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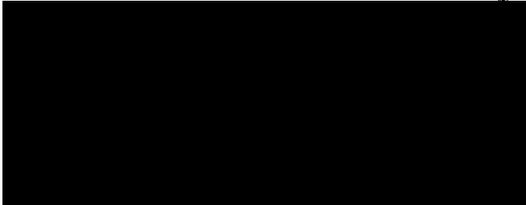
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U.S. Citizenship
and Immigration
Services

04



FILE: WAC 02 127 50124 Office: CALIFORNIA SERVICE CENTER Date: **MAY 11 2004**

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a form I-290B alleging that the director erred as a matter of law and fact.

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 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 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 Department of Labor. Here, the petition's priority date is March 19, 1996. The beneficiary's salary as stated on the labor certification is \$25.32 per hour for a forty-hour workweek, which equates to \$52,665.60 per year.

Initially, counsel did not provide any evidence of the petitioner's ability to pay the proffered wages. In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments and a wage summary, counsel submitted incomplete copies of the petitioner's federal tax returns for the years 1996, 1997, 1998, 1999, and 2000. Additionally, copies of the petitioner's quarterly wage statements for the year 2001 were submitted. The director found this evidence to be insufficient to establish the petitioner's ability to pay the proffered wage, and consequently issued a second request for evidence which required the petitioner to submit complete copies of its tax returns and copies of the beneficiary's tax returns and W-2 forms.¹

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

¹ The requests for evidence issued by the director also requested additional evidence regarding the beneficiary's qualifications and the petitioning entity's composition. The petitioner satisfied the requirements of the director with regard to these issues; therefore, it is unnecessary to discuss them further within the scope of this decision.

On appeal, counsel indicates on the Form I-290B that it would be forwarding an appeal to the AAO within 30 days. As of the date of this decision, no additional documentation has been received in this office. Therefore, the AAO will review counsel's statement as set forth on the Form I-290B in addition to the evidence contained in the record.

In determining the petitioner's ability to pay the proffered wage, the AAO will examine the net income figure reflected on the petitioner's 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 both CIS and 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 this case, the petitioner's tax returns show the following amounts of net income and net current assets:

<u>Year</u>	<u>Net Income</u>	<u>Net Current Assets</u>
1996	0	\$ 1,516.00
1997	0	\$ 17,777.00
1998	0	\$ 3,085.00
1999	0	\$ 22,818.00
2000	0	\$ 11,871.00

It is evident from the figures provided that the petitioner has demonstrated no net income from which to pay the proffered wages. Since the net income was clearly deficient, the director next examined the petitioner's net current assets, as set forth on Schedule L of its tax returns. 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 the 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 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. In this case, however, the petitioner's net current assets are insufficient to pay the proffered wage for all the years in the relevant period, as they are all significantly lower than the proffered wage.

As an additional means of proving the petitioner's ability to pay the proffered wage, counsel submitted evidence that showed wages paid by the petitioner to the beneficiary for the years 2001 and 2002. 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. The petitioner provided quarterly wage reports that show wages paid as follows:

<u>Quarter Ending</u>	<u>Amount Paid</u>
03/31/2001	\$4,898.99
06/30/2001	\$4,960.59
09/30/2001	\$5,114.00
12/31/2001	\$5,436.00
03/31/2002	\$5,110.00
06/30/2002	\$4,882.00
09/30/2002	\$5,007.00

The total amount of wages paid to the beneficiary for the year 2001 was \$20,409.58, and the partial amount for the first three quarters of 2002 totals \$14,999.00. Both of these amounts are extensively lower than the proffered wage of \$52,665.00. In addition, the petitioner has provided no financial documentation for the years 2001 and 2002, so there is no evidence in the record to show that the petitioner could augment the deficit for these years. Additionally, although the labor certification application indicates that the petitioner has employed the beneficiary since 1991, the petitioner has not established that the beneficiary was a paid employee at the establishment of the priority date. The petitioner has submitted not evidence to support this claim. The petitioner has made no attempt to clarify the discrepancies between the information stated on the labor certification and the evidence provided. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner was given ample opportunity to provide evidence to clarify this issue and support its claim. Although the director specifically requested copies of the beneficiary's federal tax returns and W-2 forms from 1996 to the present in an attempt to verify the petitioner's ability to pay the proposed salary through its actual employment of and payment of wages to the beneficiary, no such documentation was provided. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petitioner. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. *See* 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). In this case, the petitioner has no net income during the relevant period, and its net current assets are insufficient to pay the proffered wage. In addition, although it provided minimal evidence of its employment of the beneficiary, the petitioner fails to establish that it paid the beneficiary the proffered wage at the time of the priority date. Finally, the evidence in the record shows that the wages paid to the beneficiary in 2001 and 2002 are substantially lower than the proffered wage, thereby indicating that the petitioner would not have the continuing ability to pay the proposed salary. Therefore, the AAO concurs with the director's finding that the petitioner failed to establish its ability to pay the proffered wage as required by the regulations.

On appeal, counsel for the petitioner merely alleges that CIS erred as a matter of law and fact by finding that the petitioner did not establish its ability to pay. Counsel submitted no additional evidence or documentation in support of this contention.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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.