

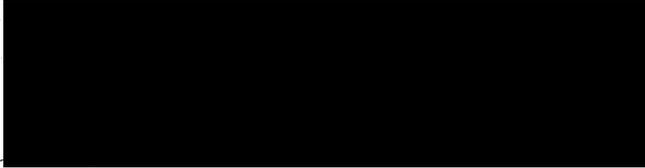
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U.S. Citizenship  
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MAY 28 2004

FILE: WAC-02-275-50243 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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:



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

for

**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 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.

The director determined that the evidence failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal counsel states that the petitioner has been paying the proffered hourly wage to the beneficiary since the priority date, and that the evidence establishes the ability of the petition 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 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 [Citizenship and Immigration Services (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. 8 C.F.R. § 204.5(d). 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 an undated letter 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 license 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 undated letter 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 evidence consisting of additional copies of documents previously submitted for the record. On the Form I-290B Notice of Appeal counsel refers to attached payroll records of the petitioner. However, no such payroll records are among the documents submitted as evidence on appeal, nor are any payroll records for the petitioner among the documents submitted previously for the record.

Counsel states on appeal that the petitioner has been paying the proffered hourly wage since establishing the priority date, and that the construction industry is dependent on many factors with regard to working hours. Counsel asserts that the evidence that petitioner has been paying the proffered hourly wage should be deemed sufficient to establish the petitioner's ability to pay the proffered wage.

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. This assertion appears to be 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 Form W-2 wage and tax statements in the record show that the petitioner paid the beneficiary \$30,830 in 2001 and \$36,303.41 in 2002. The amount paid to the beneficiary in 2001 was \$170 less than the original proffered wage, while the amount paid to the beneficiary in 2002 was \$5,103.41 more than the original proffered wage.

Correspondence attached to the Form ETA 750 and a correction stamp affixed to the Form ETA 750 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, [www.flcdatabcenter.com/owl.asp](http://www.flcdatabcenter.com/owl.asp).

As noted above, the Form W-2 for the beneficiary for the year 2002 shows compensation received from the petitioner in the amount of \$36,303.41. That figure suggests that the beneficiary was paid at the rate of \$15.00 per hour for approximately the first four months of 2002, and then was paid at the rate of \$18.78 per

hour for approximately the last eight months of that year. (Four months at \$15.00 per hour would equal \$10,400, and eight months at \$18.60 would equal \$26,041.60, for a twelve-month total of \$36,441,60).

The evidence in the record therefore suggests that the petitioner began paying the beneficiary the proffered wage of \$18.78 per hour in about May 2002, two months 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 \$30,830.00 in 2001 and \$36,303.41 in 2002. The difference between those amounts and the proffered wage of \$39,062.40 is \$8,232.40 for 2001 and \$2,758.99 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 May 7, 2003 on a record which closed on March 13, 2003. At the time the record closed 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. Assuming 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, 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 as of the priority date and continuing until the beneficiary obtains lawful permanent residence was therefore correct.

With regard to the evidence submitted on appeal, all documents submitted on appeal are additional copies of documents which were in the record prior to the director's decision. Those documents were adequately considered in the director's decision.

Beyond the decision of the director, CIS electronic database records show that the petitioner filed I-140 petitions on behalf of four other beneficiaries at about the same time as the instant petition was filed. All five petitions were filed between September 3, 2002 and September 10, 2002. CIS database records indicate that, as of this date, of the other four petitions, one was approved, one resulted in the issuance of a notice of intent to deny with no further decision, and two resulted in denials which were unsuccessfully appealed to the AAO.

Even if the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, nor about the priority dates of those petitions, nor about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

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.