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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005
WAC-03-087-55233

IN RE: Petitioner:
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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and an appeal was dismissed by the Administrative Appeals Office (AAO) on appeal. The matter is again before the AAO following a second transmittal of the file from the director. The appeal will remain dismissed and the petition will remain denied.

The file has been transmitted to the AAO a second time apparently because the director found that certain documents submitted by the petitioner had not been forwarded to the AAO to be placed in the file. The director has now placed those documents in the file and has transmitted the file to the AAO.

A description of the relevant procedural history is set forth below.

The decision of the director was issued on July 14, 2003 and a notice of appeal to the AAO was timely filed on August 15, 2003. On the I-290B notice of appeal, signed by counsel on August 14, 2003, counsel checked the block indicating that she would be sending a brief and/or evidence to the AAO within 30 days. The record was transmitted to the AAO on September 9, 2003 without any further documentation in the file. The record as transmitted to the AAO by the director included copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001 and 2002, but no copies of the petitioner's tax returns for any earlier years.

Counsel later submitted to the AAO a letter dated October 15, 2003, accompanied by additional evidence. The additional evidence included a letter from the Internal Revenue Service dated September 26, 2003, with attached IRS transcripts of the petitioner's federal tax returns for 2001 and 2002. The other evidence submitted with counsel's letter consisted of copies of the beneficiary's Form W-2 Wage and Tax Statements for 1995 and 1996.

In her letter dated October 15, 2003, counsel stated that the petitioner had previously submitted certified copies of the petitioners tax returns for the years 1996, 1997, 1998 and 1999. Despite counsel's assertions, no copies of those returns were found in the record.

In her letter, counsel also stated that copies of the petitioner's tax returns for "2001, 2001 & 2002" had been provided in response to a request for evidence. (Letter from counsel, October 15, 2003). Counsel's first reference to the "2001" return was an apparent typographical error, where counsel apparently intended "2000." Copies of those three tax returns were in the record as transmitted to the AAO, as noted above.

The AAO found good cause for the submission more than 30 days after the notice of appeal of the additional evidence accompanying counsel's letter dated October 15, 2003. Therefore the record on appeal also included IRS transcripts of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002, and copies of the beneficiary's Form W-2 Wage and Tax Statements for 1995 and 1996. No brief was found in the record on appeal.

In a decision dated January 21, 2004 the AAO dismissed the appeal, finding 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.

Following the AAO decision, the file was transmitted to the director. CIS electronic records show that the file was received by the director on January 28, 2004. A dismissal of the appeal was entered in CIS electronic records on March 17, 2004. However, on June 3, 2004 the file was again transmitted to the AAO.

The file as received by the AAO the second time contains on the non-record side a processing sheet from the director's office dated June 1, 2004, showing the processing of a motion. The file now also contains on the non-

record side a motion to reopen and reconsider from counsel to the director date-stamped as received by the director's office on August 18, 2003. That date was three days after the August 15, 2003 date on which the I-290B notice of appeal was received by the director's office. That motion was not in the file when the file was first transmitted to the AAO.

The file now also contains a letter from counsel dated August 29, 2003, date-stamped as received by the director's office on September 5, 2003. With counsel's letter are IRS-certified copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1996, 1997, 1998 and 1999, and an envelope from counsel addressed to the director's office, date-stamped as received on September 5, 2005. Those are the tax returns which counsel in her letter of October 15, 2003 said that she had submitted earlier, but which were not in the file when the file was first transmitted to the AAO.

All of the documents described above were submitted to the director prior to the AAO decision of January 21, 2004. It is apparent that after the file was returned to the director following the AAO's decision, the documents were then placed in the file and the processing sheet dated June 1, 2004 was also placed in the file. The director apparently then determined that the file should be transmitted to the AAO a second time.

Counsel's motion to reopen or to reconsider will be discussed first, and the additional evidence now in the file will then be discussed.

Concerning motions to reopen or to reconsider, the regulation a 8 C.F.R. § 103.5(a)(1) states in part as follows:

> (i) *General* Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242 and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision. . . .
>
> (ii) *Jurisdiction* The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. . . .

Concerning the time to file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) states in part as follows:

> Any motion to reconsider an action by [CIS] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [CIS] filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of [CIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b).

As noted above, the decision of the director was issued on July 14, 2003. The 33-day period after that date expired on Saturday, August 16, 2003. By operation of the regulation at 8 C.F.R. § 1.1(h), the deadline for filing a motion to reopen or a motion to reconsider was extended until Monday August 18, 2003. Therefore counsel's motion to reopen to the director was timely.

Although counsel's motion to reopen or reconsider was timely, counsel was on notice that her previous filing of the I-290B notice of appeal would cause the appeal and the record of proceeding to be transmitted to the AAO in Washington, D.C. Upon receipt of a notice of appeal, the regulation at 8 C.F.R. § 103.3(a)(2) requires the official

who made the unfavorable decision to review the appeal and to decide whether or not favorable action is warranted. If the official decides that favorable action is not warranted, the regulation states that the official "shall promptly forward the appeal and the related record of proceeding to the [AAO] in Washington, D.C." 8 C.F.R. § 103.3(a)(2)(iv).

CIS electronic records indicate that the file was not transmitted to the AAO until September 2, 2003. The petitioner's motion to reopen and reconsider did not reach the file by that date.

Since counsel's filing of the notice of appeal had begun the process of file transfer to the AAO, counsel's later filing of a motion to reopen and reconsider was procedurally inconsistent with the notice of appeal. Moreover, the motion was not submitted on Form I-290A, as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii). For the foregoing reasons, the petitioner motion to reopen or to reconsider was not a properly filed motion.

As noted above, the file now also contains a letter from counsel dated August 29, 2003, accompanied by additional evidence. Those documents were received by the director on September 5, 2003. 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). Concerning evidence submitted on appeal after the filing of an I-290B notice of appeal, the I-290B form states that a brief and/or evidence are to be submitted to the AAO. The instructions on the reverse side of the I-290B form similarly state: "You may submit a brief, statement and/or evidence *with* this form. Or you may send these materials to the [AAO] within 30 days of the date you sign this form." The address of the AAO is then stated in the instructions. (Form I-290B, Instructions, section 4.)

Counsel's letter dated August 29, 2003, accompanied by additional evidence was submitted to the director, not to the AAO. The address on the letter is that of the California Service Center, which is also the address on the envelope which is found in the file immediately below those evidentiary documents. Since the evidence was submitted to the director, rather than to the AAO, the submission did not comply with the instructions on the I-290B form. That additional evidence was placed in the file after the AAO's decision. But that evidence would not have been properly before the AAO even if those documents had been forwarded by the director to the AAO prior to the AAO's decision in this case.

Nonetheless, even if the additional evidence submitted with counsel's letter dated August 29, 2003 were properly before the AAO, that evidence would fail to establish the petitioner's ability to pay the proffered wage. A full analysis of all the evidence now in the file follows below.

The petitioner is a glass and mirror company firm. It seeks to employ the beneficiary permanently in the United States as a glazier. A photocopy of Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In a letter dated December 30, 2002 accompanying the petition, counsel stated that the original ETA 750 had been lost and requested that CIS request a duplicate certification from the Department of Labor. Under Department of Labor regulations, a duplicate copy of an approved ETA 750 labor certification may be issued only after a written request of a Consular officer or a CIS officer. *See* 22 C.F.R. § 656.30(e) (Jan. 1, 2004 ed.).

The non-record side of the file contains a copy of a facsimile transmission from the director to the Department of Labor dated March 17, 2003 requesting a duplicate copy of the labor certification. The non-record side of the file also contains a letter dated April 23, 2003 to the director from an official of the Employment and Training Administration, U.S. Department of Labor, along with a duplicate copy of the ETA 750.

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 December 28, 1995. The proffered wage as stated on the Form ETA 750 is $14.18 per hour, which amounts to $29,494.00 annually. On the Form ETA 750B, signed by the beneficiary on December 22, 1995, the beneficiary claimed to have worked for the petitioner beginning in June 1995 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on January 22, 2003. On the petition, the petitioner claimed to have been established on May 1, 1988, to currently have four employees, and to have a gross annual income of $1,100,000.00. In the item for net annual income the petitioner wrote "Not available." (I-140 petition, Part 5).

In his decision, the director found 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.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 December 22, 1995, the beneficiary claimed to have worked for the petitioner beginning in June 1995 and continuing through the date of the ETA 750B.

As noted above, the record before the AAO in its previous decision included copies of Form W-2 Wage and Tax statements of the beneficiary, for 1995 and 1996, showing compensation received from the petitioner. The amounts on those Form W-2's are as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1995	$9,280.00	$29,494.40	$20,214.40
1996	$15,680.00	$29,494.40	$13,814.40

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in either 1995 or 1996. Moreover, the record contains no copies of Form W-2's for the beneficiary for later 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 a corporation. The record before the AAO in its previous decision contained copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2001 and 2002. The additional evidence now in the file includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1996, 1997, 1998 and 1999.

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. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1995	not submitted	$20,214.40*	no information
1996	$5,310.00	$13,814.40*	-$8,504.40
1997	-$36,409.00	$29,494.40**	-$65,903.40
1998	$14,016.00	$29,494.40**	-$15,478.40
1999	-$30,104.00	$29,494.40**	-$59,598.40
2000	$16,050.00	$29,494.40**	-$13,444.40
2001	$17,939.00	$29,494.40**	-$11,555.50
2002	$29,971.00	$29,494.40**	$476.60

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in 1995 through 2001. Only in 2002 was the petitioner's net income higher than 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 amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed
	Beginning of year	End of year	to pay the proffered wage
1995	not submitted	not submitted	$20,214.00*
1996	-$62,045.00	-$54,791.00	$13,814.40*
1997	-$54,791.00	-$105,227.00	$29,494.40**
1998	-$105,227.00	-$90,445.00	$29,494.40**
1999	-$90,445.00	-$118,425.00	$29,494.40**
2000	-$118,425.00	-$87,705.00	$29,494.40**
2001	-$87,705.00	-$66,460.00	$29,494.40**
2002	-$66,460.00	-$36,033.00	$29,494.40**

* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage for any of the years at issue in the instant petition.

The file contains no other evidence relevant to the petitioner's ability to pay the proffered wage.

As noted above, the petitioner's motion to reopen or to reconsider submitted to the director on August 18, 2003 was not a properly filed motion. Nonetheless, even if that document is considered as a brief on appeal, the assertions of counsel therein fail to overcome the decision of the director.

Counsel asserts that the petitioner's gross income of $1,100,000.00 annually is sufficient *prima facie* evidence of the petitioner's ability to pay the proffered wage. However, as noted above, CIS looks to net income, rather than to gross income, in evaluating a petitioner's ability to pay the proffered wage. Counsel also asserts that the petitioner had been incurring significant costs for subcontractors for glazing services which would be performed by the beneficiary in-house at a significant cost savings. Counsel states that the subcontracting costs as shown on the petitioner's Form 1120, Schedule A, Line 2 were $64,035.00 in 2000; $77,192.00 in 2001; and $92,085.00 in 2002. Counsel makes no assertions about subcontracting costs for prior years.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The figures cited by counsel appear as expenses itemized as "outside services" on the petitioner's tax returns for 2000 and 2001 and itemized as "subcontractors" on its return for 2002. But the record lacks evidence that any part of those expenses would be saved upon the hiring of the beneficiary. Moreover, no assertions of potential cost savings are made about the years 1995 and 1996, when the beneficiary was working for the petitioner, though receiving compensation each year significantly less than the annual proffered wage. Nor does counsel make any assertions about potential cost savings in 1998 or 1999.

Counsel asserts that the beneficiary was employed by the petitioner from 1995 to 1998. However the only evidence in the record of the beneficiary's employment consists of the beneficiary's Form W-2's for 1995 and

1996, which are discussed above, and which fail to establish the petitioner's ability to pay the proffered wage in those years.

Finally, counsel asserts that the director should have considered all of the petitioner's documents offered in evidence, even those which were not submitted by the deadline date of the director's request for evidence (RFE). However, under the regulations the director had no discretion to grant an extension of time to respond to the RFE. The period for responding to an RFE is set by regulation as twelve weeks from the date of the RFE. *See* 8 C.F.R. § 103.2(b)(8).

In any event, however, even if all the evidence now in the file were properly before the AAO, the evidence would fail 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, for the reasons discussed above.

For the reasons discussed above, the assertions of counsel and the additional evidence which was not in the file prior to the AAO's previous decision 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 remains dismissed and the petition remains denied.