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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

FEB 24 2004

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair shop and gas station. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 April 21, 1999. The beneficiary's salary as stated on the labor certification is $775.00 per week or $40,300.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence submitted initially consisted of the following:

1. Copy of signed Form 1040 U.S. Individual Income Tax Return for 2000 for Humberto & Bibiana Garcia;
2. Copy of signed Form 1040 U.S. Individual Income Tax Return for 2001 for Humberto & Bibiana Garcia;
3. Letter from Humberto Garcia, Northwest Marathon, dated 7/6/02, describing the beneficiary's experience;
4. Letter from Humberto Garcia, Northwest Marathon, dated 7/6/02, stating his ownership of the business since 4/15/00; and
5. Letter from the Lincoln Continental Proprietors Club, Mexico City, dated 3/24/1999, describing the beneficiary's experience, with certified English translation.

In a request for evidence (RFE), dated September 6, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

In response to the RFE, counsel submitted a letter dated October 28, 2002 and the following documents:

6. Copy of signed Form 1040 U.S. Individual Income Tax Return for 1999 for Humberto & Bibiana Garcia;
7. Additional copy of signed Form 1040 for 2000 for Humberto & Bibiana Garcia;
8. Additional copy of signed Form 1040 for 2001 for Humberto & Bibiana Garcia;

9. Unaudited financial statements for the petitioner; and
10. Statement of monthly expenses for the owner's household.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal counsel submits the following evidence with the Form I-290B Notice of Appeal:

11. Copy of W-2 form for the beneficiary for 2000;
12. Copy of W-2 form for the beneficiary for 2001;
13. Copy of signed Form 1040 for 1999 for Donald J. Wilson, previous owner of the petitioner;
14. Additional copy of Form 1040 for 2000 for Humberto & Bibiana Garcia; and
15. Additional copy of Form 1040 for 2001 for Humberto & Bibiana Garcia

Counsel states on appeal that the evidence shows the petitioner's ability to pay the proffered wage from the priority date to the present.

An analysis of the evidence follows.

The evidence submitted by counsel for the first time on appeal consists of W-2 forms for the beneficiary for 2000 and 2001 and a Form 1040 tax return for 1999 for the previous owner of the petitioner. 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 as follows:

> Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. Where, however, 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 evidence submitted on appeal relates to the pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2), quoted in part on page two above, which states in full:

> *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].

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) and *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE, dated September 6, 2002, that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE specifically requested the petitioner's signed federal income tax return for 1999, a list of petitioner's recurring household expenses, and checking and savings account balances.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case 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 for the first time on appeal will not be considered for any purpose. We will therefore evaluate the director's decision based on an analysis of the evidence in the record prior to the director's decision.

The director analyzed the tax returns of the petitioner's owner for 1999, 2000 and 2001. The director found that the owner's total income in 1999 was $36,639. The director also found that the petitioner's Schedule C for 2000 showed gross receipts or sales of $1,543,763, but a net profit of only $4,209, and for 2001 gross receipts or sales of $2,406,213, but a net profit of only $16,832.

The director stated that the unaudited financial statements submitted by the petitioner were not an acceptable form of evidence. That ruling of the director was correct, since unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). The regulation neither states nor implies that an *unaudited* document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements..

The director found that the petitioner's income each year for 1999, 2000 and 2001 was less than the offered wage. The conclusion of the director that the evidence failed to establish the ability of the petitioner to pay the proffered wage was correct, but the analysis of the director was incomplete.

For the years 2000 and 2001, the director considered only the business income shown on the Schedule C's for each of those years. But since the petitioner is a sole proprietorship, the relevant financial information is that of the owner, not simply that of the business. The Form 1040s also show that the owner's adjusted gross income for 2000 was $14,837 and for 2001 was $12,899. These figures were less than the proffered annual wage of $40,300, even without making any deductions for the owner's household expenses.

A more fundamental error in analysis by the director was in failing to note that the current owner did not own the business as of the April 12, 1999 priority date. Therefore the current owner's tax records for 1999 have no relevance to the petitioner's ability to pay the proffered wage that year.

The ETA 750 form was signed on behalf of the petitioner on March 31, 1999 by "Donald J. Wilson, Owner." The Form 1040 for 1999 for the current owner Humberto Garcia and his wife had no attached Schedule C and

Line 12 for business income or loss was left blank. One of the letters from Mr. Garcia dated July 2, 2002 states that Mr. Garcia had owned the business since April 15, 2000. The tax returns for Humberto Garcia and his wife for 2000 and 2001 contain Schedule C's which identify the petitioner as a sole proprietorship. The I-140 petition was signed on behalf of the petitioner on July 8, 2002 by Humberto Garcia.

The record before the director lacked any evidence to explain how the current owner took over a business which had gross receipts or sales of $1,543,763 from April 15, 2000 until December 31, 2000. The record before the director also lacked any evidence to establish that the current owner had taken over all the rights, duties and obligations of the prior owner, as would be required to establish a successor in interest under the ruling in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Counsel's Notice of Appeal states that Donald J. Wilson was the previous owner of the petitioner. But counsel makes no mention of the successor in interest issue, nor does counsel state whether the current owner took over all the rights, duties and obligations of the prior owner.

The evidence in the record before the director therefore failed to establish that the petitioner, a sole proprietorship by the name of Northwest Marathon, was the successor in interest of the employer of the same name, Northwest Marathon, which had filed the ETA 750 on April 21, 1999 signed by "Donald J. Wilson, Owner," and received certification by the U.S. Department of Labor.

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.