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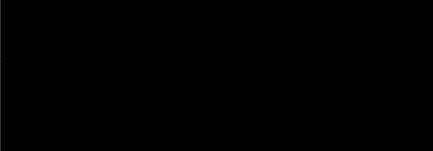
BC

FILE: WAC 03 037 50580 Office: CALIFORNIA SERVICE CENTER Date: FEB 14 2005

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

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:



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.

R
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a metal works company. It seeks to employ the beneficiary permanently in the United States as a machinist. As required by statute, a Form ETA 750, Application for Alien Employment Certification was approved by the Department of Labor accompanied the petition. The director, however, 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.

The petitioner is structured as a closely-held corporation and files income-tax returns under Subchapter S of the Internal Revenue Code. The petitioner contends on appeal that it has employed the beneficiary since the December 20, 2001 priority date. It explains that the beneficiary did not receive W-2 Forms for either 2001 or 2002, instead that it paid the beneficiary in cash because he lacks a Social Security card. The petitioner submitted the beneficiary's signed receipts as evidence of this along with the beneficiary's declaration on the ETA 750 that the petitioner has employed him in the proffered position since April 1999.

The petition, filed November 12, 2002, states the petitioner started in business in 1988, currently employing 15 with its most recent gross annual income being \$1.1 million and a net annual income of \$185,000. Along with the petition, counsel also submitted a written offer of employment; a letter from the beneficiary's previous employer, listing his employment from January 1996 to February 1999; the Form ETA-750 labor certification showing a December 10, 2001 priority date; and the petitioner's 2001 federal Subchapter-S tax return, which reported that the petitioner had paid no salaries or wages.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on April 7, 2003, sent the petitioner a request for evidence (RFE) asking the petitioner for proof of its ability to pay for 2001 and 2002; its W-2 Forms for 2001 and 2002 showing the beneficiary was working for the petitioner; and the latest year's state quarterly wage reports. The service center also asked the petitioner to complete parts of the petition left blank, which it later did.

In response, on April 16, 2003, the petitioner submitted two years of tax returns, its 2001 and 2002 federal Subchapter S tax returns; its quarterly wage reports for June 30, 2002 to March 31, 2003, which the petitioner had filed with the state unemployment office listing all employees. The beneficiary was not on the list of employees. The petitioner asserts it pays the beneficiary's wages in cash, evidenced in the petition, which states the beneficiary does not have a Social Security number.

On June 3, 2003, the director denied the petition, finding that the evidence submitted did not establish the petitioner's continuing ability to pay the proffered wage, starting with the priority date. The director found that the petitioner's net income for 2001 was only \$13,794, and for 2002, only \$13,287. He found significant the petitioner's omission of the beneficiary from among the company's listing of employees on its state quarterly unemployment reports, concluding from this "the petitioner never employed the beneficiary."

The decision, inconsistently reciting that the beneficiary "is currently employed by the petitioner," determined that the petitioner "has no proof of employment" of the beneficiary.

On appeal, the petitioner contends its cash receipts, signed by the beneficiary, and company check registers, demonstrate that it has employed the beneficiary since the priority date. The petitioner first submitted the receipts and check registers on appeal.

In the instant case, the petitioner's cash wages paid to the beneficiary as evidence of the beneficiary's employment with the petitioner can constitute *prima facie* proof of the petitioner's ability to pay the proffered wage if the amounts paid are equal to or greater than the proffered wage. However, the petitioner did not submit the written receipts and other documentary evidence of such ongoing payments with the petition or in response to the RFE but instead only upon its filing of the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) authorizes the director, prior to making a decision on the petition, to request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined until the appeal to provide Citizenship and Immigration Services (CIS) with copies of W-2 Forms or other documentary evidence showing that the petitioner was paying the beneficiary's wages from the priority date forward. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Evidence sent in response to an RFE must be submitted together at one time rather than piecemeal, even if all done within the allotted time, a requirement explicitly stated in 8 C.F.R. § 103.2(b)(11), which the RFE cites. The regulation states:

Submission of evidence in response to a Service request. All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

Further, the purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The director, lacking the receipts and other documents purporting to show proof of the beneficiary's ongoing employment, based his decision upon the petitioner's net income and net assets from its income tax returns, showing in either case that the petitioner lacked sufficient income or assets to cover the proffered annual wage of \$23,254.40. From the petitioner's unaudited financial statements, receipts submitted on appeal, and its corporate income tax returns, it has not clearly established that sufficient wages have been paid to the beneficiary. The items on the petitioner's tax return listed "other deductions" or "employee leasing," are not sufficient evidence to show the required ability to pay. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Ho further states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

However, the AAO also finds the petitioner's contention that it has shown the ability to pay via a series of receipts made out to cash and a tally of other payments labeled "outside processing" inadequate to prove its ability to pay. First, the petitioner used unaudited financial statements to document the total amount of payments under the heading of "outside processing." The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Likewise, the petitioner's partial list of checks is not persuasive evidence. There is nothing in the record that defines "outside processing" as it relates to the petitioner's ability to pay the proffered wage.

Next, the AAO will review the decision and any claims of error by the petitioner. While the petitioner assigns no specific error in the decision, its statements in the appeal Form I-290B and in its letter of June 17, 2003, focuses on its ongoing wage payments to the beneficiary. In determining the petitioner's ability to pay the proffered wage during a given period, CIS can examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the full proffered wage in 2001 and 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered

wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the 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 granting 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.

The petitioner must demonstrate the 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. See 8 CFR § 204.5(d). Here, the Department of Labor accepted the petitioner's Form ETA 750 application for processing Dec. 20, 2001, stating the proffered wage was \$11.18 per hour, or \$23,254.40 per year. On the application, the beneficiary claimed he had worked for the petitioner as a machinist since April 1999.

With the appeal, the petitioner submitted the petitioner's non-audited income statement showing an expense account for 2001 labeled "outside processings" totaling \$22,834.52, and for a similar account for 2002 totaling \$28,418.87. The petitioner apparently submitted each total to demonstrate that it relied on cash payments for its employees and therefore lacked proof of the beneficiary's work history with the company.

Even if the petitioner had supplied the requested evidence in a timely manner, however, the record still lacks proof of its ability to pay the proffered wage.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: \$13,794 for 2001, and \$13,287 for 2002. Since each of those figures is below the amount of the proffered wage, they fail to establish the ability of the petitioner to pay the proffered wage.

The evidence further does not establish that the beneficiary has worked for the petitioner since the priority date. Moreover, lacking W-2 Forms showing wages paid to the beneficiary, the petitioner cannot claim to satisfy proof of its ability to pay a part of the proffered wage, with the petitioner's net income making up the remainder.

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.¹ 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. Thus the petitioner would convert its net current assets to cash as the proffered wage becomes due. 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's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$72,763 for 2001, and -\$18,491 for 2002. The petitioner's net current assets at the end of 2001, -\$18,491, are relevant, because the priority date is December 10, 2001. Therefore, those figures fail to establish the ability of the petitioner to pay the proffered wage in 2001 and 2002.

The petitioner has not shown that it had the ability to pay the proffered wage during 2001 and 2002. 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 met that burden.

ORDER: The appeal is dismissed and the petition is denied.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.