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

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 02 270 52133 Office: CALIFORNIA SERVICE CENTER

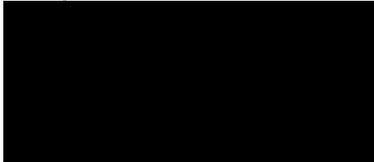
Date: DEC 08 2003

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 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a drywall and plastering contractor. It seeks to employ the beneficiary permanently in the United States as a plasterer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel argues that the evidence submitted demonstrates the petitioner's ability to pay the proffered wage.

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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted on April 26, 2001. The proffered salary as stated on the labor certification is \$18.78 per hour, which equals \$39,062.40 per year.

The Form ETA 750 Part B states that the beneficiary worked full-time for the petitioner from September 1992 to "Present," which

would indicate the priority date. Curiously, that form also indicates that the beneficiary worked for another company full-time from 1995 to 1997. This office assumes that some portion of that information is in error.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S Income Tax Return for an S Corporation. Because the priority date of the petition is April 26, 2001, the information on that form is not directly relevant to the petitioner's ability to pay the proffered wage since the priority date or to any other issue in this case.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on December 4, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested that the petitioner provide copies of the beneficiary's Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to him in wages.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S Income Tax Return for an S Corporation. That return states that the petitioner declared a loss of \$17,773 as its ordinary income from trade or business activities during that year. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities exceeded its current assets. Counsel did not provide the requested W-2 forms.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage during 2001 and, on March 12, 2003, denied the petition.

On appeal, counsel states that the petitioner did not employ the beneficiary on the priority date of the petition, but did not explain the discrepancy between that statement and the information given on the Form ETA 750 Part B. Counsel does not state that the petitioner had employed the beneficiary at any time since the priority date.

Counsel argues that the size of the petitioner's payroll, over \$1 million during 2000 and 2001, demonstrates the petitioner's ability to pay the proffered wage.

Although counsel has not stated that the petitioner has been paying the beneficiary the proffered wage, counsel cites two non-precedent decision of this office for the proposition that if the petitioner has been paying the proffered wage, it need not show

the ability to pay it. How counsel meant to apply that proposition to the instant case is unclear. In any event, although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel's argument pertinent to the size of the petitioner's payroll is inapposite. Ordinarily, a petitioner must demonstrate that it had the ability to pay the proffered wage **in addition to** its other expenses. Exceptions or partial exceptions would be made if the petitioner demonstrated that it would replace an existing employee with the beneficiary, or that the hiring the beneficiary would predictably and reliably reduce the petitioner's expenses in some other way. Another exception would be if the petitioner were already paying wages to the beneficiary. In that event, the petitioner would only be obliged to show the ability to pay the balance of the proffered wage. Counsel has submitted no evidence that any of those exceptions apply to this case, however, and the petitioner is obliged to show the ability to pay the entire proffered wage **in addition to** the wages it actually paid during the salient years.

During 2001, the petitioner declared a loss of \$17,773 as its ordinary income and ended the year with negative net current assets. The petitioner has failed to show the ability to pay the proffered wage during 2001 out of its income or its assets. 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.