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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: **JUN 07 2011** Office: TEXAS SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition filed by the petitioner in this case was denied by the Director, Texas Service Center. The subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The petition will remain denied.

The petitioner is a plumbing contractor. It seeks to employ the beneficiary permanently in the United States as a plumber. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage and that the petitioner had not demonstrated that the beneficiary possessed the requisite two years of experience as a plumber prior to the priority date. Accordingly, the petition was denied. A subsequent appeal was timely filed, however, the AAO summarily dismissed the appeal because counsel failed to identify specifically erroneous conclusion or provide any additional evidence.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). In the instant motion to reopen, counsel confirms that evidence in support of the previous appeal was submitted before the AAO issued its final decision and submits additional evidence on motion to establish the petitioner's ability to pay the proffered wage and the beneficiary's qualifications. Therefore, the instant motion to reopen meets the requirement of a motion to reopen. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion and in response to the AAO's requests for evidence (RFE), and Notice of Derogatory Information (NDI), issued on October 4, 2010, December 28, 2010 and February 28, 2011 respectively.

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 nature, for which qualified workers are not available in the United States.

As set forth in the director's February 19, 2008 denial, issues in this case are whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position, and whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on April 27, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's

credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(1)(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 instant petition was filed without independent verification of the beneficiary's experience in the form of a letter from the beneficiary's former employer. In response to the director's RFE dated August 18, 2007, the petitioner submitted a handwritten experience letter from [REDACTED]. The director determined that the author failed to identify the exact dates of the beneficiary's employment, the position which he held, or the duties performed by the beneficiary, and thus the letter does not satisfy the regulatory requirements for evidence which may substantiate work experience. On appeal, the petitioner submitted another letter dated April 8, 2008 from [REDACTED]. This letter verifies the beneficiary's employment with this company as a plumber from January 1, 1997 through December 31, 1999 and includes a specific description of the duties the beneficiary performed. The AAO finds that this letter, in addition to the hand-written letter submitted to the director, demonstrates that the beneficiary acquired the requisite two years of experience in the job offered. Thus, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the portion of the director's decision is herewith withdrawn.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$23.43 per hour (\$48,734.40 per year). On the petition the petitioner claimed to have been established in January 1981 and to have 17 employees. On the Form ETA 750B signed by the beneficiary on March 9, 2006, the beneficiary claimed to have worked for the petitioner since July 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date 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). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 submits for the first time on appeal, the beneficiary's W-2 forms for 2000 through 2003, 2005, 2008 and 2009. The beneficiary's 2000 W-2 form is not necessarily dispositive because the priority date is in 2001 and the petitioner is not responsible for demonstrating its ability to pay the proffered wage for 2000. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$29,887.56 in 2001, \$25,643.24 in 2002, \$24,761.74 in 2003, \$10,962.39 in 2005, \$48,734.40 in 2008 and \$48,734.40 in 2009. However, because of inconsistencies reflected on these W-2 forms, they cannot be accepted as credible evidence of ability to pay the proffered wage. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The W-2 forms issued by the petitioner for 2001 through 2003 and 2005 identify the beneficiary with the social security number (SSN) [REDACTED] the W-2 forms for 2008 and 2009 identify the beneficiary with SSN [REDACTED]. On February 28, 2011, this office served the petitioner a

NDI, notifying the petitioner of the inconsistencies and requesting verification that all of the W-2 forms in the record of proceeding were issued to the instant beneficiary, and requesting an explanation for the inconsistencies as well as independent proof of the beneficiary's identity. As of this date, more than two months later, this office has not received any correspondence from the petitioner in response. Therefore, the AAO will not accept any of the W-2 forms on record as evidence of the ability to pay the proffered wage. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "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." Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The record of proceeding contains additional inconsistencies regarding the petitioner's tax returns for 2001 through 2006. The petitioner's tax returns show that the petitioner paid total salaries and wages of \$8,011 to its employees in 2001, \$5,000 in 2002, \$7,000 in 2003, and \$4,000 in 2005. The petitioner did not submit its tax returns for 2008 and 2009. Therefore, the petitioner's tax returns in the record do not support that the petitioner paid the beneficiary \$29,887.56 in 2001, \$25,643.24 in 2002, \$24,761.74 in 2003, and \$10,962.39 in 2005 as indicated on the beneficiary's W-2 forms for 2001 through 2003 and 2005. The beneficiary's W-2 forms for 2008 and 2009 (which reflect a different SSN for the beneficiary) are not supported by any independent objective evidence, such as the petitioner's tax returns, the petitioner's Form 841 Employer's Quarterly Tax Reports, the petitioner's W-3 Transmittal of Wage and Tax Statements for these years. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, without independent objective evidence to resolve these inconsistencies, the AAO will not consider these W-2 forms as primary evidence to demonstrate that the petitioner paid the beneficiary a full or partial proffered wage in the relevant years. Accordingly, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary from the year of the priority date to the present.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits

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 USCIS, 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The evidence in the record shows that the petitioner is structured as an S corporation. The record contains the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001 through 2006. According to the tax returns in the record, the petitioner's fiscal year runs based on a calendar year. The petitioner's tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income¹ of \$67,315.

¹ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS

- In 2002, the Form 1120S stated net income of \$27,213.
- In 2003, the Form 1120S stated net income of \$72,138.
- In 2004, the Form 1120S stated net income of \$89,660.
- In 2005, the Form 1120S stated net income of \$173,009.
- In 2006, the Form 1120S stated net income of \$77,616.

Therefore, for the years 2001, and 2003 through 2006, the petitioner had sufficient net income to pay the proffered wage. However, the petitioner did not have sufficient net income to pay the proffered wage for 2002.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets for 2002, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$24,610.

Therefore, for the year of 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may request additional evidence in appropriate cases. During the adjudication of the instant motion, the AAO served the petitioner three RFEs and one NDI. Although specifically and clearly requested by this office, the petitioner declined to provide copies of its annual reports, tax returns or audited financial statements for 2007 through 2010. These documents would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the

Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 21, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2006, the petitioner's net income is found on Schedule K of its tax returns.

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.

proffered wage. Without these documents, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2007 through 2010. The petitioner has therefore failed to establish its ability to pay the proffered wage for these years. Furthermore, the petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets because it failed to establish its ability to pay the proffered wage for 2002, and 2007 through 2010.

In response to the AAO's RFE dated October 4, 2010, counsel submitted copies of the documents for vehicles owned by the petitioner as evidence that the petitioner had additional assets available to pay the proffered wage. USCIS will review the petitioner's assets. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets including its vehicles 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Furthermore, no evidence was submitted to demonstrate that the value of those vehicles owned by the petitioner was not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the assets specified on Schedule L that have been considered in determining the petitioner's net current assets in the previous discussion.

The petitioner also submitted copies of invoices and sales agreements showing that the petitioner can use retained earnings to pay the proffered wage. However, retained earnings are a company's accumulated earnings since its inception less dividends. *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. *Id.* Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. *Id.* at 27. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

The record contains balance sheet and statement of income for the petitioner as of September 30, 2007 submitted with initial filing, on appeal and in response to the AAO's October 4, 2010 RFE. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form and they are not audited or reviewed. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's assertions on motion 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 DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, while the petitioner's tax returns show that it had sufficient net income to pay the beneficiary the proffered wage for 2001 and 2003 through 2006, it failed to establish its ability to pay the proffered wage for 2002 and 2007 through the present. Furthermore, the AAO notes that the petitioner claimed to have 17 employees on the petition, however, its tax returns show that it paid a total of salaries and wages in the amount of \$4,000 to \$8,011 per year to its 17

employees. The petitioner did not pay a minimum wage to its employees including the beneficiary for all these years. This raises doubt as to whether the petitioner really had sufficient net income to pay the proffered wage for 2001, and 2003 through 2006. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the predecessor and the petitioner had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted. The ground of eligibility based on the qualifying experience in the director's February 19, 2008 decision is withdrawn, but the ground of the petitioner's failure to establish its continuing ability to pay the proffered wage is affirmed and the petition remains denied.