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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 20 2005
EAC-03-112-52393

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

The petitioner is a car wash. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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.

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 April 13, 2001. The proffered wage as stated on the Form ETA 750 is $23.45 per hour, which amounts to $48,776.00 annually. On the Form ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 2000 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on January 31, 2003. On the petition, the petitioner claimed to have been established on November 6, 1991, to have a gross annual income of $374,849.00, and to have a net annual income of $363,704.00. The item on the petition for the petitioner's current number of employees was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 30, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on December 27, 2003.

In a decision dated February 2, 2004, 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 states on appeal that the petitioner's tax return for 2001 reflects the lowered level of economic activity in New York City following the attacks of September 11, 2001 and that therefore it is not an indication of the petitioner's ability to pay the proffered wage in the future. Counsel also states that the director's analysis relied too heavily on the petitioner's net income and failed to consider other factors.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the instant case, the evidence submitted on appeal includes a copy of a preliminary report dated September 28, 2001 by an organization in New York City on the effects of the September 11, 2001 attacks; a letter dated March 1, 2004 from a certified public accountant; and copies of pay statements of the beneficiary. None of those documents were specifically requested by the director. The other evidence submitted on appeal is a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003. The director had requested copies of any W-2 forms showing compensation from the petitioner to the beneficiary. However, the record before the director closed on December 27, 2003 with the petitioner's submission in response to the RFE. As of that date, the beneficiary's W-2 form for 2003 was not yet available. For the above reasons, no grounds would exist to preclude any of the foregoing documents from consideration on appeal. Therefore, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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 March 28, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 2000 and continuing through the date of the ETA 750B.

No evidence was submitted of any compensation by the petitioner to the beneficiary in the year of the priority date of 2001 or in 2002.

The record contains copies of pay statements issued by the petitioner to the beneficiary dated in 2003 and 2004, and a copy of the beneficiary's Form W-2 Wage and Tax Statement from the petitioner for 2003. The pay statements show weekly pay amounts of $938.00. The latest pay statement for 2003 is dated December 14, 2003, and it shows total earnings to date of $5,628.00. The Form W-2 for 2003 shows wages, tips and other compensation of $7,504.00 received from the petitioner for the year, an amount consistent with the pay statements, since two additional pay periods remained in the year 2003 after the pay period ending on December 14, 2003. The pay statements for 2003 and the W-2 form for 2003 indicate that the beneficiary worked a total of eight weeks for the petitioner in 2003.

The latest pay statement in 2004 is for the pay period ending on February 22, 2004, and it shows total earnings to date to be $7,504.00. Those pay statements indicate that as of February 22, 2004, the beneficiary had worked a total of eight weeks for the petitioner in 2004.

The evidence in the record of payments by the petitioner to the beneficiary 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. Although the beneficiary claimed on the ETA 750 to have begun working for the petitioner in September 2000, no evidence was submitted of any compensation by the petitioner to the beneficiary in the year of the priority date of 2001 or in 2002. Moreover, for the years 2003 and 2004 the amounts of compensation received by the beneficiary were less in each year than the proffered wage of $48,776.00. The amount needed to raise the beneficiary's actual compensation to the proffered wage would be $7,504.00 in 2003 and that same amount in 2004.

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 an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from

sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irs.gov/pub/irs-03/i1120s.pdf, Instructions for Form 1120, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income.

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

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$22,546.00	$48,776.00*	-$26,230.00
2002	$15,615.00	$48,776.00*	-$33,161.00

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

As noted above, the record before the director closed on December 27, 2003 with the petitioner's submission in response to the RFE. As of that date the petitioner's tax return for 2003 was not yet available. Therefore, the petitioner's tax return for 2002 was its most recent return available.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage either in 2001 or in 2002.

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 to pay the proffered wage
	Beginning of year	End of year	
2001	$9,353.00	$5,737.00	$48,776.00*
2002	$5,737.00	$6,118.00	$48,776.00*

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

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage either in 2001 or in 2002.

The record contains a copy of a report dated September 28, 2001 entitled Economic Impact of the September 11 World Trade Center Attack: Preliminary Report, by the Fiscal Policy Institute, of New York, New York. That report estimates total lost output to the New York City economy as a result of the attacks to be $16.9 billion, including direct effects on the businesses in the vicinity of the attack and indirect effects on related industries and in weaker consumer demand. Those estimates, made less than three weeks after the attacks, rely heavily on certain economic assumptions, since actual data on many of the effects of the attacks were obviously not yet available. But even if the estimates made in that report were accurate, the information in that report is not sufficient to establish the petitioner's ability to pay the proffered wage.

The petitioner's business location is on Soundview Avenue in the Bronx, a location at a significant distance from the site of the World Trade Center attacks. The record lacks any evidence of the specific effects of the attacks on the petitioner's business. Although the petitioner's business as a car wash might be expected to suffer from a general decline in discretionary consumer spending, it is not in a sector of the economy which the report estimates would be most directly affected by the attacks, such as air transportation and tourism.

Although temporary periods of unprofitability may be considered by CIS under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612, it is still necessary for the petitioner to submit evidence that establishes its ability to pay the proffered wage during the years at issue. The petitioner has failed to establish any variations in profitability in its business caused by the World Trade Center attacks or by any other factor.

The record also contains a copy of a letter from an accountant dated March 1, 2004. In that letter, the accountant states that the petitioner's tax return for 2001 reflected payments on leases totaling $2,949.26 per month, for total lease payments during the year of $35,391.12. The accountant states that as of the date of his letter, those lease obligations have been entirely paid off, thus freeing that amount in total cash flow which is now available for additional salaries.

It is unclear to what payments in 2001 the accountant's letter refers. The petitioner's Form 1120S for 2001 states no deductions for rent payments on line 11. The return shows $74,941.00 on line 19 for other deductions, but no schedule of those other deductions is attached to the copy of the Form 1120S for 2001 in the record. The accountant's letter fails to identify the property leased or to identify the lease periods. But in any event, even assuming the accuracy of the accountant's statements, the main point of the letter is that as of March 1, 2004, the petitioner's previous lease obligations had been paid off. Although that information would be relevant to the petitioner's ability to pay the proffered wage in the year 2004, the information in the accountant's letter fails to provide additional support to establish the petitioner's ability to pay the proffered wage in the years 2001, 2002 or 2003.

In his decision, the director correctly stated the petitioner's net income as shown on its 2001 return. The director erred in his analysis by adding to the petitioner's net income its deductions for depreciation. However, that error did not affect the director's conclusion, since even if depreciation expenses are considered as additional financial resources of the petitioner in 2001, the total of net income and deprecation is still less than the proffered wage. The director did not discuss the petitioner's tax return for 2002, apparently because the director determined that the failure of the evidence to establish the petitioner's ability to pay the proffered wage in 2001 rendered unnecessary any analysis of later years. The director's decision to deny the petition was correct, based on the evidence submitted prior to the director's decision. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In summary, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage in the year 2001 or in any other year thereafter.

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.