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

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 105 53827 Office: CALIFORNIA SERVICE CENTER Date: NOV 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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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 an asphalt striping company. It seeks to employ the beneficiary permanently in the United States as a striper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied 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 and denied the petition accordingly.

On appeal, the petitioner submits a statement.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 March 13, 2001. The proffered wage as stated on the Form ETA 750 is $18.52 per hour, which equals $38,521.60 per year.

On the petition, the petitioner stated that it was established on June 6, 1995 and incorporated during 1999, and that it employs 3 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April of 2000. The Form ETA 750 originally indicated that the petitioner would employ the beneficiary in Los Angeles, California, but was amended to show that the petitioner will employ the beneficiary in Signal Hill, California. The petition states that the petitioner will employ the beneficiary in Torrance, California.[1]

In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date. Therefore, on June 27, 2003, the California Service Center requested,

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[1] Because all of the municipalities stated as the location of the prospective employment are in the same county, the location change does not affect the predominant wage determination. Therefore the possible discrepancy need not be further pursued.

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 2001 and 2002 tax returns, (2) The petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters, and (3) the Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2000[2], 2001, and 2002.

The petitioner submitted the requested documents specifically requested. The petitioner's 2001 tax return shows that during that year it declared ordinary income of $14,279. The corresponding Schedule L shows that at the end of that year the petitioner had $14,129 in current assets and $5,403 in current liabilities, which yields $8,726 in net current assets.

The petitioner's 2002 tax return shows that the petitioner declared a loss of $523 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had net current assets of $5,166 and current liabilities of $3,068, which yields net current assets of $2,098.

The Form DE-6 reports show that the petitioner employed the beneficiary and paid him $7,195.22, $8,809.71, $5,241.06, and $8,923.95 during the third and fourth quarters of 2002 and the first and second quarters of 2003, respectively. The 2000, 2001, and 2002 W-2 forms showing that the petitioner paid the beneficiary $10,977.51, $33,311.88, and $28,012.44 during those years, respectively.

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 September 16, 2003, denied the petition.

On appeal, the petitioner states

> I am appealing this decision based on two factors. 1. The prevailing wage rate in the area is $16.50 per hour, this is the amount I currently pay my employee. 2. The second reason is that my business generates sufficient gross receipts to pay the $38,561.50 salary. The cost of labor shown on my 2002 Tax return shows labor expenses of $57,942.00, an amount sufficient enought [sic] to cover the required salary. Please review this information and send me a detailed result as soon as possible.

In issuing the Form ETA 750 Labor Certification in this case, the Department of Labor determined the prevailing wage in the petitioner's area. Neither the petitioner nor this office is able to amend the requirements stated on an approved labor certification in order to render a petition approvable. Unless the petitioner can show the ability to pay the proffered wage stipulated on the approved ETA 750 labor certification, the petition cannot be approved.

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[2] Because the priority date in this case is March 13, 2001, evidence pertinent to the petitioner's financial condition and amounts it paid to the beneficiary during previous years are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Why the Service Center requested the 2000 W-2 form is therefore unclear.

The petitioner's reliance on the amount of its gross receipts and labor expense is misplaced. Showing that the petitioner petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[3] or otherwise increased its net income,[4] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income, or ordinary income.

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. The W-2 forms submitted in this case show that the petitioner paid the beneficiary $10,977.51 during 2000, $33,311.88 during 2001, and $28,012.44 during 2002. In addition, the California Form DE-6 reports show that the petitioner paid the beneficiary wages of $14,165.01 during the first half of 2003.

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).

The petitioner's net income, however, 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 $38,521.60. The priority date is March 13, 2001.

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[3] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employees wages, and that those obviated wages would be sufficient to cover the proffered wage. In this case, however, that showing would be more difficult as the beneficiary is already working for the petitioner.

[4] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

During 2001 the petitioner paid the beneficiary $33,311.88. That amount is less than the proffered wage. The petitioner must demonstrate the ability to pay $5,209.72 balance of the proffered wage. The petitioner declared ordinary income of $14,279 during that year. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary $28,012.44. The petitioner must show the ability to pay the $10,509.16 balance of the proffered wage. During that year the petitioner declared a loss of $523. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of $2,098. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available 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 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.