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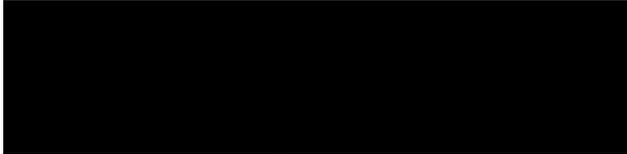
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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FILE: [REDACTED]
SRC-03-113-53418

Office: TEXAS SERVICE CENTER Date: JUN 22 2007

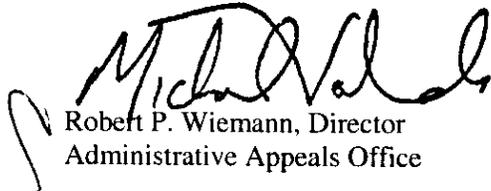
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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 law office. It seeks to employ the beneficiary permanently in the United States as a paralegal. 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 August 1, 2002. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040.00 annually. On the Form ETA 750B, signed by the beneficiary on July 18, 2002, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on March 13, 2003. On the petition, the petitioner claimed to have been established in 1999, to currently have two employees, to have a gross annual income of \$150,000.00, and to have a net annual income of \$35,000.00. With the petition, the petitioner initially submitted no evidence.

In a request for evidence (RFE) dated July 14, 2003, the director requested evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and evidence that the beneficiary had the experience required by the ETA 750.

In response to the RFE the petitioner submitted evidence pertaining to the petitioner's ability to pay the proffered wage and pertaining to the beneficiary experience.

In a second RFE dated December 16, 2003, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by CIS on January 21, 2004.

In a decision dated February 5, 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, the petitioner submits additional evidence.

The petitioner states on appeal that the balances on the petitioner's bank statements submitted in evidence and the information on the petitioner's federal tax return for 2003 also submitted in evidence show the petitioner's ability to pay the proffered wage.

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). 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 documents submitted on appeal consist of a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 and copies of bank statements of the petitioner dated from July 31, 2003 through January 31, 2004. The record before the director closed on January 21, 2004 with the petitioner's submissions in response to the second RFE. As of that date the petitioner's tax return for 2003 was not yet due. Accordingly, that document is not precluded from consideration on appeal.

The director's second RFE, dated December 16, 2003, had requested copies of the petitioner's bank statements from August 2002 to the present. Five of the bank statements submitted on appeal are duplicates of statements submitted in response to the second RFE, statements which are dated July 31, 2003 through November 30, 2003. Statements dated December 31, 2003 and January 31, 2004 are newly submitted on appeal. Since those statements were issued after the date of the second RFE, the statements from December 2003 and January 2004 will not be precluded from consideration on appeal. For the foregoing reasons, 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 Sonogawa*, 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 July 18, 2002, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 record in the instant petition contains a partial copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001, lacking Schedule K and other supporting schedules, and copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2002 and 2003, with supporting schedules. On the 2002 and 2003 returns no income is shown on Schedule K other than the ordinary income figure from line 21 of the Form 1120S.

The petitioner's tax returns show the following amounts for ordinary income: -\$2,326.00 for 2001, -\$1,106.00 for 2002, and \$32,901.00 for 2003.

The petitioner's ordinary income for 2001 is not directly relevant to the instant petition, since the priority date is in the following year. The petitioner's ordinary income for 2002 is negative, therefore it fails to establish the petitioner's ability to pay the proffered wage in that year. The petitioner's ordinary income of \$32,901.00 in 2003 is higher than the proffered wage of \$27,040.00.

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.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 in the record lacks a Schedule L. Calculations based on that Schedule L's attached to the petitioner's 2002 and 2003 returns yield the following amounts for net current assets: \$21,250.00 for the beginning of 2002, \$3,036.00 for the end of 2002; and \$408.00 for the end of 2003. Each of those figures is less than the proffered wage of \$27,040.00. Therefore, those figures also fail to establish the ability of the petitioner to pay the proffered wage either in 2002 or in 2003.

The record also contains copies of bank statements. However, 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. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In his decision, the director correctly analyzed the petitioner's tax returns for 2001 and 2002, which were the only returns in the record at the time of the director's decision. The director also correctly analyzed the petitioner's bank statements in the record. The director found that the information on the petitioner's tax returns and on the petitioner's bank statements 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 decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence newly submitted on appeal 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.