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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

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 23 2005
EAC-03-109-50043

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be withdrawn in part and affirmed in part.

The petitioner transports garbage. It seeks to employ the beneficiary permanently in the United States as an estimator. 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. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief.

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 first issue to be discussed in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 12, 2001. The proffered wage as stated on the Form ETA 750 is $32.09 per hour, which amounts to $66,747.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have a gross annual income of $540,000. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 30, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide 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.

In response, the petitioner submitted the first page of its Form 1120-A corporate tax return for 2001. The tax return indicates that the petitioner's net income as reported on Line 24, was $75,985 and showed no reporting of wages paid[1].

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 October 24, 2003, denied the petition. The director stated that the petitioner's net income of $75,985 could not cover the proffered wage of $120,000.

On appeal, counsel asserts that the director miscalculated the proffered wage, which is only $64,180, and its net income does cover that amount.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 2001.

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, CIS will next 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 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). 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets

[1] Contrary to its representation on the visa petition, the first page of its corporate tax return shows that is gross revenues were approximately $125,000.

are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net income of $75,985 is greater than the proffered wage of $66,747.20. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001 out of its net income. The director miscalculated the petitioner's net income. Although the petitioner did not submit its complete tax return, there is no derogatory information contained in the record of proceeding to indicate that the partial return submitted is unreliable evidence. However, the AAO advises the petitioner that any additional submission in this matter must contain IRS-certified tax returns.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 2001. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. Thus, the portion of the director's decision regarding the petitioner's continuing ability to pay the proffered wage is withdrawn.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. For a visa petition to be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 12, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of estimator. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have four years of training in order to perform the job duties listed in Item 13, which states the following: "Inquiry for services offered, rates and areas serviced by our company, to ascertain approximate weights and type of crating required, investigate customers [sic] complaints, prepare estimate cost for clients." Item 15 indicates that there are no other special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for Voyager Trucking Corp. in

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Elmhurst, New York, from June "199" to 2001. The description of his work for [redacted] reflects duties similar to the duties of the proffered position.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications to perform the duties of the proffered position.

The director sought evidence of the beneficiary's qualifications on April 30, 2003. In response, the petitioner submitted a translated letter from [redacted] Production and Commercialization of Aridez, stating that the beneficiary worked for that company as an "estimator for contracts" from January 1994 to August 1998. The letter is signed by the manager of the company.

The director's decision states that the letter from Minera failed to provide details of the beneficiary's duties while he was employed there and thus failed to conform to the regulatory requirements of 8 C.F.R. § 204.5(l)(3).

On appeal, counsel states that perhaps the translation was unclear, but the Minera experience letter states that he was working as an estimator from January 1994 to August 1998.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director concerning the evidentiary deficiency of the letter contained in the record of proceeding. The AAO notes that beneficiary did not include his prior employment experience with Minera on his ETA 750B or a Form G-325, Biographic Information sheet, accompanying his application to adjust status to lawful permanent resident[3]. Additionally, the regulations specifically require the experience letter to provide "a description of the training received or the experience of the alien." The Minera letter simply states the beneficiary's job title, not a description of the training received or the experience of the alien[4]. For that omission, the letter does not conform to the regulatory requirements of 8 C.F.R. § 204.5(l)(3) and the petitioner has failed to establish that the beneficiary has the qualifying employment experience making him qualified to perform the duties of the proffered position. The portion of the director's decision concerning the beneficiary's qualifications is affirmed.

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[3] The petitioner did not provide a letter of experience from [redacted] which is the entity the beneficiary listed on the Form ETA 750B as recent qualifying employment experience.

[4] It is not obvious that the beneficiary's position as "estimator of contracts" includes the same duties as those listed on the Form ETA 750A.

The director's decision is withdrawn in part and affirmed in part. 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.