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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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[REDACTED]
ATTENTION:
[REDACTED]

FILE: [REDACTED] EAC-03-139-52614

Office: VERMONT SERVICE CENTER

Date: MAY 18 2005

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
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 commercial cleaning firm. It seeks to employ the beneficiary permanently in the United States as an electric motor repairer. 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 been employing the beneficiary and paying the prevailing wage and that the petitioner's financial statements should be considered to be audited statements.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.34 per hour, which amounts to \$29,827.20 annually. On the Form ETA 750B, signed by the beneficiary on March 22, 2001, the beneficiary claimed to have worked for from September 2000 until the date of the ETA 750B.

The I-140 petition was submitted on March 21, 2003. On the petition, the petitioner claimed to have been established on February 27, 1995, to have a gross annual income of \$4,867,809.00, to have a net annual income of \$463,933.00, and to currently have 19 employees. With the petition, counsel submitted supporting evidence.

In a request for evidence (RFE) dated May 14, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence, including copies of its federal tax returns for 2001 and 2002.

In a decision dated September 2, 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 additional evidence. 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, two documents are submitted for the first time on appeal, a copy of a letter from an accounting firm to accompany the petitioner's financial reports and a letter from a certified public accountant explaining the petitioner's accounting system. In the proceedings before the director, the director did not specifically request a letter or letters from the petitioner's accountant. Therefore no grounds would exist to preclude those documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The evidence now in the record consists of the following: a letter dated January 27, 2003 from the petitioner's general manager confirming a continuing offer of employment to the beneficiary; a copy of a letter dated March 3, 2003 from a transportation company in Poland confirming the beneficiary's experience as a mechanic electrician from April 1, 1990 to August 31, 2000; copies of Form 1099-MISC Miscellaneous Income statements for the beneficiary showing income received from the petitioner in 2001 and 2002; copies of the petitioner's Form 1120S, U.S. Income Tax Returns for an S Corporation for 2001 and 2002; copies of the petitioner's income tax returns for Virginia for 2001 and for the District of Columbia, Maryland, Delaware, Pennsylvania and New Jersey for 2001 and 2002; a copy of the petitioner's financial statements for the years ended December 31, 2001 and 2000; a copy of the petitioner's financial statements for the years ended December 31, 2002 and 2001; a copy of a letter dated March 22, 2003 from an accounting firm; and a copy of a letter dated October 3, 2003 from a certified public accountant.

Counsel states on appeal that the petitioner has been employing the beneficiary and paying the prevailing wage. Counsel asserts that a letter from a certified public accountant, submitted for the first time on appeal, shows that the petitioner's financial statements submitted for the record should be considered to be audited financial statements.

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

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 22, 2001, the beneficiary claimed to have worked for from September 2000 until the date of the ETA 750B. The record contains copies of Form

1099-MISC Miscellaneous Income statements for the beneficiary showing income received from the petitioner in the amounts of \$23,689.85 in 2001 and \$20,582.36 in 2002. Those amounts are less than the proffered wage of \$29,827.20. The amounts needed to raise the beneficiary's actual compensation to the proffered wage are \$6,137.35 for 2001 and \$9,244.84 for 2002. The evidence on the petitioner's compensation to the beneficiary therefore fails to establish the petitioner's ability to pay the proffered wage during those years.

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 evidence indicates that the petitioner is 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 petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation 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, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income. The petitioner's tax returns show the following amounts for ordinary income: -\$73,522.00 for 2001 and -\$78,106.00 for 2002. Since each of those figures is negative those figures fail to establish the ability of the petitioner to pay the proffered wage.

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's attached to the petitioner's tax returns yield the following amounts for net current assets: \$100.00 for the beginning of 2001; -\$12,392.00 for the end of 2001; and -\$63,412.00 for the end of 2002. Since the figure for the beginning of 2001 is less than the amount needed to raise the beneficiary's compensation to the proffered wage that year, and since each of the year-end figures for 2001 and 2002 is negative, those figures also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains a copy of the petitioner's financial statements for the years ended December 31, 2001 and 2000; a copy of the petitioner's financial statements for the years ended December 31, 2002 and 2001; and a copy of a letter dated October 3, 2003 from a certified public accountant. In his letter the accountant states that the petitioner's financial statements for 2001 and 2002 had been compiled by his firm. The letter does not state that the petitioner's financial statements for those years have been audited.

Unaudited financial statements 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. A letter accompanying the financial statements from the accounting firm which prepared them contains the following language: "A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the following financial statements" (Letter of March 22, 2003 from accounting firm, at 1).

Concerning the petitioner's system of accounting, in the letter of October 3, 2003 mentioned above the certified public accountant states the following: "The income tax returns were prepared on the cash basis of accounting. This results in variations in income due to the timing of cash collections. It also excludes accrual of current assets and liabilities from schedule L. This results in the appearance of reduced net current assets." (Letter of October 3, 2003 from certified public accountant, at 1). Aside from the unaudited financial statements discussed above, no evidence in the record substantiates the claim of the accountant that a cash basis of accounting not only causes variations in income timing but also causes the appearance of reduced net current assets.

For the foregoing reasons, the evidence in the record fails 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.

In his decision, the director correctly stated the figures for the petitioner's ordinary income. The director correctly calculated the petitioner's year-end net current assets for 2001, but made an error in the amount of three dollars in calculating the petitioner's year-end net current assets for 2002. That minor error did not affect the director's analysis. The director correctly concluded that the information on the petitioner's federal tax returns failed to establish the petitioner's ability to pay the proffered wage during the relevant time period. The director also correctly determined that the unaudited financial statements in the record were not an acceptable form of evidence. The director's decision to deny the petition was correct.

The assertions of counsel on appeal and the letter from a certified public accountant submitted for the first time on appeal fail to overcome the decision of the director, for the reasons discussed above.

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.