U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 25 2005

SRC 03 107 54262

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a manager, retail store. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 that the integrity of the evidenced did not allow for a favorable decision.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(i) of 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, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 24, 2001. The proffered salary as stated on the labor certification is $15.91 per hour or $33,092.80 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The return reflected a taxable income before NOL deduction and special deductions of $42,847 and net current assets of $124,269.

The director considered this documentation insufficient, and, on August 13, 2003, he requested additional evidence of the petitioner's ability to pay the proffered wage. The director specifically requested that the petitioner provide a copy of the beneficiary's 2002 Form W-2, Wage and Tax Statement, and a copy of the beneficiary's entire 2002 income tax return.

In response, counsel provided a copy of the beneficiary's 2002 Form W-2, and a copy of the beneficiary's 2002 Form 1040, U.S. Individual Income Tax Return. Both the Form W-2 and the tax return reflected wages paid to the beneficiary of $2,400.

On September 19, 2003, the director issued a Notice of Intent to Deny informing the petitioner of several discrepancies in the record and stating that if the petitioner wished to pursue the petition, the petitioner would need to submit all its W-2s for 2001 and 2002, its federal tax return for 2002, the job titles of all the employees with notations on whether they are full-time or part-time workers, and Form 8821, Tax Information Authorization, allowing CIS access to the petitioner's tax records that were actually filed with the IRS. The petitioner would also need to provide an explanation concerning the discrepancies between the beneficiary's low wage total and the statement that he worked full-time. Also, the petitioner would need to provide the reason for the inaccuracies on the ETA 750 and G-325, Biographic Information, (included with the concurrently filed I-485, Application to Register Permanent Residence or Adjust Status).

In response to the Notice of Intent to Deny, the petitioner, through counsel, submitted Form 8821 and amended copies of Forms ETA-750 and G-325. Counsel states:

> The beneficiary worked for J. H. Food Store for only a short time. While at this part-time job, Beneficiary was set-up for selling a beer to a minor. It is normal reaction, when something bad happen, one tends to suppress the "bad" memory and only keep the "good" memory. As a result, the beneficiary had unintentionally failed to put down this "bad" memory onto the G-325. Beneficiary hereby apologizes for the inconvenience he has caused. Attached are amended G-325 and ETA-750 Part-B.
>
> Please note that Labor Department only certified the Job (ETA-750 Part-A) and not the alien (ETA-750 Part-B). Therefore, it is permissible to amend ETA-750 Part-B without invalidating the approved Labor Certification. In fact, employer can substitute employee at will.
>
> Labor Certification is granted by the Regional Certifying Officer pursuant to 20CFR 656. Technical Assistance Guide No. 656, Labor Certification U.S. Department of Labor, Employment and Training Administration at page 34 states:
>
> "The employer's guarantee to pay the prevailing wage is operative from the time a petition filed under Section 245 of the Act is approved..."
>
> In the instant case since 20CFR 656 only requires the employer to pay the prevailing wage after Section 245 is approved. The employer maintains that whatever was paid to the employee is not germane to the instance case and for similar reason, request for income tax returns and W-2s for the beneficiary cannot be complied with.

> Attached herewith employer submitting affidavit affirming under oath that employer will pay the proffered rate of pay in the amount of $33,092.80 to the beneficiary upon "the petition (application) under Sec. 245 of the Act is approved as required by 20CFR 656."
>
> IRS From [sic] 8821 has been signed as requested.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and when reviewing the totality of the record, that the integrity of the evidence did not allow a favorable decision, and, on December 10, 2003, denied the petition.

On appeal, counsel states:

> Moreover, the prospective U.S. employer is required to show the ability to pay the beneficiary the proffered wage. Given the priority date of April 24, 2001, the employer is only required by regulations to show the ability to pay the prevailing wage since April 2001. But it must be emphasized that the law does not require the petitioner to pay the offered wage until after permanent residence is granted. 20 C.F.R. § 626.209(c)(2). Appellant submitted a copy of its 2001 corporate income tax return indicating more than $2.9 million in revenues, $265,394 in gross profits, and $42,847 in net income. However, the Texas Service Center failed to consider the $62,137 in salaries and wages the appellant paid to its employees in conjunction with the net profit, which totals $104,984. Additionally, Appellant deducted nearly $3,000 as depreciation, which is a non-cash deduction, thus giving appellant even more cash to pay the prevailing wage. Therefore, the Texas Service Center erred in finding that "if the beneficiary had been paid $33,092.80 as a Night Manager, that would have left less than half the wages to be shared by the four other employees." Not only does the appellant have the money to pay the prevailing wage of $33,092.80, there would remain in excess of more than twice the figure cited by the Texas Service Center. Therefore, appellant has met its burden of proving its ability to pay the prevailing wage.

At the outset, the petitioner failed to submit all the requested evidence in its response to the director's Notice of Intent to Deny. The petitioner specifically failed to provide copies of all its W-2s for 2001 and 2002 as well as the job titles of all its employees and whether the employees are part-time or full-time workers. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the above-mentioned documentation was not provided. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 and 2002.

As an alternative 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 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 CIS 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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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 petitioner's net current assets during 2001 were $124,269. The petitioner could have paid the proffered wage in 2001 from its net current assets; however, since neither the petitioner nor the director (through Form 8821) provided evidence of the petitioner's 2002 federal tax return, the AAO cannot conclude that the petitioner had the ability to pay the proffered wage in 2002

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

from its net current assets. It is noted that the petitioner filed its appeal on January 13, 2004. The petitioner's 2002 federal tax return should have been available to submit on appeal.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $42,847 and net current assets of $124,269. The petitioner could pay the proffered wage in 2001 from either its taxable income or its net current assets. However, again, since neither the petitioner nor the director provided the 2002 federal tax return, the AAO is unable to determine if the petitioner had the continuing 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. *See* 8 C.F.R. § 204.5(g)(2).

In addition to the issue of ability to pay the proffered wage, there are several other issues raised by the director that the petitioner has failed to successfully address. The first issue is the inconsistent statements regarding hours worked and wages paid to the beneficiary.

The petitioner asserts that the beneficiary worked in the position of full-time night manager in 2002. However, the beneficiary's 2002 Form W-2 reflects wages earned of $2,400. For one-year's worth of full-time employment, these wages would equal approximately $46.15 per week or $1.15 per hour, well below the proffered wage, the prevailing wage, and the minimum wage. It is unimaginable to think anyone with a family of three would accept a full-time position at such a small wage. The petitioner has provided no explanation or evidence for this inconsistency. The fact that the petitioner has not paid even the prevailing wage brings into question the petitioner's statement that it will pay the beneficiary the proffered rate of pay in the amount of $33,092.80 when the application under Section 245 of the Act is approved as required by 20 C.F.R. § 656.20(c)(2). *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.
>
> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The director also informed the petitioner of several other discrepancies, specifically involving the Form ETA-750 and the Form G-325. Those discrepancies included an address on the beneficiary's Form W-2 that was not listed on the Form G-325 in the list of residences for the last five years and a position with J.H. Food Store that was not listed on the ETA-750B or the G-325.

The petitioner provided amended forms ETA-750 and G-325 to show the changes in employment and address; however, this office is not persuaded by the petitioner's and the beneficiary's reasoning for excluding this information. The beneficiary under penalty of perjury signed both forms, and the petitioner

under penalty of perjury signed the Form ETA-750. The beneficiary may not exclude pertinent information for the adjudication of a petition simply because it brings up a "bad memory". *See Matter of Ho, supra.*

In summary, the record is not conclusive as to whether the petitioner has established that it had the continuing ability to pay the proffered wage beginning at the priority date, April 24, 2001. However, the appeal will be dismissed due to the petitioner's failure to submit evidence requested by the director and also due to the petitioner's failure to adequately explain the inconsistencies in the record.

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.