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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6

FILE:

Office: TEXAS SERVICE CENTER Date:

APR 07 2010

SRC 07 100 52837

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center (TSC), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company which seeks to employ the beneficiary permanently in the United States as a welding supervisor. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (USDOL). The TSC Director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel states the director based his denial on a cursory analysis of the submitted IRS Form 1120, Corporation Income Tax Returns. Counsel argues that the director improperly insisted upon audited financial statements when full income tax returns were submitted and should have relied more on the explanations provided by the petitioner's Certified Public Accountant (CPA). No additional evidence was submitted on appeal.

It is noted that in his Request for Evidence dated July 31, 2007, the TSC Director did not insist the petitioner submit audited financial statements as indicated by counsel on appeal, but requested the submission of audited financial statements as an optional form of evidence the petitioner could forward for consideration.

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 nature, for which qualified workers are not available in the United States.

The regulations at 8 C.F.R. § 204.5(g)(2) provide, 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 either 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 USDOL. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the

Form ETA 750 is \$30.01 per hour, which amounts to \$54,618 annually based on the specified 35-hour work week. On the Form ETA 750B, the beneficiary stated he began working for the petitioner in January 1998.

The record shows the petitioner was established in June 1997, had a gross income of "over \$1,500,000 sales," and employed fourteen workers when the Form I-140 was filed. In support of the petition, the petitioner submits a letter dated January 29, 2007 from [REDACTED], who states the petitioner's cost of labor for tax year 2000 was \$264,905, for tax year 2001 it was over \$90,000 while in 2002 it totaled over \$66,000 and that these sums partially represent payroll paid to employees no longer employed by the firm. He indicates that the beneficiary replaced a few part-time employees as he was hired as a full-time employee. He also asserts the taxable income as reported on line 30 of the corporation's 2000 tax return was \$0 as a result of a net operating loss deduction because of prior year losses available to offset the current year income.

The record reflects the petitioner filed another Form I-140 on February 20, 2003 seeking to employ this same beneficiary as a welding supervisor using the same Form ETA 750 which was accepted for processing by USDOL on April 12, 2001. Because the Director, Vermont Service Center (VSC), deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 26, 2004, she requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the VSC Director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and specifically for 2001 along with any evidence of wages actually paid to the beneficiary.

In response, previous counsel stated that the petitioner terminated employees who would be replaced by the beneficiary as evidenced by IRS Forms W-2, Wage and Tax Statements, submitted in response to the VSC Director's request for evidence. Then counsel attached fifteen Forms W-2 for 2001 and eleven for 2002. Counsel also claimed that IRS Forms 1099-MISC, Miscellaneous Income Tax Statement, were issued to the beneficiary for work he performed for the petitioner which was reflected on the petitioner's tax return. No IRS Forms 1099-MISC issued to the beneficiary has been submitted to date. It is noted that the Form I-140 filed on February 20, 2003 was denied by the VSC Director on July 14, 2004 and that a subsequent appeal was dismissed by the AAO on November 28, 2005.

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner employed and paid the beneficiary during that period. Evidence that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is deemed *prima facie* proof of its ability to pay the proffered wage. In this case, the petitioner has not establish that it employed and paid the beneficiary the full proffered wage from the time he said he became employed by the corporation to date. Nor has it documented any amounts paid to the beneficiary during the requisite period.

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, USCIS next examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 USCIS 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 rejected the argument that USCIS should have considered income before expenses rather than net income. The court in *Chi-Feng Chang* further noted at 537:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

The petitioner's Form 1120 tax returns demonstrate its net income for the first five years of the requisite period below:<sup>1</sup>

<u>Year</u>	<u>Net Income (\$)</u>
2000	8,129
2001	-7,081
2002	-137,238
2003	-134,440
2004	-125,389

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<sup>1</sup>For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

2005      321,663

Therefore, for the years 2000 through 2004, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS may review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its net current assets for the required period, as shown in the table below.<sup>3</sup>

<u>Year</u>	<u>Net Current Assets (\$)</u>
2000	-143,369
2001	-101,024
2002	-139,540
2003	-101,794
2004	-255,765
2005	-244,886

For the years 2000 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, the petitioner has not established that it had the

<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup>On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Although counsel asserts that the petitioner would replace terminated employees, as the VSC Director noted, the petitioner failed to demonstrate that employees were terminated. The assertions of counsel do not constitute 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 AAO further notes that no evidence was presented that those allegedly terminated employees performed the duties of the proffered position.<sup>4</sup> It is important to reiterate that in the AAO decision dated November 28, 2005 referenced above, it was found unlikely that the beneficiary could perform the work of twelve to fifteen employees or that the petitioner had twelve to fifteen part time supervisors as claimed. 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 evidence submitted does not establish that the petitioner 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.

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<sup>4</sup> In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.