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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC-02-165-52557 Office: VERMONT SERVICE CENTER Date: FEB 20 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 petitioner is a marble and tile firm. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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

Eligibility in this matter turns in part on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is March 26, 2001. The beneficiary's salary as stated on the labor certification is $28.72 per hour or $59,737.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence on that issue consisted only of a Schedule C, Profit or Loss from Business, identified as "tile contracting" showing the proprietor as [redacted] and covering the year 2001. In a request for evidence (RFE) dated July 26, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specifically requested the petitioner's complete federal income tax return for 2001, copies of the beneficiary's Form W-2 wage and tax statements showing how much the beneficiary was paid by the petitioning business, and "additional evidence to establish that the employer had the ability to pay the proffered wage or salary of $59,737.60 as of March 26, 2001, the date of filing and continuing to the present."

In response to the RFE, counsel submitted an additional copy of the Schedule C for 2001 for the tile contractor business owned by [redacted] a copy of a Schedule C for another business for 2001 identified as 'sale of household items" showing the proprietor as [redacted] a Form 1099 for the beneficiary for 2001, and an undated letter with an illegible signature, presumably that of [redacted] and with no typed name under the signature, but with the words "owner, SS Tile" written under the signature.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present. The director then denied the petition.

On appeal, counsel submits a brief in the form of a letter and additional evidence consisting of bank statement summaries for [redacted] for months ending December 31, 2000 through November 30, 2001, a Form 1040 individual income tax return for [redacted] and his wife [redacted] for 2001, and a copy of an undated letter from [redacted] owner of [redacted] ating that the beneficiary's gross salary

for January 2002 to January 2003 will be $55,100.00. Counsel also submits additional copies of documents which were previously submitted as evidence.

Counsel states on appeal that the evidence establishes the ability of the petitioner to pay the prevailing wage to the beneficiary. Counsel also states that the director "overlooked" information on the owner's Form 1040 individual tax return in reaching his decision. The file, however, contains no Form 1040 individual tax return other than the one submitted for the first time on appeal.

The evidence submitted by counsel for the first time on appeal raises the issue of whether that evidence should be considered in deciding this appeal. All of the newly-submitted evidence relates to the employer's ability to pay the proffered wage. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated as follows:

> Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

The petitioner was put on notice of the need for evidence on its ability to pay the proffered wage by the regulation at 8 C.F.R. § 204.5(g)(2) quoted in part on page two above, which states in full as follows:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated July 26, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted for the first time on appeal will not be considered for any purpose. We will therefore evaluate the director's decision based on an analysis of the evidence in the record prior to the decision of the director.

The director found that although the petitioner had submitted a Schedule C for the year 2001, it had failed to submit an individual Form 1040 to which that Schedule C was an attachment. The director noted that a specific request had been made in the RFE for a copy of the complete Form 1040, but that the petitioner had not provided one.

The director found that the petitioner had submitted a "W-2 Wage and Tax Statement" showing that the beneficiary had been paid $50,960 in the year 2001. The director's description of the document in question was inaccurate, for the file contains no W-2 statement, but rather contains a Form 1099 for Miscellaneous Income for the beneficiary for 2001, which in block 7 shows "nonemployee compensation" in the amount of $50,690.00.

The fact that the compensation to the beneficiary is recorded on the Form 1099 as "nonemployee compensation" indicates that the beneficiary was not an employee of the petitioner in 2001. This information is inconsistent with information provided on the Form ETA 750 B, signed on March 6, 2001, where the beneficiary states that he has been employed by [redacted] since June 1998. The petitioner's issuance of a Form 1099 to the beneficiary for the year 2001 indicates that the petitioner failed to make tax withholding payments from the beneficiary's wages during that year and raises the inference that the petitioner failed to make the required employer's contributions to social security taxes for the beneficiary for that year.

The director determined that because the tax information in the record was incomplete, CIS could not determine "the number of dependents the owner had to support, if income from other sources was available and other pertinent details provided by a complete return." The director then found that the evidence failed to establish that the petitioner had the ability to pay the proffered wage of $59,737.60 as of the March 26, 2001 filing date and continuing to the present.

Other than the Form 1099, the evidence in the record before the director contained no other financial information other than the two Schedule C's for businesses owned b[redacted] and the letter from the owner of the petitioner with an illegible signature, presumably that of Steve Carinci, which was submitted in response to the RFE. The body of that letter states in its entirety, "In reference to S&S Tiles Tax return. The cost for a subcontractors Labor [sic] is included in the cost of goods sold."

The director was correct in finding that the evidence failed to provide CIS with a basis to determine the number of dependents of the petitioner's owner, whether income was available to the owner from other sources, and other matters pertinent to the petitioner's ability to pay the proffered wage. The evidence in the record before the director therefore was insufficient to establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. The decision of the director to deny the petition was therefore correct.

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.