C, Profit or Loss From Business, (4) assessment notices for properties in Montgomery County and Baltimore City, Maryland, (5) letters from the petitioner's owner dated May 10, 2005 and December 8, 2005, (6) a list of the petitioner's owner's recurring monthly expenses (budget) during 2002 and 2003, (7) a 2003 W-2 form, and (8) copies of the beneficiary's 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns. 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 sole proprietorship and that it reports taxes pursuant to cash convention accounting. During 2002 and 2003 the petitioner's owner filed jointly and claimed three dependents. During 2004 the petitioner stated that he was single and had no dependents.

The 2001 Schedule C shows that the petitioner returned \$17,920 in net income to its owner during that year. Because the remainder of the petitioner's owner's 2001 tax return was not provided this office is unable to determine the petitioner's owner's adjusted gross income during that year. This office notes, however, that the priority date of the instant petition is June 20, 2002. Evidence pertinent to the petitioner's or petitioner's owner's finances during previous years, therefore, is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2002 the petitioner returned \$29,563 in net income to the petitioner's owner. The petitioner's owner reported adjusted gross income of \$35,532 during that year, including the petitioner's net income.

During 2003 the petitioner returned \$27,557 in net income to the petitioner's owner. When the 2003 tax return was photocopied a portion of the front page was occluded. This office is unable to read the petitioner's owner's adjusted gross income.

During 2004 the petitioner returned \$16,623 in net income to the petitioner's owner. The petitioner's owner reported adjusted gross income of \$14,743 during that year, including the petitioner's net income.

The document that occluded a portion of the petitioner's owner's 2003 tax return is the 2003 W-2 form mentioned above. That W-2 form shows that [REDACTED] of Silver Spring, Maryland paid wages of \$13,894.38 to [REDACTED] also of Silver Spring, during that year. The significance of that W-2 form to this case, if any, and whether it was included by accident or design, are unknown to this office.

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<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).

Schedules C attached to the beneficiary's personal tax returns show amounts he received as the sole proprietor of an electrical services firm. Whether the petitioner paid the beneficiary any portion of those amounts is unknown to this office. The proposition counsel intended to support by providing the beneficiary's personal tax returns is unknown to this office.

The petitioner's owner's budgets list various monthly expenses and ostensible monthly totals. Although the items on the 2002 budget total \$3,110 the petitioner's owner stated that the total is \$3,610. The \$4,470 monthly total shown on the 2003 budget is correct. The petitioner's owner also stated on those budgets that he owns assets that he could liquidate as necessary to pay the proffered wage. The petitioner's owner's May 10, 2005 letter reiterates that the petitioner's owner is willing to liquidate personal assets as necessary to pay the proffered wage.

The petitioner's owner's December 8, 2005 letter stated that the petitioner's owner's spouse works full-time and family expenses are shared. The petitioner's owner also stated that he owns two houses, one of which, his personal residence, is not encumbered by a mortgage. Finally, the petitioner's owner stated that the beneficiary is currently working for the petitioner.

The acting director denied the petition on November 16, 2005. In that decision the acting director incorrectly stated that the petitioner's owner's monthly living expenses were \$43,320 during 2002 and \$53,640 during 2003. This office notes that those amounts are twelve times the petitioner's owner's monthly expenses as listed on the budget provided by the petitioner's owner. Further, the 2002 amount should be amended to \$37,320 to correct the petitioner's owner's arithmetic error on the budget as noted above.

On appeal, counsel asserted that the evidence provided demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a brief filed to supplement the appeal counsel noted that the petitioner's owner stated that he is able and willing to liquidate assets as necessary to pay the proffered wage. Counsel, however, provided no additional evidence pertinent to those assets. Counsel also stated that the petitioner has employed the beneficiary since 2000 and that the beneficiary has been receiving a salary since 1999. Counsel provided no evidence in support of either of those assertions other than the petitioner's owner's December 8, 2005 letter.

The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The assessment notices are the only evidence in the record pertinent to the petitioner's owner's assets. If counsel is relying on other assets of the petitioner's owner that are not in evidence, then counsel's reliance is misplaced. This office will not consider assets not in evidence.

This office considers the assessment notices provided sufficient to show that the petitioner's owner owns two pieces of real property. They are not sufficient to establish the market value of the property.<sup>3</sup> Further, those assessments contain no information pertinent to the amounts by which the properties may be encumbered and the statement of the petitioner's owner that one of the properties is unmortgaged is insufficient to show the

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<sup>3</sup> A disinterested estimate of market value would typically be provided by a professional real estate appraiser.

extent to which either property may or may not be encumbered.<sup>4</sup> The petitioner's owner's equity in those properties has not been demonstrated.

Even if the amount of the petitioner's owner's equity in those properties had been demonstrated, that would not demonstrate that the equity is readily available to use to pay wages. Equity in real estate is not the sort of liquid asset generally considered to be available to pay wages.<sup>5</sup> Counsel's reliance on the petitioner's owner's real estate holdings is misplaced.

Counsel's reliance on unaudited financial records is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial records to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial records 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 records will not be considered.

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 beneficiary claimed, on the Form ETA 750B, to have worked for the petitioner since 2000. Further, counsel submitted a letter from the petitioner's owner stating that the beneficiary works for the petitioner. How much the petitioner has paid to the beneficiary during the salient years was neither demonstrated nor even alleged. In the instant case, the petitioner did not establish that it paid any amount to 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 that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

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<sup>4</sup> A list of the encumbrances on real property is typically determined by a professional title search.

<sup>5</sup> The petitioner's owner might be able to extract his equity from those properties through a mortgage, a second mortgage, or a home equity loan. Any of those alternatives, however, would create a debt. Available credit is not an indication of a sustainable ability to pay a proffered wage. 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 is not part of the calculation of the funds available to pay the proffered wage.

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. 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).

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that she could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$46,987.20 annually. The priority date is June 20, 2002.

During 2002 the petitioner's owner reported adjusted gross income of \$35,532. That amount was insufficient to pay the petitioner's owner's \$37,320 annual living expenses incurred during that year. Although the petitioner's owner stated that his wife provides additional income, the wife's income was included in the adjusted gross income shown on that joint return. The petitioner submitted no reliable evidence of any other evidence available to it during 2002 with which it could have paid the beneficiary's wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The adjusted gross income on the submitted photocopy of the petitioner's owner's 2003 tax return was illegible. As a result this office is unable to determine whether the petitioner's owner could have met his 2003 living expenses of \$53,640 and still have been able to pay the \$46,987.20 proffered wage during that year. The petitioner submitted no reliable evidence of any other evidence available to it during 2003 with which it could have paid the beneficiary's wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner reported adjusted gross income of \$16,623, including the petitioner's net income and the petitioner's owner's spouse's income. That amount was insufficient to pay the petitioner's owner's \$37,320 annual living expenses incurred during that year. The petitioner submitted no reliable evidence of any other evidence available to it during 2004 with which it could have paid the beneficiary's wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on January 12, 2005. On that date the petitioner's 2005 tax return was unavailable. On February 15, 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 2005 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.