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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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APR 21 2005

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC-03-057-51361

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

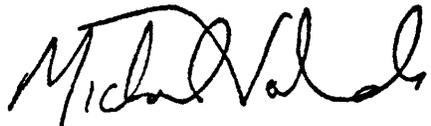
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian continental specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel states that the petitioner has substantial financial resources and has established its ability to pay the proffered wage.

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually. On the Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary claimed to have worked for the petitioner from September 1999 through the date of the ETA 750B.

The I-140 petition was submitted on November 12, 2002. On the petition, the petitioner claimed to have a gross annual income of "\$2.2 M" and to currently have 30 employees. The items for the date when the petitioner was established and for the petitioner's net annual income were left blank on the petition.

In support of the petition, the petitioner submitted a copy of a payroll summary for RA 22 Park Enterprises, Inc., for the pay period October 26, 2002 through November 1, 2002; and an undated letter from [redacted] stating the beneficiary's employment with that company as a cook from July 8, 1997 through September 16, 1999.

In a request for evidence (RFE) dated March 19, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted an additional copy of the payroll summary which had been submitted previously; and copies of bank statements for an account of [REDACTED] for the months of February 2003 and March 2003.

In a decision dated August 4, 2003, 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 continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and a copy of the Form 1120S U.S. Income Tax Return for an S Corporation for [REDACTED] for 2000. Counsel also submits additional copies of the payroll summary and of the bank statements which had been submitted previously.

Counsel states on appeal that the director abused his discretion in finding that the evidence in the record failed to establish the petitioner's ability to pay the proffered wage during the relevant time period.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the director mentioned the petitioner's tax return for 2001 as a type of acceptable evidence, but no reference was made to the petitioner's tax return for 2000, nor did the director explicitly request any tax return of the petitioner or of any other entity. Therefore no grounds exist to preclude the consideration of the Form 1120S U.S. Corporation Income Tax Return for an S Corporation for 2000 of [REDACTED] from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

In his brief, counsel states that the financial documents in the record are those of the petitioner. 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). The evidence in the record fails to corroborate the statements of counsel concerning the financial documents.

As noted, above, the tax return in the record is for a corporation named [REDACTED]. The payroll record and the bank statements submitted in evidence are also in the name of that same corporation. On the I-140 petition, the item for the IRS tax number was left blank, thereby preventing any comparison of that number with the taxpayer identification number on the Form 1120S tax return in evidence. None of the evidence pertaining to [REDACTED] mentions the name of the petitioner, although the address of that corporation, [REDACTED] is the same as the address of the petitioner. However, the record contains no other evidence relevant to the legal name of the petitioner. The record therefore fails to establish that [REDACTED] is the corporate name of the petitioner.

Moreover, even if the financial evidence in the record were assumed to be that of the petitioner, the evidence would not establish the petitioner's ability to pay the proffered wage during the relevant period.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary claimed to have worked for the petitioner from September 1999 through the date of the ETA 750B. In his RFE, the director mentioned the beneficiary's Form W-2 Wage and Tax Statement for 2001 as a type of documentation which could show the amount of compensation paid to the beneficiary by the petitioner. However, no Form W-2 for the beneficiary was submitted in evidence. Nor did the petitioner submit any other evidence corroborating the beneficiary's claim of employment with the petitioner or indicating the amount of any compensation paid to the beneficiary by the petitioner. The payroll summary for [REDACTED] Inc., for the pay period October 26, 2002 through November 1, 2002 states that company's total number of employees and its total payroll costs, but it identifies no employees by name.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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.*, the court held that the Immigration and Naturalization Service, now 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 the Service should have considered income before expenses were paid rather than net 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The tax return in evidence is for an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the Form 1120S, U.S. Income Tax Return for an S Corporation. The instructions on the Form 1120S state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. In the instant petition, however, the Form 1120S Schedule K for 2000 shows no income other than that from a trade or business. Therefore the corporation's net income will be considered to be its figure for ordinary income.

The Form 1120S U.S. Income Tax Return for an S Corporation for 2000 of [REDACTED] shows the amount of \$1,125.00 on line 21, for ordinary income. That information is not directly relevant to any year at issue in the instant petition, since the priority date is in the following year, 2001. Moreover, even if the ordinary income figure for 2000 were considered relevant, the amount of the corporation's ordinary income in 2000 of \$1,125.00 was lower than the proffered wage, and it therefore would fail to establish the petitioner's ability to pay the proffered wage in 2001 or in any other year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash

within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the Form 1120S tax return of [REDACTED] for 2000 yield the following amounts for net current assets: -\$50,534.00 for the beginning of 2000 and -\$3,879.00 for the end of 2000. The figure for the end of 2000 is the same in accounting terms as that for the beginning of 2001, which is the year of the priority date. That figure is therefore relevant to the instant petition. However, since the figure for the corporation's net current assets for the end of 2000 is negative, it would fail to establish the petitioner's ability to pay the proffered wage during 2001.

The record also contains two copies of a payroll summary for RA 22 Park Enterprises, Inc., for the pay period October 26, 2002 through November 1, 2002. Payroll statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. The payroll summary shows that the corporation's total gross payroll obligation for that period was \$13,539.00 for 26 employees, and shows the corporation's tax obligations for federal and state payroll taxes. The payroll summary contains no information to indicate that the petitioner had the ability to pay additional amounts for the proffered wage to the beneficiary during that pay period. Moreover, the payroll summary is for a single pay period, therefore it provides no information relevant to the period from the April 16, 2001 priority date until October 26, 2002, the first date covered by the payroll summary.

The record also contains copies of two bank statements. Bank statements also are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

The two bank statements in the record show ending balances of \$94,154.41 for February 2003 and \$79,167.15 for March 2003. Although those balances are each greater than the proffered annual wage of \$39,291.20, they provide no information relevant to the period from the April 16, 2001 priority date until February 1, 2003, which is the first date covered by the bank statements.

Finally, no evidence was submitted to demonstrate that the funds reported on the corporation's bank statements show additional available funds that would not be reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporation's net current assets.

In any event, in the instant petition, no bank statements for 2001 or 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

In his brief, counsel states, "There is no statutory or common law requirement to submit a federal tax return." (Brief, page 2). That statement of counsel ignores the fact that the requirement for evidence in the form of tax

returns, annual reports, or audited financial statements is found in a regulation, 8 C.F.R. § 204.5(g)(2). That regulation is quoted above. Counsel also discusses case precedents on the issue of the evidence necessary to support a CIS decision. Counsel then states, "It seems clear, then, that [CIS] retains at least the burden of producing substantial evidence supporting its determination." (Brief, page 4). Notwithstanding counsel's assertion, the burden of proof is on the petitioner, not on CIS. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In his decision, the director evaluated the payroll summary and the bank statements, which were the only financial documents in the record at the time of the director's decision. The director correctly stated that those documents are not among the types of evidence generally considered by CIS as primary evidence. The director also correctly noted that those documents cover only limited time periods. The director therefore correctly found that those documents failed 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 decision of the director to deny the petition was correct, based on the evidence in the record at the time of that decision.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to 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.