

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Ble



File: WAC-01-287-51286 Office: CALIFORNIA SERVICE CENTER Date: JUN 3 3 7AM

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)

IN 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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be denied. The prior decision of the AAO will be sustained. The petition will remain denied.

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.

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 Form ETA 750 was accepted for processing on March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$20.91 per hour, which equates to \$43,492.80 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since 1998 but provided no evidence of that employment¹. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner is a manufacturer of aluminum alloy wheels. It seeks to employ the beneficiary permanently in the United States as a technical training instructor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

The petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date with its initial petition. After requesting evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), specifically the petitioner's tax returns, audited financial statements, or an annual report, for the year 2000 to the present, on May 14, 2002, 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 and denied the petition

¹ In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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.

accordingly. The director noted that the petitioner only submitted unaudited financial statements for nine months in 2001 and cited the petitioner's failure to provide evidence required by 8 C.F.R. § 204.5(g)(2)².

The AAO summarily dismissed the petitioner's appeal on January 22, 2004 for failure to identify specifically any erroneous conclusion of law or statement of fact. Counsel had sought a 150-day extension to provide new evidence, namely the petitioner's 2001 tax return, because the petitioner sought an extension of time to file the tax return with the Internal Revenue Service (IRS). Counsel also submitted a copy of Form 7004 filed by the petitioner with the IRS to obtain an extension of filing its 2001 tax return. Counsel stated that the petitioner would file its taxes before October 15, 2002. Since more than 150 days elapsed from the time counsel dated the appeal, on June 4, 2002³, without any additional evidentiary submissions, and counsel pointed to no error in the director's decision, the AAO summarily dismissed the appeal.

On motion, counsel submits additional evidence. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel merely states that "[o]n April 10, 2003 counsel mailed the requested 2001 tax return, please see attached letter and tax return." Counsel submits a copy of a letter dated April 10, 2003, but no proof that the letter or tax return was mailed on that date. Regardless, the duration of time between June 4, 2002 when the petitioner dated its appeal, and April 10, 2003, is 310 days, which is longer than the 150 days counsel requested as a discretionary extension from the AAO. The instructions on Form I-290B clearly state that extensions may be granted only for good cause shown. Counsel clearly said that the petitioner would file its tax return before October 15, 2002, and that a copy of those taxes would be forwarded to the AAO at that time⁴. There is no evidence the copy of the tax return was ever submitted to the AAO until the instant motion and does not state new facts to be proved.

Regardless, in response to the director's request for evidence, no responsive statement was submitted to explain why the petitioner failed to comply with the director's request for tax returns, audited financial statements, or annual reports. The purpose of the request for evidence 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, and certainly not on motion. *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 request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion (or appeal), especially since no evidence was submitted that counsel complied with the discretionary extension of time he sought to provide the AAO with the evidence required under the regulation at 8 C.F.R. § 204.5(g)(2) after filing the petitioner's appeal. Thus, since the new evidence presented on motion is untimely and precluded by the application of *Soriano*, the motion does not qualify for consideration as a motion to reopen.

² 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.

³ It was received by the AAO on June 5, 2002.

⁴ The copy of the petitioner's 2001 tax return is signed and dated in April 2003.

Even if the AAO were to consider the evidence submitted on motion, the petitioner still fails to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Its net income is \$16,981 and its net current assets are -\$306,159. Thus, the petitioner could not pay the proffered wage of \$43,492.80 out of either its net income or its net current assets⁵. Counsel and the petitioner failed to state how the petitioner's 2001 tax return reflects its continuing ability to pay the proffered wage and there is no other evidence of funds available to the petitioning entity. The petitioner failed to submit evidence sufficient to demonstrate that it has the ability to pay the proffered wage in 2001 or subsequently. Therefore, the petitioner failed to establish that it has 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 motion to reopen is denied. The prior decision of the AAO, dated January 22, 2004, is sustained. The petition remains denied.

⁵ 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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.

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. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year 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.