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U.S. Citizenship
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FILE:

WAC 03 046 53820

Office: CALIFORNIA SERVICE CENTER

Date: MAR 04 2005

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 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 sales and installation contractor. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 that the beneficiary did not meet the experience requirements as stated on the Form ETA 750.

On appeal, the petitioner submits a brief and previously submitted evidence.

Section 203(b)(3)(A)(i) of 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, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on June 28, 1999. The proffered salary as stated on the labor certification is \$25.75 per hour or \$53,560 per year.

With the petition, the petitioner, through counsel, submitted a copy of its 2001 Form 1120, U.S. Corporation Income Tax Return, and copies of its Forms DE-6, Quarterly Wage and Withholding Report, for the first, second, and third quarter of 2002. The tax return reflected a taxable income before net operating loss deduction and special deductions of -\$52,044 and net current assets of -\$8,958. The Forms DE-6 showed that the petitioner employed the beneficiary in the first and third quarter of 2002; however, the beneficiary's name was not listed on the petitioner's Form DE-6 for the second quarter of 2002.

The director considered this documentation insufficient, and, on March 10, 2003, he issued a Notice of Intent to Deny (NOID) the petition. The director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of June 28, 1999 and continuing

through fiscal year 2001. The director informed the petitioner that the evidence must be in the form of copies of annual reports, federal tax returns (signed by an authorized company official and certified by the Internal Revenue Service (IRS) with all schedules and attachments), or complete audited financial statements. Stating that there were discrepancies regarding the letter provided by the beneficiary's prior employer and the beneficiary's statement on the Form ETA 750, the director also requested additional evidence that the beneficiary met the experience requirements as stated on the labor certification.

In response, counsel provided copies of the petitioner's 1999 through 2001 Forms 1120, U.S. Corporation Income Tax Returns, a copy of Form 1120X, Amended U.S. Corporation Income Tax Return for the fiscal year ended January 31, 2000, and another letter from the beneficiary's prior employer changing the beneficiary's dates of employment from January 1, 1996 through June 1, 2000 to January 1985 through March 1990. The 1999 amended tax return reflected a taxable income before net operating loss deduction and special deductions of \$22,076 and net current assets of -\$9,724. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$17,548 and net current assets of \$70,709.

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 when reviewing the totality of the record, that the integrity of the evidence did not allow a favorable decision with regard to the beneficiary's experience. On April 23, 2003, the director denied the petition.

On May 28, 2003, counsel filed an appeal of the denial with additional evidence in the form of copies of the beneficiary's 1999 through 2001 Forms W-2, Wage and Tax Statements, copies of the beneficiary's 1999 through 2001 Forms 1040, U.S. Individual Income Tax Returns, and copies of the beneficiary's bank statements. The beneficiary's 1999 through 2001 Forms W-2 reflected wages earned of \$22,696.13, \$24,807.30, and \$18,376.41, respectively. However, the director determined that the filing of the appeal was late. The director then treated the appeal as a Motion to Reopen/Reconsider in accordance with the regulation at 8 C.F.R. § 103.5(a)(2) and (3) and redened the petition.

On July 23, 2003, counsel filed a new appeal that is now before the AAO.

On appeal, counsel provides previously submitted evidence and states:

This is the 2nd appeal filed on behalf of the petitioning employer. The first appeal was submitted in a timely manner (See Exhibit A). The Bureau should not have treated it as a MTR. Even if the Bureau does not take into account the "cash basis" of accounting, the employer's tax returns demonstrated his ability to pay the proffered wage during the qualifying period. The employer's corporate tax returns for the years 1999, 2000, and 2001, are resubmitted for review. The corporate tax returns for 2002 are not due yet, therefore, copies are not available. The employer has 15 part time employees. He is attempting to hire full time employees. The beneficiary will be hired as a full time employee after he secures his permanent status.

Counsel provides no explanation with regard to the discrepancies between the beneficiary's prior employer's letter and the Form ETA 750.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage from 1999 through 2001.

As an alternative 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 (9th 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 (7th 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.

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 are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current liabilities are shown on lines 16(d) through 18(d). 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 current assets from 1999 through 2001 were -\$9,724, \$70,709, and -\$8,958, respectively. The petitioner could have paid the proffered wage in 2000 from its net current assets; however, the petitioner could not have paid the proffered wage in 1999 and 2001 from its net current assets.

The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of \$22,076 and net current assets of -\$9,724. The petitioner could not have paid the proffered wage in 1999 from either its taxable income or its net current assets. In addition, even when adding the wages actually paid to the beneficiary to the taxable income, the sum is still \$8,787.87 less than the proffered wage. ($\$22,076 \text{ taxable income} + \$22,696.13 \text{ wages earned} = \$44,772.13$; $\$53,560 \text{ proffered wage} - \$44,772.13 = \$8,787.87$)

The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of \$17,548 and net current assets of \$70,709. The petitioner could have paid the proffered wage in 2000 from its net current assets.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$52,044 and net current assets of -\$8,958. The petitioner could not have paid the proffered wage in 2001 from either its taxable income or its net current assets. Furthermore, the wages earned by the beneficiary in 2001 were \$18,376.41, \$35,183.59 less than the proffered wage. ($\$53,560 \text{ proffered wage} - \$18,376.41 \text{ wages earned} = \$35,183.59$)

In addition to the issue of ability to pay the proffered wage, there is another issue raised by the director that the petitioner has failed to successfully address. This issue is the inconsistent statements regarding the years the beneficiary worked for his prior employer.

The first employment letter by the beneficiary's prior employer indicates that the beneficiary was employed by the prior employer from January 1996 through June 2000. A subsequent letter from the same prior employer indicates that that employer employed the beneficiary from January 1986 through March 1990. The Form ETA 750 indicates that the petitioner employed the beneficiary from April 1990 until the present. However, a letter provided by the petitioner indicates that the petitioner has employed the beneficiary since October 1990. The petitioner has provided no explanation as to why there is such a discrepancy in the beneficiary's dates of employment.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In summary, the record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning at the priority date, June 28, 1999 and continuing, and the petitioner has also failed to adequately explain the inconsistencies in the record.

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.