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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 25 2005
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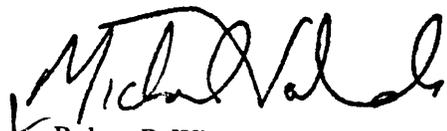
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international trading and building/construction firm. It seeks to employ the beneficiary permanently in the United States as a purchasing manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 found that the petitioner had failed to establish that the beneficiary possessed the requisite work experience specified on the labor certification.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

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 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 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$35,443 per year. On the Form ETA 750B, signed by the beneficiary on February 19, 2001, the beneficiary does not claim to have worked for the petitioner.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have three years of work experience in the job offered as purchasing manager or three years in the related occupation of purchasing manager in any field with sales experience.

On Part 5 of the petition, the petitioner claims to have been established in 1996, to have a gross annual income of \$682,349, and to currently employ five workers.

In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. It shows that the petitioner reported -\$129,039 as taxable income before net operating loss (NOL) deduction and special deductions (line 28). Schedule L of the tax return shows that the petitioner had \$196,110 in current assets and \$234,152 in current liabilities, resulting in -\$38,042 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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 also supplied an affidavit from the beneficiary, as well as two sworn statements from [REDACTED]. [REDACTED] first statement is signed as an owner/manager of "Dollar Store Wholesale" located at [REDACTED] St., Phoenix, Arizona. He states that the beneficiary was employed full-time at this store from October 1996 through April 1997 as a purchasing and wholesale manager. [REDACTED] second statement is issued as a managing partner at "Dollar Store LLC," located at [REDACTED]. He states that the beneficiary worked at that store from "May 1997 through July 1999," as a purchasing agent in which he planned, coordinated and directed retail sales and wholesale product purchases. It is noted that the director interpreted this period of employment as being from May 1997 to July 1997. The AAO finds that ETA 750B, completed by the beneficiary and submitted with the petition, lists the same job and indicates that the correct dates should be May 1997 through July 1999. Both statements from [REDACTED] are dated February 19, 2001.

The beneficiary's affidavit, dated October 27, 2002, states that he is currently employed as a purchasing agent at Jubilee Traders Inc., which "owned a percentage of the Dollar Store" located at [REDACTED] during

the period between August 1999 to the present. He states that as a purchasing agent, he is responsible for planning and coordinating purchasing activities, products and services for retail sale. The beneficiary adds that he works 40 hours per week and made \$24,000 in 2001.

The petitioner further provided two additional statements. One is from the petitioner's president confirming a job offer to the beneficiary and one is a copy of a statement from the [REDACTED] Ltd. Company in Riyadh, Saudi Arabia. It is typed in English and signed by [REDACTED] confirms that the beneficiary worked as a heavy-duty driver for the company from January 1983 to February 1987.

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 and insufficient to establish that the beneficiary possesses the requisite work experience, on February 4, 2003, the director requested additional evidence pertinent to those issues.

Relevant to the ability to pay the beneficiary's proposed wage offer of \$35,443, the director 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 of April 2, 2001. The director also requested that the petitioner provide all schedules with any tax returns and that the director supplies copies of the last four quarters of its state quarterly wage reports.

The director also requested that the petitioner provide additional evidence to support the beneficiary's accrual of the required three years of experience as specified on the ETA 750. The director advised the petitioner that the evidence should be submitted on the employer's letterhead showing the name and title of the person verifying the information. The beneficiary's title, job duties, dates employment and number of hours worked per week should also be included in the letter.

In response to the director's request for financial data pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner, through counsel, submitted a copy of its organizational chart, a copy of an internet query to the Arizona Corporation Commission showing the titles of various documents filed with the state, and copies of three state unemployment tax and wage reports filed by "[REDACTED] dba City Construction" for the first three quarters of 2001. A [REDACTED] dba City Construction appears on the organizational chart of the petitioner as being in a box directly underneath the petitioner's name, but it apparently operates under a different employer identification number and is listed as a subsidiary on an attached Affiliations Schedule (Form 851) submitted with the petitioner's 2001 corporate tax return.

The 2001 tax return indicates that that the petitioner reported taxable income before the NOL deduction of - \$545,722. Schedule L of the return reflects that the petitioner had \$154,802 in current assets and \$484,386 in current liabilities, resulting in -\$484,386 in net current assets. The petitioner does not provide a copy of its 2002 tax return or other financial evidence relevant to 2002. Counsel's cover letter explains that the petitioner's president is in Iraq attending to business connected with the reconstruction and has not completed the company's 2002 tax return.

With reference to evidence establishing the beneficiary's three years of qualifying experience, the petitioner submits the originals of [REDACTED] previously submitted February 2001 statements and the original statement from the beneficiary. A copy of the beneficiary's Form 1040NR, U.S. Nonresident Alien Income Tax Return for 2002 is also submitted. It shows the beneficiary claimed \$24,000 as other income (line 21) from a "Dollar Store." His occupation is given as manager.

On May 30, 2003, the director denied the petition, concluding, in part, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 2, 2001. The director noted that both the petitioner's 2000 and 2001 tax returns failed to show sufficient net taxable income or net current assets to cover the proffered wage.

The director also found that the petitioner had failed to persuasively demonstrate that the beneficiary had obtained the requisite three years of qualifying experience as a purchasing manager as set forth in the ETA 750. The director noted that the letter provided by [REDACTED] confirming that the beneficiary had been a heavy-duty driver could not equate to experience as a purchasing manager.

On appeal, counsel resubmits a copy of the beneficiary's 2002 individual tax return, as well as copies of his 2000 and 2001 individual tax returns. The 2000 and 2001 tax return shows that he is a partner in [REDACTED] and reported income of \$20,000 and \$24,000, respectively. Counsel asserts on appeal that as a manager/partner in this enterprise, his own affidavit and extended employment with executive authority should be sufficient to verify his qualifying experience. While the AAO believes that the beneficiary could have been more candid with the director in identifying himself as the president of [REDACTED] and thereby participating in the ownership of an interest in the business of Dollar Store located at [REDACTED] Phoenix, it raises the question why the other partner of the business beginning in August 1999 could not have submitted a letter and vouched for the beneficiary's performance of the qualifying duties, rather than provide a self-verifying affidavit from the beneficiary. As it is, the documentation, including the beneficiary's tax returns, may be considered sufficiently convincing to conclude that the beneficiary has accrued the requisite three years of experience as a purchasing manager.

Regarding the petitioner's ability to pay the proffered wage, counsel claims that the director's finding that the petitioner's 2001 tax return shows negative net current assets of \$484,386 is an error and that the director should have considered total assets of \$269,203, which are shown on page 1 of the Form 1120 and on Schedule L. Counsel also refers to the petitioner's 2000 total assets of \$316,892. Counsel's claim that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is not persuasive. 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, as stated above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

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 may have employed and paid the beneficiary

during that period. If the petitioner establishes by credible documentary evidence that it may have 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 record does not suggest that the petitioner has employed the beneficiary.

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 wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. 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.

In this case, the petitioner's 2000 tax return is less probative of its ability to pay the proffered wage because it does not cover the priority date of April 2, 2001. As noted by the director, however, neither the petitioner's net taxable income of -\$129,039, nor its net current assets of -\$38,042 was sufficient to cover the proposed wage offer of \$35,443 in 2000.

Similarly, as shown in the petitioner's 2001 tax return, neither its net taxable income of -\$545,722, nor its net current assets of -\$484,386 demonstrate its ability to pay the proffered wage of \$35,443 in 2001. Based on the underlying record and the evidence and argument submitted on appeal, the AAO concludes that the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage in 2001 or any subsequent period. 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 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.