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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 152 50876 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2004

IN RE: Petitioner: [redacted]
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: [redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a granite and marble fabrication and installation company. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel submits a statement and additional evidence.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on February 8, 1993. The proffered wage as stated on the Form ETA 750 is $24.82 per hour, which equals $51,652.60 per year.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on December 13, 1993, the Western Service Center (subsequently its

name was changed to California Service Center) requested evidence of that ability. The Service Center specified that the evidence should, in accordance with 8 C.F.R. § 204.5(g)(2), be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested that the petitioner provide copies of its four most recent quarterly wage reports.

In response, counsel submitted the petitioner's quarterly wage reports for the third and fourth quarters of 1999, rather than the four most recent reports. Those reports show that the petitioner paid the beneficiary $5,600 during each of those quarters.

Counsel also submitted copies of the 1996, 1997, and 1998 Form 1040 joint personal income tax returns of the petitioner's owner and owner's spouse, including the corresponding Schedules C, Profit or Loss from Business (Sole Proprietorship).

The 1996 Schedule C shows that the petitioner earned a net profit of $28,078 during that year. The 1996 Form 1040 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $25,035, including all of the petitioner's profit offset by deductions. That return shows that the petitioner's owner and owner's spouse had two dependents during that year.

The 1997 Schedule C shows that the petitioner earned a net profit of $33,507 during that year. The 1997 Form 1040 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $29,795, including all of the petitioner's profit offset by deductions. That return also shows that the petitioner's owner and owner's spouse had two dependents during that year.

The 1998 Schedule C shows that the petitioner earned a net profit of $52,001 during that year. The 1998 Form 1040 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $40,980, including all of the petitioner's profit offset by deductions. That return also shows that the petitioner's owner and owner's spouse had two dependents during that year.

Finally, counsel submitted an unaudited profit and loss statement for 1999 and an unaudited balance sheet for December 31, 1999. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that only copies of annual reports, federal tax returns, or **audited** financial statements are competent evidence of the petitioner's ability to pay the proffered wage (Emphasis added). The unaudited financial statements are not competent evidence of that ability and shall not be considered.

The Acting 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, on May 9, 2002, denied the petition. The Acting Director characterized the petitioner's quarterly wage reports as demonstrating that the petitioner pays the beneficiary $22,400 annually.

On appeal, counsel submitted copies of (1) the petitioner's articles of incorporation, (2) the petitioner's Form SS-4 Application for Employer Identification Number, (3) the petitioner's Form SO-200 Statement of a Domestic Stock Corporation, (4) the first quarter 2002 wage summary of American Employer's Group, Inc., which counsel characterized as "Copy of Quarterly Wage Report for year ending 2001 for [the petitioner]," and (5) copies of the petitioner's 1999, 2000, and 2001 Forms 1120S U.S. Income Tax Return for an S Corporation.

Counsel asserts that the 1999 quarterly wage reports, submitted in response to the request for evidence, demonstrate that the petitioner paid the beneficiary an annual wage of $22,400. The AAO finds that those wage reports show that the petitioner paid the beneficiary $5,600 during the third quarter of 1999 and another $5,600 during the last quarter of 1999. They do not demonstrate that any wages were paid to the beneficiary during any other quarters or during any other years.

The first quarter wage summary of American Employer's Group, Inc., submitted on appeal, which counsel represented to be the petitioner's quarterly wage report, shows $6,400 in wages were paid to David Mares MARTINEZ during that quarter. Counsel asserts that this document shows that the petitioner is paying the beneficiary $25,000 annually.

Finally, counsel stated the following on its notice of appeal:

> The petitioner does admit that there have been some years where the petitioner has not made income, but the petitioner will provide further evidence to establish that it did in fact have the ability to pay the proffered wage even if the petitioner did not make income. There are some problems with financial documents for the early years when the petitioner initially submitted this petition which the petitioner is attempting to rectify. Please refer to the attached chart of accounts.
>
> We are requesting one month's time to submit a written brief and elaborate on the above.

Contrary to counsel's statement, no "chart of accounts" was submitted with the petitioner's appeal. Additionally, no brief

has been received by the AAO to date.

The documents submitted clearly establish that the petitioner incorporated on March 10, 1999. The issue in this matter, however, is whether the petitioner had the ability to pay the proffered wage on the priority date and has continued to have that ability since that time.

The petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation shows that the petitioner declared a loss of $43,153 as its Line 21 Ordinary income (loss) from trade or business activities during that year. The corresponding Schedule L shows that the petitioner's current liabilities at the end of that year exceeded its current assets.

The petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation shows that the petitioner declared income of $63,265 during that year.

The petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation shows that the petitioner declared income of $115,725 during that year.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, 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.

Although the priority date is February 8, 1993, no evidence was submitted pertinent to the petitioner's ability to pay the proffered wage during 1993, 1994, or 1995. The petitioner has not demonstrated the ability to pay the proffered wage during those years.

The proffered wage is $51,652.60 per year. During 1996, 1997, and 1998, the petitioner was a sole proprietorship. During those years, the petitioner's owner was obliged to pay the petitioner's

debts and obligations from his own income and assets. Therefore, consideration of the petitioner's owner's income and assets in determining the petitioner's ability to pay the proffered wage is appropriate.

During 1996, the petitioner's owner and the owner's spouse declared an adjusted gross income of $25,035, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. No evidence was submitted to demonstrate that the petitioner's owner and the owner's spouse had any other assets with which to pay the proffered wage during that year. The petitioner has not established that it was able to pay the proffered wage during 1996.

During 1997, the petitioner's owner and the owner's spouse declared an adjusted gross income of $29,795, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. No evidence was submitted to demonstrate that the petitioner's owner and the owner's spouse had any other assets with which to pay the proffered wage during that year. The petitioner has not established that it was able to pay the proffered wage during 1997.

During 1998, the petitioner's owner and the owner's spouse declared an adjusted gross income of $40,980, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. No evidence was submitted to demonstrate that the petitioner's owner and the owner's spouse had any other assets with which to pay the proffered wage during that year. The petitioner has not established that it was able to pay the proffered wage during 1998.

The petitioner has demonstrated that during 1999 it paid $11,200 in wages to the beneficiary. The petitioner must show the ability to pay the $40,452.60 balance of the proffered wage for the remainder of that year. During 1999, the petitioner declared a loss of $43,153 and had negative year-end net current assets. The petitioner has not established that it was able to pay the balance of the proffered wage during 1999.

During 2000, the petitioner declared income of $63,265. The petitioner has established its ability to pay the proffered wage during 2000.

During 2001, the petitioner declared income of $115,725. The petitioner has established its ability to pay the proffered wage during 2001.

Counsel submitted a wage summary showing that a corporation paid $6,400 to an employee, apparently the beneficiary, during the first quarter of 2002. One-fourth of the proffered wage is $12,913.15. Even if the wage summary is presumed to show wages

paid by the petitioner to the beneficiary, it is insufficient to show the ability to pay one-fourth of the proffered wage during that quarter. Because the appeal was filed on June 10, 2002, however, the petitioner was unable to provide any one of the three types of competent evidence of the ability to pay the proffered wage during that year. Therefore, the petitioner's failure to show the ability to pay the proffered wage during the first quarter of 2002 shall form no part of the basis for this decision.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1993, 1994, 1995, 1996, 1997, 1998, or 1999. 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.