U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-035-55258 Office: CALIFORNIA SERVICE CENTER Date: APR 28 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]

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a service station and convenience store. It seeks to employ the beneficiary permanently in the United States as a gas station and mini market manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is September 29, 1997. The beneficiary's salary as stated on the labor certification is $10.00 per hour or $20,800.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence consisted of copies of the following: Form 1120S U.S. income tax returns for an S corporation for the petitioner for 1996, pages 1 and 3, and 1997, pages 1 and 3.

In a request for evidence (RFE) dated February 25, 2002, the director requested additional evidence 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, and additional evidence to establish the beneficiary's experience.

The petitioner responded to the RFE by providing copies of the following: a letter dated March 31, 2002 from a previous employer of the beneficiary; a letter dated October 10, 2000 from an accountant; a letter dated February 8, 2002 from an accounting firm; an incomplete Form 1120S U.S. income tax return for an S corporation for the petitioner for the year 1998; a complete Form 1120S for the petitioner for the year 1999; and a California Form 100S franchise or income tax return for an S corporation for the petitioner for the year 2000.

In a second request for evidence dated June 25, 2002, the director requested additional evidence 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, and additional evidence to establish the beneficiary's experience.

In response to the second RFE the petitioner submitted a letter from the beneficiary dated September 16, 2002 and copies of the following: Form 1120S U.S. income tax return for an S corporation for the petitioner for the years 2000 and 2001; a summary Form 1120S printout for the petitioner for the year 2000; quarterly payroll statements for the petitioner for the last two quarters of 2001 and the first two quarters of 2002; a declaration dated August 19, 2002 from a manager at a previous employer of the beneficiary; a declaration dated August 28, 2002 from a former supervisor of the beneficiary as the same previous employer; pay stubs for the beneficiary from that former employer for selected pay periods between October 2, 1991 and October 29 1996; Form W-2 wage and tax statements for the beneficiary for the years 1990 through 1997 from three employers; and an Internal Revenue Service notice dated June 22, 1992 to the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also found that the petition had been improperly filed, because the response to the second RFE was submitted not by the petitioner but by the beneficiary. The director then denied the petition.

On appeal, counsel submits a brief and additional evidence. Some of the documents are additional copies of documents previously submitted. Newly-submitted for the first time on appeal are copies of the following: complete Form 1120S U.S. income tax returns for an S corporation for the petitioner for the years 1996, 1997 and 1998; and bank statements for the petitioner for two accounts at one bank, two accounts at a second bank, and two accounts at a third bank, for certain months between April 1996 and November 2001.

Counsel states on appeal that the gross receipts or sales and the gross profit of the petitioner during the relevant years were sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary.

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.

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 petitioner did not establish that it had previously employed the beneficiary.

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.

In the instant case the petitioner's Form 1120S tax returns show the following amounts on line 21 for ordinary income: -$137,019 for 1996; -$68,288 for 1997; $18,502 for 1998; $49,643 for 1999; $40,854 for 2000; and -$48,759 for 2001. The amounts in ordinary income for the years 1996, 1997 and 1998 were less than the proffered wage of $20,800. The ordinary income for 1999 and for 2000 was higher than the proffered wage, and

was therefore sufficient to establish the ability of the petitioner to pay the proffered wage in each of those two years.

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 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 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 the 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 Form 1120S tax returns for 1996 and 1997 submitted prior to the director's decision lack copies of Schedule L, therefore no analysis can be made of the petitioner's net current assets for those years. The Form 1120S tax returns for 1998 and 2001 each include a copy of Schedule L. Calculations based on the current assets and current liabilities shown on the Schedule L's for 1998 and 2001 yield the figures of -$56,385 for net current assets for the end of 1998 and -$12,393 for the end of 2001. Since those amounts are negative, they fail to establish the petitioner's ability to pay the proffered wage of $20,800 in 1998 or in 2001.

In summary, the petitioner's tax returns submitted prior to the director's decision fail to establish the ability of the petitioner to pay the proffered wage in 1997, 1998 or 2001. The figures for the year 1996 are not directly relevant in the instant case, since the priority date was in 1997.

The petitioner's tax returns submitted prior to the director's decision do establish the petitioner's ability to pay the proffered wage in 1999 and 2000.

The director correctly analyzed the tax returns in the record before him, and correctly concluded that the evidence failed to establish the ability of the petitioner to pay the proffered wage in 1996, 1997, 1998 or 2001, because the amount of net income was less than the proffered wage and because either the amount of net current assets in each of those years was also less than the proffered wage or no information was provided on which to base calculations of net current assets.

The director did not discuss the two letters from accountants in the records. The first of those letters is dated October 10, 2000 and is addressed to the petitioner. That letter is merely a cover letter transmitting to the petitioner certain unspecified tax returns which were prepared for the petitioner by that accountant. The letter states that the returns were prepared "without verification or audit." The second letter from an accounting firm is dated February 8, 2002. The letter transmits to the petitioner financial statements compiled for the petitioner by that accounting firm, based on the representations of the petitioner. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. The regulation at 8 C.F.R. § 204.5(g)(2) requires that any financial statements submitted in evidence be audited financial statements. That regulation neither states nor implies that an <u>unaudited</u> document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. The director was therefore correct in not considering the letters from accountants as evidence in the instant cases.

In his decision the director also found that the petition had been improperly filed. The director stated that the owner of the petitioning business had signed the I-140 petition, but that the response to the second RFE had been by the beneficiary. The director quoted from the letter dated September 16, 2002 from the beneficiary submitted in response to the second RFE, which states "This is in response to your request for evidence. I have enclosed my sponsor's federal tax returns for the years 2000 and 2001 . . ." The director stated that the beneficiary was not the

employer noted on the petition nor on the individual labor certification, and found that the petition had been improperly filed.

The director cited no regulation or other authority in support of his reasoning that a response to an RFE from a beneficiary rather than from a petitioner is grounds for finding the filing of the I-140 to have been improper.

The director erred in finding that the petition was improperly filed. The signature on the I-140 petition was that of the petitioner's president. The petition met all the requirements for filing as specified in 8 C.F.R. § 204.5(a). The fact that the response to the second RFE was submitted by the beneficiary is not a ground for finding the initial filing of the I-140 petition to be improper.

Based on the evidence submitted prior to the director's decision, the director was therefore correct in finding that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence. However, the director erred in finding that the initial filing of the petition was improper.

On appeal, counsel submits additional evidence consisting of complete copies of tax returns for 1996, 1997 and 1998 and copies of bank statements for certain months between April 1996 and November 2001. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

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 petitioner was put on notice by the director in the RFEs dated February 27, 2002 and June 25, 2002 that the evidence which it submitted was insufficient concerning the petitioner's ability to pay the proffered wage. The first RFE stated that "complete federal tax returns" should be submitted.

The petitioner therefore was given reasonable notice of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered.

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. Concerning the tax returns, the only additional relevant evidence submitted for the first time on appeal is the Schedule L for 1997. Calculations based on current assets and current liabilities as shown on that schedule yield a negative figure for net current assets for the end of 1997. Therefore the net current assets fail to establish the petitioner's ability to pay the proffered wage in 1997.

Concerning the bank statements submitted for the first time on appeal, the petitioner's submissions omitted certain months for each of the accounts for which statements were submitted. Therefore it is not possible to evaluate the petitioner's financial condition during the relevant period based on the bank statements.

Moreover, the record lacks any evidence that the bank statements represent additional funds beyond those of the tax returns.

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.