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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



FILE: EAC-01-231-55206 Office: VERMONT SERVICE CENTER

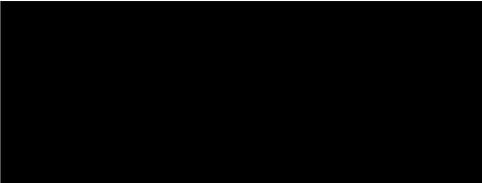
Date: APR 23 2004

IN RE: Petitioner:
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:



PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 an auto repair shop. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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:

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].

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 June 2, 1997. The beneficiary's salary as stated on the labor certification is \$18.80 per hour or \$39,104.00 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 copy of the beneficiary's W-2 Wage and Tax Statement for 1997 showing wages received from the petitioner. In a request for evidence (RFE) dated September 24, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE specifically requested copies of the 1997 and 2000 tax returns for the petitioner's business, with all schedules and attachments. The RFE stated that if the beneficiary was employed by the petitioner in 1998, 1999 and 2000 the petitioner should submit copies of the beneficiary's W-2 Wage and Tax Statements for those years.

In response to the RFE counsel submitted a letter dated November 9, 2001 and partial copies of the petitioner's Form 1120S, U.S. income tax return for an S corporation, for the years 1997, 1998, 1999 and 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the date of the director's decision, and denied the petition.

On appeal, counsel submits a brief in the form of a letter and submits complete copies of the petitioner's federal and New York state income tax returns for the year 2000. Counsel states on appeal that the petitioner's expenses shown on its tax return, apparently referring to the tax return for the year 2000, included cost of labor for "the alien," apparently referring to the beneficiary.

The AAO will first evaluate the director's decision based on the evidence submitted prior to the decision. Evidence submitted for the first time on appeal will then be considered.

As noted above, the record includes a copy of a W-2 form for the beneficiary for the year 1997, showing compensation received from the petitioner. That W-2 form shows total wages paid to the beneficiary in the year 1997 in the amount of \$40,500. That amount is higher than the proffered wage of \$39,104.00 per year. The record does not indicate whether any portion of the compensation paid to the beneficiary in 1997 included overtime hours, but Form ETA 750 stated that no overtime would be paid. The AAO therefore finds that the W-2 form for the beneficiary for 1997 is sufficient to establish the ability of the petitioner to pay the proffered wage as of the June 2, 1997 priority date.

The record lacks copies of any other W-2 Forms showing wages paid to the beneficiary, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner. The record therefore lacks evidence that the petitioner was actually paying the proffered wage to the beneficiary during 1998, 1999, and 2000. The petitioner offers no explanation for the absence of W-2 forms for the beneficiary for the years 1998, 1999 and 2000. The AAO will therefore evaluate the petitioner's ability to pay the entire proffered wage for the years 1998, 1999 and 2000 by reviewing other evidence in the record of proceeding.

The director found that the petitioner's tax return for the year 2000 showed a loss of -\$4,263 and depreciation of \$9,145. The director stated that the petitioner had failed to submit certain pages of the Form 1120S tax return for that year. The director found that the evidence failed to establish the petitioner's present ability to pay the proffered wage as of the date of the director's decision.

In considering depreciation as part of his analysis of the petitioner's net income the director erred. In determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] will 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. 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. supra*, at 1084, 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. 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. supra*, 632 F.Supp. at 1054.

The petitioner's Form 1120S tax returns in evidence show the following amounts on Line 21 for ordinary income: \$14,367 for 1997, -\$2,655 for 1998, \$18,097 for 1999, and -\$4,263 for 2000. The director's finding that the petitioner's income in the year 2000 was insufficient to pay the proffered wage was therefore correct. The AAO notes that the petitioner's income for 1998 and 1999 was also insufficient to pay the proffered wage in those years.

The petitioner failed to provide complete copies of the tax returns for 1997, 1998, 1999 and 2000. No schedule L's were submitted prior to the date of the director's decision. Therefore it was not possible for the director to evaluate the petitioner's net current assets as an alternative basis to establish its ability to pay the proffered wage.

For the foregoing reasons, the decision of the director to deny the petition was correct, based on the evidence then in the record.

On appeal the petitioner submits for the first time a complete copy of its Form 1120S federal income tax return for the year 2000, with all schedules and attachments, along with a copy of its New York State S Corporation franchise tax return for 2000. 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:

Where . . . 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.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above.

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 September 24, 2001 that the 1997 and 2000 income tax returns should be submitted "with all schedules and attachments."

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.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. Counsel asserts in his brief that the petitioner's expenses shown on its tax return, apparently referring to the tax return for the year 2000, included cost of labor for "the alien," apparently referring to the beneficiary. No evidence in the record supports this assertion of counsel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, regardless of the information in the tax return for the year 2000, the petitioner has still failed to submit complete copies of its tax returns for the years 1998 and 1999.

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.