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**U.S. Citizenship
and Immigration
Services**

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **MAR 22 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
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 an auto 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 the Service.

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 April 16, 2001. The beneficiary's salary as stated on the labor certification is \$700.00 per week or \$36,400 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage. The supplementary documentation submitted with the I-140 petition consisted exclusively of documents related to the identity and qualifications of the beneficiary. In a request for evidence (RFE) dated June 12, 2002, 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 included the statement, "If your business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business."

Counsel responded to the RFE with a letter dated September 5, 2002 accompanied by additional evidence, including: a copy of a Schedule C for the petitioner for the year 2000; a copy of the Form 1040 U.S. joint individual tax return for 2001 for the owner of the petitioner and his wife with attached Schedule C for the petitioner; a copy of bank statement dated August 29, 2002 for an account of the owner; a copy of a credit union statement dated September 3, 2002 for three accounts of the owner; and a letter dated September 5, 2002 from the owner stating that he had "over \$16,00" [sic] in personal bank accounts. The petitioner's evidence submitted in response to the RFE also included other federal and Pennsylvania state tax forms for 2001 for the owner and for his wife.

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

On appeal, counsel submits a brief accompanied by additional evidence. Counsel asserts that the evidence establishes that the petitioner had the ability to pay the proffered wage during the relevant time period.

The AAO will first analyze the director's decision considering the evidence submitted prior to the decision of the director. The evidence newly-submitted on appeal will then be considered.

The evidence in the record before the director relevant to the petitioner's ability to pay the proffered wage consisted of the documentation submitted by the petitioner in response to the RFE. That evidence is described above. No Form 1040 U.S. individual tax return was submitted for 2000. The Schedule C for the petitioner for 2000 shows net profit as \$37,437. For the year 2001, the Form 1040 return is a joint return and it shows three children as dependents. The owner's household therefore consists of five persons. The Schedule C for the petitioner for 2001 shows net profit as \$20,249. A W-2 form for the owner's wife for 2001 shows compensation to her in the amount of \$12,887.73 paid by the firm Monell Chemical Senses Center, a company with no evident connection to the petitioner. The Form 1040 for the owner of the petitioner and his wife for 2001 shows their adjusted gross income to be \$33,389. The major sources of income for the owner and his wife in 2001 therefore appear to have been the net profit of \$20,249 from the business which is the petitioner and the \$12,887.73 in compensation received by the owner's wife as shown on her W-2 form.

Copies of Pennsylvania state income tax forms for 2001 show figures which are consistent with the figures on the federal return for that year. Copies of tax notices to the owner and his wife from Northampton Township, Bucks County, Pennsylvania, show local taxes paid by the owner and his wife in 2001

The bank statement dated August 29, 2002 for the owner shows a balance as of August 7, 2002 of \$13,729.98. The credit union statement dated September 3, 2002 for the owner shows balances of \$51.79 in a savings account, \$2,418.08 in a checking account, and \$1,074.54 in a certificate of deposit account. The letter dated September 5, 2002 from the owner of the petitioner states that he has "over \$16,00" [sic] in personal bank accounts, which would be available if necessary to pay the beneficiary's salary.

In considering the above evidence the director described the net profit figure on the Schedule C for 2000 as "income" and found that the amount of \$37,437 would be insufficient to pay the beneficiary the offered salary of \$36,400 and also support the owner and his family at a level of income which exceeds the federal poverty guidelines. The director found that the adjusted gross income of \$33,389 shown on the Form 1040 for 2001 would also be insufficient to pay the offered salary and to support the owner and his family. The director found that the owner's claim of over \$16,000 in personal bank accounts was not supported by the evidence, and that in any event this amount would still be insufficient to pay the proffered salary of \$36,400 while supporting the owner and his family.

The director's finding that "bank statements" do not support the owner's claim of over \$16,000 in personal bank accounts is technically correct, since the owner's bank statement dated August 29, 2002 shows a balance of only \$13,729.98 as of August 7, 2002. But when the owner's three credit union accounts shown on the credit union statement dated September 3, 2002 are added to the bank account balance the total is \$17,234.79. Nonetheless, this total does not establish the ability of the petitioner to pay the proffered wage and to support the owner and his family. Moreover, the bank statement and the credit union statement contain no information on the account balances as of the April 16, 2001 priority date, therefore they provide no evidence of the owner's financial resources as of that date.

The director made no mention of the absence of any individual tax return for the owner for the year 2000. The director incorrectly treated the Schedule C as a statement of the petitioner's "income" rather than as a statement of the net profit of the petitioner, which is only a part of the amount which should be reflected as income on the owner's Form 1040 U.S. individual tax return. Depending on the other income or losses of the owner, the

adjusted gross income of the owner for 2000 could have been either higher or lower than the amount shown on the Schedule C for the petitioner. In evaluating a petitioner's ability to pay the proffered wage the AAO looks to the adjusted gross income of the owner, and not to the net profit of the petitioner. In the instant case, no Form 1040 for the owner for 2000 had been submitted.

The AAO finds that the petitioner's tax information for 2000 is incomplete, and that the tax information, bank account and credit union account information for 2001 fail to establish the ability of the petitioner to pay the proffered wage in 2001, which is the year of the priority date. Moreover the evidence submitted prior to the decision of the director contains no statement of the monthly household expenses of the owner, and no information on the total assets and total liabilities of the owner.

Despite the director's errors in analysis, therefore, the director's conclusion that the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date is correct.

On appeal counsel submits additional evidence. Some of the documents submitted on appeal are copies of documents previously submitted. Documents submitted for the first time on appeal are a bank statement dated November 12, 2002 for an account of the owner (updating the bank statement submitted previously); a credit union statement dated November 12, 2002 for four accounts of the owner (different accounts than on the credit union statement submitted previously); a letter from the owner dated November 22, 2002; and a copy of the federal poverty guidelines for 2002.

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 petitioner was put on notice of the need for evidence on the petitioner's ability to pay the proffered wage by the regulation which is quoted on page two above, 8 C.F.R. § 204.5(g)(2).

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 Sonogawa*, 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 June 12, 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 RFE did not mention any of the newly-submitted documents by name or category. But the director would have had no way of knowing of the existence or the relevance of specific documents prior to receiving them as evidentiary submissions. Therefore the fact that the RFE did not mention by name certain documents or types of documents, such as credit union statements, does not relieve the petitioner from its burden of proving its case before the director. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed.

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.

With regard to the evidence newly submitted on appeal, the AAO finds that the bank statement dated November 12, 2002 is not precluded from consideration on appeal, since it is an update of the bank statement dated August 29, 2002 for the same account, which was submitted prior to the decision of the director. The AAO also finds that the copy of the federal poverty guidelines for 2002 is not precluded from consideration on appeal, since no mention was made by the director of the federal poverty guidelines prior to the director's decision on October 28, 2002.

The AAO finds, however, that the credit union statement dated November 12, 2002 and the letter from the owner dated November 22, 2002 are precluded from being considered on appeal by *Matter of Soriano, supra*. The credit union statement is not an update of the prior credit union statement dated September 3, 2002 which gives the balances for three accounts of the owner. Rather, the credit union statement dated November 12, 2002 gives the balances for four other accounts of the owner, consisting of one savings account with a balance of \$9,391.28 and three certificate of deposit accounts with a total balance of \$31,159.62. Similarly, the letter dated November 22, 2002 from the owner of the petitioner stating the totals of his account balances as "over \$39,000" in credit union accounts and \$13,000 in personal bank accounts appears to include amounts from credit union accounts which were not mentioned in the evidence submitted prior to the decision of the director.

Counsel makes no claim that the newly-submitted evidence was unavailable previously, but counsel's brief asserts that in the initial submission of evidence the owner "forgot to mention his CD accounts, in which the employer has over \$31,000 available to pay the beneficiary's salary, and his additional savings account in which he has over \$9,000 available to pay the beneficiary's salary." Counsel's Brief, page 2. 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, an explanation that the petitioner "forgot" to include all relevant evidence, without additional details, is in any event an insufficient explanation for the failure to submit evidence.

Based on the foregoing analysis, the evidence submitted on appeal which is not precluded from consideration by *Matter of Soriano, supra*, is the bank statement dated November 12, 2002 and the copy of the federal poverty guidelines for 2002. The November 12, 2002 bank statement shows a balance of \$13,764.17, an amount only \$34.19 greater than the balance shown on the previously-submitted bank statement dated August 29, 2002. Therefore the November 12, 2002 bank statement contains no information which would change the analysis of the evidence submitted previously. The federal poverty guidelines were submitted on appeal by counsel in apparent response to the reference to those guidelines by the director in his decision. Nonetheless, the AAO does not view the federal poverty guidelines as an appropriate measure of the expenses needed to support a petitioner's owner and the owner's household. Therefore the copy of the federal poverty guidelines submitted by counsel on appeal contain no information which would change the AAO's analysis of the evidence submitted previously, as discussed above.

The decision of the director to deny the petition was therefore correct, based on the evidence then in the record, and the evidence submitted on appeal does not overcome the decision of the director.

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.