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**U.S. Citizenship
and Immigration
Services**

B6

FILE:

WAC 03 029 55178

Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 2005

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. The Form I-140 petition states that the petitioner seeks to employ the beneficiary permanently in the United States as a lead abatement and [REDACTED] project supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Form I-140 states that the petitioner wishes to hire the beneficiary as a safety inspector. 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 and denied the petition accordingly.

On appeal, counsel submits a statement. Counsel also indicated that he would submit a brief and/or additional evidence to this office within 30 days. No further evidence or argument has been received.

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 granting 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.

The petitioner must demonstrate the 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25.81 per hour, which equals \$53,684.80 per year.

On the petition, the petitioner stated that it was established during January 1986 and that it employs four workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Phoenix, Arizona.

In support of the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on January 16, 2003, requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director

requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested (1) the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters, (2) the petitioner's 2001 and 2002 W-3 transmittals, and (3) the job title and job description of each of the petitioner's employees.

In response, counsel submitted an IRS printout of a 2002 Schedule C from the petitioner's owner's Form 1040 U.S. Individual Income Tax Return. That printout shows that the petitioner's owner owns a company named [REDACTED]. That printout shows that the [REDACTED] declared net profit of \$2,952 during that year.

Counsel provided 1099 miscellaneous income forms for 1995, 1996, 1997, and 1998. Those forms show that petitioner paid the beneficiary \$3,220, \$6,090, \$6,704.85, during 1995, 1997, and 1998, respectively. The amount the petitioner paid the beneficiary during 1996 is illegible.

Counsel did not submit any wage reports, transmittals or job descriptions. In a letter dated April 7, 2003, counsel explained that the petitioner has no employees but utilizes subcontractors.¹ Counsel further states that, if hired, the beneficiary will oversee the work of those contractors. Counsel submitted a list of the subcontractors the petitioner uses.

On April 17, 2003 the Service Center issued another Request for Evidence. The Service Center again requested, *inter alia*, that the petitioner provide either copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that, in any event, the petitioner provide complete copies of its 2001 and 2002 tax returns.

In response counsel submitted the 2001 and 2002 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. Those returns show that the petitioner's owner and owner's spouse had five dependent children during 2001 and six dependent children during 2002.

A 2001 Schedule C shows that [REDACTED] earned a profit of \$19,416 during that year. The 2001 Form 1040 shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$18,044 during that year, including the petitioner's entire profit offset by deductions.

A 2002 Schedule C shows that [REDACTED] earned a profit of \$2,952 during that year, as was stated above. The 2002 Form 1040 shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$22,638 during that year, including the petitioner's entire profit offset by deductions.

In a letter dated June 10, 2003 counsel noted that the 2001 and 2002 tax returns state that the petitioner paid \$112,716 and \$149,013 to subcontractors during those years, respectively. Counsel stated that the work those subcontractors do is the same work the beneficiary would do if hired. Counsel stated that, therefore, the

¹ This is contrary to the petitioner's previous claim, on the Form I-140 petition, that it employs four workers.

petitioner has demonstrated the ability to pay the proffered wage during those years out of the amounts it paid to contractors during those years.

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 August 5, 2003, denied the petition.

On appeal, counsel states,

Evidence addressed showed without doubt that what the petitioner was paying outside contractors for what the beneficiary is being petitioned for to do was more than the beneficiary's proffered wage. Thereby the petitioner had established ability to pay.

If the work for which the petitioner paid \$112,716 and \$149,013 to subcontractors during 2001 and 2002 is the same work for which the petitioner wishes to hire the beneficiary, and if the beneficiary would have been able to do sufficient work to obviate payment of at least \$53,684.80 during each of those years, then the petitioner has, in fact, demonstrated that it had funds available to pay the proffered wage.

Counsel submits no evidence, however, to demonstrate that the work the beneficiary could perform in a year would obviate expenditures equal to the amount of the proffered wage. The record contains no evidence, for instance, that the hourly rate paid to the subcontractors was higher than that offered to the beneficiary. Further, the Form ETA 750, the Form I-140 petition, and a previous statement by counsel all indicate that the work the beneficiary would perform is not the same work for which the petitioner paid the contractors.

The Form ETA 750 states that the proffered position is that of safety inspector. The Form I-140 petition states that the proffered position is that of "Supervision, Monitoring, Coordination of Lead Abatement and [redacted] Project." In the letter of April 7, 2003 counsel stated that, if hired, "The beneficiary will be the person to over see [sic] the work of these sub contractor [sic] to make sure that they adhere to the appropriate safety guidelines."

Although those job titles and descriptions may be consistent with each other, none is consistent with the beneficiary performing hands-on lead abatement. They are consistent with the beneficiary supervising the work of contractors doing hands-on lead abatement. Contrary to counsel's more recent statements, in the June 10, 2003 letter and on appeal, no evidence in the record indicates that the beneficiary's work will obviate any of the work performed during 2001 and 2002 by subcontractors. The funds paid to subcontractors during those years, therefore, were not funds available to pay the wage proffered to the beneficiary, had the petitioner then employed him.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary during any of the salient years.²

² That is, although the petitioner showed that it paid some funds to the beneficiary during 1995, 1996, 1997, and 1998,

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$53,684.80. The priority date is April 30, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$18,044, including the petitioner's profit.³ That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$22,638, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had

the priority date is April 30, 2001. Amounts paid during those prior years are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ This statement assumes that [REDACTED] is identical to [REDACTED] Company, the petitioner in this case. This is supported by the fact that the petitioner's owner's income tax returns for 2001 and 2002 do not show income from, or loss through, any other companies during those years.

any other funds available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.