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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-02-168-52578 Office: CALIFORNIA SERVICE CENTER Date: SEP 20 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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, 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 roofing services firm. It seeks to employ the beneficiary permanently in the United States as a roofer. 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 accordingly denied the petition.

On appeal, counsel states that the tax returns of the petitioner's owner show taxable income which is sufficient to pay the proffered wage during the relevant period.

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 [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 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). The priority date in the instant petition is November 8, 1996. The proffered wage as stated on the Form ETA 750 is $21.77 per hour, which amounts to $45,281.60 annually.

The evidence indicates that the petition is a sole proprietorship. With the petition, the petitioner submitted copies of Schedule C, Profit and Loss from Business (Sole Proprietorship), for the years 1999 and 2000.

The director found the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore on June 25, 2002, the director requested additional evidence pertinent to that ability. 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. The director also requested additional evidence to establish that the beneficiary possessed the three years of experience in the offered position as of the priority date as required on the ETA 750.

In response, the petitioner submitted a letter dated September 16, 2002 and the following evidence: copies of Form 1040, U.S. individual income tax joint returns for the petitioner's owner and his wife for 1998, 1999, 2000, and 2001; copies of Form 540 California resident income tax returns for 1998, 1999, 2000, and 2001; copies of W-2 wage and tax statements for the petitioner's employees for 1997, 1998, 1999, 2000 and 2001; a copy of the petitioner's payroll record for the pay period ending April 20, 2002; and a copy of the petitioner's wage and tax register for the quarter ending June 30, 2002.

The director issued a second request for evidence (RFE) dated November 6, seeking further evidence on the beneficiary's experience and requesting the petitioner's federal tax returns for 1996 and 1997, with all accompanying schedules and tables.

In response, counsel submitted a letter dated January 22, 2003 and the following evidence: a copy of a letter dated September 1992 from a construction company in Mexico attesting to the beneficiary's experience with that company from 1989 to 1992; a copy of a letter dated December 2, 2002 from an architect apparently with that same construction company attesting to the beneficiary's experience as a roofer with the company from 1989 to 1992; copies of the beneficiary's Form W-2 wage and tax statements for 1996; a copy of the beneficiary's Form 1040A U.S. Individual Income Tax Return for 1996; and a copy of the beneficiary's Form 540A California Resident Income Tax Return for 1996.

The director issued a third RFE on March 21, 2003, again requesting copies of the petitioner's federal tax returns for 1996 and 1997, with all tables and charts.

In response, counsel submitted a letter dated June 13, 2003 stating that the petitioner's federal tax returns for 1996 and 1997 were unavailable and requesting a decision based on the evidence already submitted.

In a decision dated July 28, 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 the following additional evidence: a copy of a Form 4564 Information Document Request dated May 4, 1999 issued to the petitioner's owner by an Internal Revenue Service revenue agent concerning the owner's 1996 taxes; an unsigned and undated Form 872 Consent to Extend the Time to Assess Tax for the petitioner's owner and his wife for 1996; a copy of a California Franchise Tax Board Notice of Proposed Assessment dated February 29, 2000 issued to the petitioner's owner and his wife; and copies of four quarterly reports for 1996 titled Deposits and Filings, prepared by ADP Tax Filing Service for the petitioner's owner.

Counsel states on appeal that the petitioner was unable to submit the 1996 and 1997 tax returns when previously requested by the director due to an IRS audit. Counsel states that the 1996 and 1997 tax returns are being submitted with the appeal, though in fact those returns are not among the documents submitted with the appeal. Counsel states that the petitioner's 1996 revised taxable income and 1997 gross income were sufficient to pay the proffered wage in those years.

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.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1993. The I-140 petition states in Part 5 that the petitioner was formed in 1990, has a gross annual income of $772,745.00 and has seven employees.

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, the record contains copies of the beneficiary's Form W-2 wage and tax statements for 1996, showing income received from the petitioner and from another employer during that year. The W-2 form from the petitioner shows compensation of $4,500.07 to the beneficiary that that year. Since that amount is less than the proffered wage of $45,281.60, that evidence fails to establish the petitioner's ability to pay the proffered wage that year. The record contains copies of the W-2 forms for the petitioner's employees for 1997, but no W-2 form for the beneficiary is among the copies of the 1997 W-2 forms submitted.

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 sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040, U.S. Individual Income Tax Return. The petitioner failed to submit the tax returns of the petitioner's owner for 1996 and 1997. The tax returns in the record for the petitioner's owner and his wife show the following amounts for adjusted gross income: $133,364.00 for 1998; $121,051.00 for 1999; $112,465.00 for 2000; and $115,839.00 for 2001. The tax returns of the petitioner's owner and his wife show two dependent children in 1998 and 1999 and one dependent child in 2000 and 2001. The amounts remaining for the personal household expenses of the petitioner's owner after paying the proffered wage of $45,281.60 to the beneficiary would have been $88,082.40 in 1998; $75,769.40 in 1999; $67,183.40 in 2000; and $70,557.40 in 2001. Those amounts are considered to be sufficient to pay the reasonable household expenses of the petitioner's owner and his family.

Although the tax returns of the petitioner's owner and his wife are sufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, 2000 and 2001, the record before the director contained no further evidence relevant to the petitioner's ability to pay the proffered wage during 1996, which is the year of the priority date, nor for 1997. Therefore the evidence submitted prior to the director's decision 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 incorrectly stated the proffered wage as $41,760.00 annually. The correct figure is $45,281.60, which is the hourly wage of $21.77 multiplied by 40 hours per week, and then multiplied by 52 weeks. The director also stated that his analysis was based on the figures for gross income of the petitioner's owner and his wife. But the figures actually used by the director in his analysis were the figures for gross income for 1998, for business income from the petitioner for 1999, and for adjusted gross income for 2000 and 2001. The director correctly stated that the petitioner's federal tax returns for 1996 and 1997 had not been submitted in evidence. Despite the errors in analysis by the director, the director correctly concluded that the evidence failed 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. The director therefore denied the petition, a correct decision based on the evidence then in the record.

On appeal, counsel submits additional evidence consisting of a copy of a Form 4564 Information Document Request dated May 4, 1999 issued to the petitioner's owner by an Internal Revenue Service revenue agent concerning his 1996 taxes; an unsigned and undated Form 872 Consent to Extend the Time to Assess Tax for the petitioner's owner and his wife for 1996; a copy of a California Franchise Tax Board Notice of Proposed Assessment dated February 29, 2000 issued to the petitioner's owner and his wife; and copies of four quarterly reports for 1996 titled Deposits and Filings, prepared by ADP Tax Filing Service for the petitioner's owner.

In his brief counsel states that the petitioner's tax returns for 1996 and 1997 were unavailable previously because of an IRS audit, and that they are now being provided. But in fact, the submissions on appeal do not include copies of the 1996 and 1997 tax returns of the petitioner's owner and his wife.

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. The only evidence of the tax filings of the petitioner's owner among the documents newly submitted on appeal consists of copies of four quarterly reports for 1996 titled Deposits and Filings, prepared by ADP Tax Filing Service for the petitioner's owner. Those documents show the federal withholding tax payments made by the petitioner's owner relating to the petitioner's employees, but they do not show the adjusted gross income of the petitioner's owner and his wife. Concerning 1997, the evidence newly submitted on appeal contains no information. Therefore the evidence newly submitted on appeal fails to establish the petitioner's ability to pay the proffered wage in 1996 and

1997. For the foregoing reasons, even if the evidence newly submitted on appeal were properly before the AAO, it would fail 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.