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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-02-212-50218 Office: CALIFORNIA SERVICE CENTER Date: SEP 15 2004

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:

[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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is a electric vehicle controls firm. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 submits a brief and additional evidence.

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:

> *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. 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 [CIS].

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 February 5, 1999. The proffered wage as stated on the Form ETA 750 is $12.64 per hour, which amounts to $26,291.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1997.

On the petition, the petitioner claimed to have been established in 1987, to have a gross annual income of $836,060.00, and to currently employ four workers. In support of the petition, the petitioner submitted a copy of a letter dated May 22, 2002 from the personnel manager of H.W.E. Builders confirming the beneficiary's prior experience with that company as a bookkeeper from July 1989 to October 1991; a copy of a bachelor of science degree dated March 28, 1988 granted to the beneficiary by Adamson University, Manila, Republic of the Philippines; a copy of the beneficiary's transcript dated December 1, 1988 from Adamson University; a copy of a letter dated June 1, 1994 from Educational Evaluators International, Inc. stating that the beneficiary's studies at Adamson University are equivalent to a bachelor of science degree in accounting from a regionally accredited college or university in the United States; a copy of the petitioner's Form 1120 U.S.

Corporation Income Tax Return for 1999; and copies of printouts of several pages from the Internet web site of the petitioner.

Because the director deemed the evidence submitted to be insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to establish that the beneficiary had two years of experience in the offered position, as required on the ETA 750, the director on October 10, 2002 requested additional evidence pertinent to both of those issues. 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, counsel submitted a letter dated December 30, 2002 accompanied by the following: a letter dated November 8, 2002 from H.W.F. Builders stating that the beneficiary worked 40 hours per week for that firm as a bookkeeper from July 1989 to October 1991 and describing the beneficiary's duties; copies of the first page of each of the petitioner's Form 1120 U.S. corporation tax returns for the years 1999, 2000 and 2001; and copies of the beneficiary's Form W-2 wage and tax statements for 1999, 2000 and 2001.

The director issued a second Request for Additional Evidence (RFE) dated April 7, 2003 requesting complete signed copies of the petitioner's federal income tax returns, with all tables and charts, for the years 1999 to the present, or, in the alternative, Internal Revenue Service computer-generated printouts of those returns.

In response counsel submitted a letter dated May 29, 2003 accompanied by copies of Internal Revenue Service transcripts of the petitioner's Form 1120 U.S. corporation tax returns for 1999, 2000 and 2001.

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. Counsel submits additional copies of the beneficiary's Form W-2 wage and tax statements for 1999, 2000, and 2001 and a copy of the beneficiary's Form W-2 for 2002, which is newly submitted on appeal. Counsel also submits copies of pay checks for the beneficiary from February 9, 1999 to July 8, 2003; and copies of the first page of each monthly bank statement for a business checking account of the petitioner with Wells Fargo Bank for the months from February 1999 to July 2003, except that the statement for December 2001 is not included.

Counsel states on appeal that the petitioner's tax returns show that its taxable income was sufficient to pay the increase needed to raise the beneficiary's actual compensation to the proffered wage for the years 1999 and 2000, and that for the years 2001 and 2002 the petitioner's bank statements establish the petitioner's ability to pay the increase needed to raise the beneficiary's actual compensation to the proffered wage. Concerning 2002, counsel states that the petitioner has not yet filed its tax return for that year. Since the brief was filed with the notice of appeal in August 2003, counsel's statement appears to indicate that the petitioner obtained an extension in the deadline for the filing of its 2002 tax return.

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 present matter, the petitioner established that it had previously employed the beneficiary.

The beneficiary's W-2 wage and tax statements submitted prior to the director's decision show that the beneficiary received the following amounts in compensation from the petitioner during the relevant time period: $20,293.65 in 1999; $26,646.10 in 2000; and $25,578.62 in 2001. For the year 2000 the beneficiary's actual compensation exceeded the proffered wage of $26,291.20. For the other years, the amounts which would have been needed to raise the beneficiary's actual compensation to the proffered wage were $5,997.55 in 1999; and $712.58 in 2001. The record before the director closed on May 29, 2003 with counsel's submissions in response to the second RFE. By that date the beneficiary's W-2 form for 2002 should have been available, but the record contains no explanation for the absence of that document from the evidence submitted prior to the director's decision. The W-2 forms in the record therefore fail to establish the petitioner's ability to pay the proffered wage in the years 1999, 2001 and 2002.

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, 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.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. In the instant petition, however, the copies of the petitioner's tax returns in the record are incomplete, lacking all supporting schedules. The IRS tax transcripts in the record also appear to be incomplete, lacking information from page one of the tax returns covered by the transcripts. For the foregoing reasons, the partial copies of the petitioner's tax returns and the apparently partial IRS tax transcripts for the petitioner's tax returns in the record cannot be considered as reliable evidence of the petitioner's tax filings for the years in question. The record contains no explanation for the missing information from the tax returns and transcripts in the record.

The evidence submitted prior to the director's decision contains no other documents relevant to the petitioner's ability to pay the proffered wage. The evidence in the record prior to the director's decision therefore fails to establish the petitioner's ability to pay the proffered wage in the year 1999, which is the year of the priority date, or in the years 2001 or 2002.

In his decision the director incorrectly stated that the proffered wage is $38,160.00 per year. The director's decision does not indicate how that figure was calculated. The correct figure is $26,291.20, which is the product of the hourly wage of $12.64, multiplied by the work week of 40 hours per week, multiplied by 52 weeks. The director failed to include in his analysis any consideration of the beneficiary's actual compensation received from the petitioner during the relevant years. In failing to do so, and in basing his analysis on an incorrect figure for the

annual proffered wage which was $11,868.80 higher than correct annual proffered wage, the director used a flawed analysis. Nonetheless, as shown above, a correct analysis of the evidence in the record before the director shows that the evidence 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. That is the same conclusion reached by the director. Therefore, despite his errors in analysis, the director's conclusion on that issue was correct, and the director correctly denied the petition, based on the evidence in the record before him.

On appeal, counsel submits additional evidence. Counsel submits additional copies of the beneficiary's Form W-2 wage and tax statements previously submitted and a copy of the beneficiary's Form W-2 for 2002, which is newly submitted on appeal. Counsel also submits copies of pay checks for the beneficiary from February 9, 1999 to July 8, 2003; and copies of Wells Fargo monthly bank statements for a business checking account of the petitioner for the months from February 1999 to July 2003, except that the statement for December 2001 was not included. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE's issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO it would fail to overcome the decision of the director.

As discussed above, the evidence submitted prior to the director's decision fails to establish the petitioner's ability to pay the proffered wage during the years 1999 and 2001. The additional copies of the beneficiary's W-2 forms for 1999 and 2001 submitted on appeal are in a different format from the copies submitted previously, but they contains the same information as the earlier copies, therefore they fail to establish the petitioner's ability to pay the proffered wage in those years.

The beneficiary's W-2 Wage and Tax Statement for 2002 shows the beneficiary's actual compensation that year to be $24,444.80. That amount is $1,846.40 less than the proffered wage. Therefore the beneficiary's Form W-2 for 2002 fails to establish the petitioner's ability to pay the proffered wage in that year. The copies of the beneficiary's pay checks submitted on appeal are not accompanied by any itemization or calculation of totals, but those pay check copies appear to be consistent with the amounts shown on the beneficiary's Form W-2 wage and tax statements for the years in question. The photocopies of the beneficiary's paychecks provide further corroboration of the fact that the petitioner employed and paid the beneficiary during the relevant time period, but

the amounts shown on those paychecks do not appear to reflect additional compensation paid to the beneficiary beyond the amounts shown on the beneficiary's W-2 forms.

Concerning the bank statements submitted on appeal, counsel makes no detailed analysis of the bank statements for 1999 and 2000, relying instead on the petitioner's tax return evidence for those years. However, for the reasons discussed above, the partial copies of the petitioner's tax returns and the apparently partial IRS tax transcripts in the record cannot be considered a reliable evidence of the petitioner's tax filings.

Counsel asserts that the petitioner's bank statements establish its ability to pay the proffered wage for 2001 and 2002. Counsel asserts that the petitioner's bank statements for 2001 show an ending balance each month between $6,773.00 and $30,304.00, and that its bank statements for 2002 shown an ending balance each month between $2,713.00 and $22,821.00.

Counsel's summaries of the petitioner's bank balances for 2001 and 2002 are generally supported by the figures shown on the bank statements in evidence, though for the year 2001 the record lacks the bank statement for December. But regardless of the specific figures shown on the bank statements, bank 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. 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. Finally, no evidence has been submitted to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds that were not reflected on its tax returns, nor to explain why the tax returns submitted for the record are incomplete.

For the foregoing reasons, the evidence submitted on appeal fails 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.