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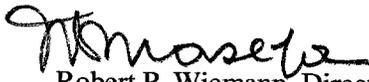
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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:
[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

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 drywall and plastering firm. It seeks to employ the beneficiary permanently in the United States as a "plaster," a job title which is assumed to be a misspelling of "plasterer." As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$18.78 per hour or \$39,062.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence consisted of the following documents: a copy of a letter dated April 12, 2001 from a former employer of the beneficiary confirming the beneficiary's experience with that employer from 1995 to 1997; a letter dated August 7, 2002 from the petitioner stating a job offer to the beneficiary and stating the total number of employees of the petitioner and its gross annual income; and a copy of the petitioner's unsigned Form 1120S U.S. income tax return for an S corporation for 2000.

In a request for evidence (RFE) dated December 19, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE also requested additional evidence to establish that the beneficiary possessed the experience listed on the Form ETA 750. Finally, the RFE requested copies of the petitioner's business licenses.

Counsel responded to the RFE with a letter dated January 28, 2003, accompanied by the following evidence: copies of the petitioner's signed Form 1120S U.S. income tax returns for an S corporation for 2000 and 2001; a copy of a business license issued on December 5, 2002 to the petitioner by the City of Elko, Nevada; a copy of the petitioner's Nevada State Contractors' Board licenses with expiration date of July 31, 2003; copies of

Form W-2 wage and tax statements for the beneficiary for 2001 and 2002; and an additional copy of the letter dated April 12, 2001 from a former employer of the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits additional evidence consisting of the following: a copy of a federal tax report for the petitioner for 2002 showing compensation and payroll tax information on the beneficiary and on another employee of the petitioner; additional copies of Form W-2 wage and tax statements for the beneficiary for 2001 and 2002; and an additional copy of the petitioner's signed Form 1120S U.S. income tax return for an S corporation for 2001.

Counsel states on appeal that the petitioner has been paying the proffered wage since establishing the priority date, as evidenced by payroll and tax records in the record, and that this evidence should be deemed sufficient to establish the petitioner's ability to pay the proffered wage.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, 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 established that it had previously employed the beneficiary.

Counsel asserts that the petitioner has been paying the proffered wage since the priority date. It appears that this assertion is based on the payment to the beneficiary of the wage as originally stated on the Form ETA 750, filed on April 26, 2001. The rate of pay specified on that form was \$15.00, which on an annualized basis is \$31,200.00. The amounts which the beneficiary actually received in the years 2001 and 2002 were higher than \$31,200.00. The Form W-2 wage and tax statements in the record show that the compensation which the beneficiary received from the petitioner was \$32,124.36 in 2001 and \$35,765.88 in 2002.

Correspondence attached to the Form ETA 750 and a correction stamp affixed by the Department of Labor indicate that the rate of pay was amended to \$18.78 per hour on July 24, 2002, the same date as the Department of Labor's approval of the labor certification. The rate of \$18.78 per hour corresponds to the prevailing wage for plasterers and stucco masons in the year 2001 in Elko, Nevada, the city of the petitioner's address. That prevailing wage information is available at the Internet web site of the Department of Labor, Employment and Training Administration.

As noted above, the Form W-2 for the beneficiary for the year 2002 shows compensation received from the petitioner in the amount of \$35,765.88. That figure suggests that the beneficiary was paid at the rate of \$15.00 per hour for approximately the first five months of 2002, and then was paid at the rate of \$18.78 per hour for approximately the last seven months of that year. (Five months at \$15.00 per hour would equal \$13,000, and seven months at \$18.60 would equal \$22,786.40, for a twelve-month total of \$35,786.40).

The evidence in the record therefore suggests that the petitioner began paying the beneficiary the proffered wage of \$18.78 per hour about June 2002, the month before the rate of pay on the ETA 750 was amended and then approved by the Department of Labor. Nonetheless, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish its ability to pay the proffered wage beginning as of the priority date, which in the instant case was April 26, 2001.

Since the actual wages paid to the beneficiary in the years 2001 and 2002 were lower than the proffered wage of \$39,062.40 per year, the evidence on the beneficiary's Form W-2 wage and tax statements is insufficient to establish the ability of the petitioner to pay the proffered wage during those years.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 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. Tex. 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.*, the court held that CIS had 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. 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." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

As stated above, the beneficiary received from the petitioner compensation in the amounts of \$32,124.36 in 2001 and \$35,765.88 in 2002. The difference between those amounts and the proffered wage of \$39,062.40 is \$6,938.14 for 2001 and \$3,296.52 for 2002. Those figures represent the additional amounts which the petitioner would have had to pay to raise the beneficiary's compensation to the proffered wage in 2001 and in 2002.

The petitioner's Form 1120S U.S. income tax return for an S corporation for 2001 shows ordinary income on line 21 as -\$17,773. Since that figure is negative, it fails to establish the ability of the petitioner to pay the proffered wage in 2001. No income tax return for the petitioner for 2002 was submitted in evidence. The director's decision was dated March 12, 2003 and at that time the tax returns for the year 2002 were not yet due.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The Schedule L attached to the petitioner's income tax return for 2001 shows current assets at the beginning of the year which total \$268,981 and current liabilities at the beginning of the year which total \$271,206, yielding a figure for net current assets of -\$2,225 at the beginning of the year 2001. That same Schedule L shows current assets at the end of the year 2001 which total \$508,687 and current liabilities at the end of the year which total \$561,920, yielding a figure for net current assets of -\$53,233 at the end of the year 2001. Since the figures for net current assets are negative both for the beginning of 2001 and end of 2001, they fail to establish the ability of the petitioner to pay the proffered wage in the year 2001. As noted above, no tax return for the year 2002 was in the record at the time of the director's decision.

In his decision the director correctly cited the petitioner's net income in 2001 as -\$17,773 and correctly calculated the petitioner's net current assets at the end of the year 2001 as -\$53,233. The director correctly found that those amounts failed to establish the ability of the petitioner to pay the proffered wage in 2001. The director did not

calculate the petitioner's net current assets as of the beginning of the year 2001. Since the priority date in this case is April 26, 2001, the net current assets for the beginning of the year 2001 are relevant to the petitioner's ability to pay the proffered wage as of the priority date. Nonetheless, the failure of the director to consider net current assets at the beginning of the year 2001 did not affect the director's conclusion, since, as shown above, the net current assets were negative both at the beginning of the year 2001 and at the end of that year. The director's finding that the evidence failed to establish the ability of the petitioner to pay the proffered wage in the year 2001, which is the year of the priority date, was therefore correct.

On appeal the petitioner submits new evidence consisting of a document titled as the petitioner's Federal Tax Report. That document shows taxable gross income and payroll tax amounts for the beneficiary and for another employee of the petitioner for the year 2002. The document is dated April 10, 2003, which is after the date of the director's decision. However, the information contained in the document pertaining to the beneficiary should have been available to the petitioner by the end of January 2002, when Form W-2 wage and tax statements for the petitioner's employees were due.

Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director. The petitioner had adequate notice of the need for evidence on the issue of the petitioner's ability to pay prior to the date of the director's decision. Therefore the evidence newly submitted on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988).

Nonetheless, even if the newly-submitted evidence were properly before the AAO, it would fail to overcome the decision of the director. The information on the federal tax report is consistent with that which appears on the beneficiary's Form W-2 wage and tax statement for 2002. The federal tax report differs from the Form W-2 in that the amounts for payroll taxes shown on the federal tax report include both the employer's and the employee's contribution for certain payroll taxes, while the Form W-2 shows only the amounts of the employee's contributions for payroll taxes, shown as deductions from the employee's total compensation. The federal tax report therefore contains no significant information relevant to the instant case beyond that shown on the beneficiary's Form W-2 for 2002, which was already in the record prior to the director's decision. As discussed above, the beneficiary's form W-2 for 2002 fails to establish the ability of the petitioner to pay the proffered wage in the year 2002. Moreover, the evidence newly submitted on appeal contains no information relevant to the year 2001, the year of the priority date. Therefore, the evidence submitted for the first time on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO.

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.