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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: LIN 03 009 52141 Office: NEBRASKA SERVICE CENTER Date: JUL 8 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

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, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is a landscape and stonework design company. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief.

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 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.

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. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$39.47 per hour or \$82,097.60 per year.

With the petition, counsel submitted a copy of a profit and loss statement for the period January 1, 2002 through August 16, 2002 and a copy of the second page of the petitioning owner's 2001 form 1040, U.S. Individual Income Tax Return. The profit and loss statement showed a net income of \$21,938 and the second page of the form 1040 reflected an adjusted gross income of -\$7,793. The director considered this evidence insufficient, and, on October 29, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. The director specifically requested copies of the petitioner's most recent Form 941, Employer's Quarterly Federal Tax Form, a copy of the petitioner's State Unemployment Compensation Report Form, a copy of the beneficiary's form W-2, Wage and Tax Statement, and a copy of the beneficiary's most recent pay voucher.

In response, counsel submitted a copy of the petitioner's forms 941 for 2002, a copy of the petitioner's State Workers Compensation Assessment, a copy of the petitioner's quarterly wage and withholding supplement, a printout of information that would appear on the beneficiary's 2001 and 2002 form W-2, and a copy of the beneficiary's most recent pay voucher. In 2001, the beneficiary received a total of \$29,456 in wages, and 2002, he received \$42,828 in wages.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on April 3, 2003, denied the petition.

On appeal, counsel submits a copy of the petitioning owner's 2000 and 2001 Schedule C, Profit or Loss from Business, from the owner's form 1040, U.S. Individual Income Tax Return, a copy of a compilation report for the period ended March 31, 2003, and copies of contracts for work to be performed by the petitioner. Counsel states: "the determination of the Service was incorrect. Attached is evidence that establishes the petitioner's ability to pay the proffered wages." Counsel further asserts:

The criteria employed by the Service are not acceptable and do not reflect real life business practices or financial realities. Moreover, 8 CFR 204.5(g)(2) provides submission of a wide range of evidence to establish a Petitioner's ability to pay the proffered wages.

If each requirement or criteria is analyzed, it becomes apparent that on its own each criteria is not applicable.

1. The Petitioner paid the beneficiary a salary equal to or grater [sic] than the proffered wage in that year.

This test would be applicable only when and if a beneficiary is a full time employee of the petitioner. . . . Lastly, the Petitioner is not required to pay the wages offered in the offer of employment until the beneficiary commences employment . . .

2. The Petitioner's Net Income in the year of filing was equal to or greater than the proffered wages.

Again this test is inaccurate and does not reflect the financial ability of the Petitioner to pay the proffered wages. In today's climate most of the largest company [sic] in the United States could not show net profits equal to potential wages to be paid. Therefore, companies such as Motorola would not be allowed to hire new foreign employees. . . . New skilled employees are hired with the expectation to generate more revenues and larger profits. . . .

3. Petitioner's net current assets in the year of filing were equal or greater than the proffered wages.

Again this test does not reflect the business realities of the Petitioner. The assets of a Masonry and Landscape Design company are its tools, good will and the ability of its

skilled workers. . . . It is also true that regulations require copies of tax returns but it also allows submission of "additional evidence". The regulations allow the submission of additional evidence which may be appropriate in a given case.

Clearly the Petitioner has the ability to pay for the proffered wages. But such ability is conditioned upon having skilled stonemasons such as the beneficiary who can actually complete the work.

Of course the Petitioner is speculating that more work and orders will continue to be placed by customers. . . . If the Petitioner is not allowed to hire the beneficiary it will not be able to complete the projects for which it has orders and it will not be able to attract new orders to maximize its workforce. A denial of this application is akin to a closure of the petitioner's business.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001. The wages paid to the beneficiary were \$52,641.60 below the proffered wage in 2001 and \$39,269.60 below the proffered wage in 2002.

Counsel's statement that the petitioner need not have employed the beneficiary at the time of the priority date is true. However, the petitioner must show that it had the ability to pay the proffered wage at that time, and had the petitioner employed the beneficiary and paid him the proffered wage in 2001, the petitioner would have established its ability to pay. The actual payment of the proffered wage is only one method acceptable to CIS that the petitioner may use to establish its ability to pay the proffered wage.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Counsel contends that the petitioner may submit additional evidence beyond tax returns. While the regulations at 8 C.F.R. § 204.5(g)(2) does allow additional evidence to be provided, the additional evidence submitted, in the instant case, does not show that the petitioner had the ability to pay the proffered wage.

The 2000 Schedule C reflects a net profit of \$18,194. Because the priority date of the petition is April 30, 2001, the petitioner's 2000 tax return has no direct relevance to the petitioner's ability to pay the proffered wage and will not be considered as evidence of the petitioner's ability to pay the wage beginning on the priority date and continuing.

The 2001 Schedule C reflects a net profit of \$36,544 and the compilation report for the period ended March 31, 2003 reflects a net income of \$12,961.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. Although the petitioner's profit during 2001 was \$36,544, that profit plus the amount paid to the beneficiary in 2001 is still less than the proffered wage (\$36,544 + \$29,456 = \$66,000). The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. The petitioning owner's adjusted gross income for 2001 was -\$7,793. The petitioner could not pay the proffered wage of \$82,097.60 out of this income. Furthermore, it is noted that the petitioner has filed additional Forms I-140 for workers at the same or approximately the same wage, that fall within the same year as the above filing date for this petition. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the time of filing of the petitions. No evidence was provided that the petitioner possessed other resources with which to pay the proffered wage.

The contracts in the record reflect services to be performed in the future. A petitioner must establish the elements for the approval of the petition at the priority date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's statement that "if the petitioner is not allowed to hire the beneficiary it will not be able to complete the projects for which it has orders and it will not be able to attract new orders to maximize its workforce. A denial of this application is akin to a closure of the petitioner's business" may be true. However, the petitioner also has an obligation to the beneficiary, which is to pay the proffered wage. The beneficiary is entitled to receive the wages stipulated on the labor certification. The petitioner has not shown that it is able to pay those wages. Without documentary evidence to support counsel's claims, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.