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U.S. Citizenship
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File:

EAC-04-017-53118

Office: VERMONT SERVICE CENTER

Date: JUN 13 2006

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.

A handwritten signature in black ink, appearing to read "Michael Valdes", written over the name of the official.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to establish its ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel indicated that she would submit a brief and/or evidence to the AAO within 60 days and stated the following: "On 9/30/2004, the Service alleges that the petitioning company does not show the ability to pay the offered wage to the beneficiary. This claim is inaccurate. The petitioning company [REDACTED] has the ability to pay the offered wage to Mr. [REDACTED]. Evidence will be submitted [in] 60 days to support this matter."

Counsel dated the appeal December 18, 2004, and the appeal was received on December 21, 2004. As of this date, more than 17 months later, the AAO has received nothing further. The AAO sent a fax to counsel on May 11, 2006 informing counsel that no separate brief and/or evidence was received to confirm whether or not she would send anything else in this matter, and as a courtesy, providing her with five (5) days to respond. To date, more than three weeks later, no reply has been received.

The petitioner is a jeweler. The petitioner seeks to employ the beneficiary permanently in the United States as a stone setter ("[REDACTED]"). As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's November 17, 2004, denial, the denial was based on whether or not the petitioner has the ability to pay the proffered wage. The director found that the petitioner did not demonstrate the continuing ability to pay the required wage, and the director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes an allegation (although vague, and unsupported) of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 regulation 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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The proffered wage as stated on Form ETA 750 for the position of a stone setter is \$18.48 per hour, 40 hours per week, which is equivalent to \$38,438.40 per year.

The labor certification was approved on September 4, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on October 24, 2003. A request for additional evidence ("RFE) was sent to the petitioner on June 18, 2004, asking the petitioner to submit the beneficiary's Form W-2 Wage and Tax Statement, if the beneficiary were employed by the petitioner; and/or if the business was organized as a sole proprietorship, to submit the individual owner's tax return (Form 1040), and Schedule C related to the business. Alternatively, the RFE stated that the petitioner could submit a 2002 annual report, accompanied by an audited or reviewed financial statement. The petitioner submitted its 2001 and 2002 federal tax returns. The director denied the petition on November 14, 2004 based on the petitioner's lack of ability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the I-140 petition filed on October 24, 2003, the petitioner listed the following information related to the petitioning entity: established 2/10/1995; gross annual income: \$266,472.00; net annual income: \$118,380.00; and the petitioner did not list its current number of employees. The I-140 Petition additionally listed the beneficiary's salary at \$18.48 per hour. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage other than the 2001 and 2002 federal tax returns submitted.

The petitioner must establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 30, 2001, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 has not claimed that it employed and paid the beneficiary the full proffered wage from the priority date of April 25, 2001. On Form

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

ETA 750B, signed by the beneficiary on February 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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. 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).

The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the years 2001, and 2002.

For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	\$2,054
2002	-\$7,572

The petitioner's net income would not allow for payment of the beneficiary's proffered wage of \$38,438.40 in either 2001, or in 2002. The petitioner therefore cannot demonstrate its continuing ability to pay the wage from the priority date of April 25, 2001, until the beneficiary obtains lawful permanent residence.

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 the difference between the petitioner's current assets and current liabilities.² Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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, and evidences the petitioner's ability to pay. The net current assets are expected to be converted to cash as the proffered wage becomes due.

Following this second analysis, the petitioner's Federal Tax Return similarly shows that the petitioner lacks the ability to pay the required wage.

- The petitioner's net current assets during 2001 were \$6,340.
- The petitioner's net current assets during 2002 were -\$1,540.

²According 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.

Under this method of evaluation, the petitioner has similarly failed to establish its ability to pay the proffered wage of \$38,438.40 from the priority date until the beneficiary obtains lawful permanent residence, as the petitioner did not have sufficient net current assets to pay the wage.

While petitioner's counsel asserts on the I-290B appeal form that the "petitioning company" has the ability to pay the offered wage to Mr. [REDACTED] the petitioner has not asserted how this is possible, or what evidence the director failed to consider. The petitioner has not submitted any additional documentation to demonstrate its ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, April 25, 2001, to the present, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The petitioner fails this test under an examination of wages paid to the beneficiary (no evidence), its net income (insufficient for 2001 and 2002), or net current assets (insufficient for 2001 and 2002).

The Petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 denied.