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U.S. Citizenship
and Immigration
Services

B6

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: **OCT 21 2005**

LIN 03 115 51268

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail and fur repair firm. It seeks to employ the beneficiary permanently in the United States as a furrier or mink specialist. 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, former counsel asserts that the petitioner has established its continuing financial ability to pay the proffered salary. The notice of appeal, filed May 3, 2004, indicated that a brief and/or evidence would be submitted to the AAO within 30 days. Nothing has been received to the record. Upon further inquiry with former counsel, notification was received that he was no longer attorney of record in this case. As neither the file nor Citizenship and Immigration Services (CIS) electronic records identify any new counsel representing the petitioner, a copy of this decision will only be forwarded to the petitioner.

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 January 27, 1997. The proffered wage as stated on the Form ETA 750 is \$32,703 per year. On the Form ETA 750B, signed by the beneficiary on January 9, 1997, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed February 25, 2003, the petitioner states that it was established in 1949, has a gross annual income of \$98,000 and currently employs two workers.

Because the petitioner initially submitted no evidence of its ability to pay the beneficiary's wage offer, on August 27, 2003, the director requested additional evidence pertinent to that ability. He instructed the petitioner to either submit copies of its latest annual report, federal tax returns for 1997 through 2002, or audited financial statements. The director also requested the petitioner to provide copies of bank records for twelve consecutive months, which encompass the priority date of January 27, 1997, as well as copies of the petitioner's most recent quarterly employer's

federal tax return or state unemployment compensation form accompanied by the supplement identifying all employees and respective social security numbers.

In response, the petitioner, through former counsel, submitted a partial copy of its Form 1120 U. S. Corporation Income Tax Return for 1997, consisting of the first page. It reflects that the petitioner files its taxes on the basis of a standard calendar year. It also reveals that the petitioner declared net taxable income of \$32,805 before the net operating loss (NOL) deduction. No other federal income tax returns were submitted.

The petitioner provided financial statements for the periods ending March 31, 2002 and March 31, 2003. They are not audited, but rather represent compilations from the petitioner's accounting firm. The petitioner also submitted copies of its federal quarterly returns (Form 941) accompanied by the corresponding state wage reports. These documents show that the petitioner employed six workers during the first quarter, two workers in the second quarter (other than the owner), and only the owner was carried as an employee in the third quarter. None of the documents appear to include the beneficiary as one of the employees.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition on March 31, 2004, noting that although the partial copy of the petitioner's 1997 tax return showed sufficient net income to cover the proffered wage of \$32,703, the remaining evidence covering the intervening years was not submitted or was insufficient to establish the petitioner's ability.

On appeal, former counsel asserts that the petitioner has the financial ability to pay the offered salary as shown by the financial statements and by the fact that it has been in business since 1947.

Former counsel's assertions are not persuasive. The unaudited, compiled financial statements, are not persuasive evidence of a petitioner's ability to pay the certified wage. 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. By their own terms, the financial statements represent part of a compilation. A compilation is a presentation of financial statement information by an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during 2002 and 2003 as offered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. In the instant case, the record does not indicate that the petitioner employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also review 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). 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.

In this case, as noted by the director, the partial copy of the 1997 tax return shows sufficient net taxable income to pay the proposed wage offer during that period. The regulation at 8 C.F.R. § 204.5(g)(2), however, requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. Despite the director's request, the petitioner failed to submit any documentation covering 1998 through 2001 and the unaudited 2002 and 2003 financial statements cannot be considered sufficiently probative to demonstrate the petitioner's ability to pay during those years. 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). Although the petitioner may have been in business for a very long time as claimed, longevity alone does not establish sufficient financial ability to pay a specific certified wage. In this matter, the petitioner has failed to demonstrate that it has had the *continuing* financial ability to pay the certified wage beginning January 27, 1997.

Based upon a review of the evidence contained in the underlying record and argument offered on appeal, the AAO concludes that the petitioner has failed to demonstrate that it has 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 not met that burden.

ORDER: The appeal is dismissed.