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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

MAR 0 2 2004

FILE: WAC-02-194-52771 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner is an automotive assembly and export firm. It seeks to employ the beneficiary permanently in the United States as a marketing 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.

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 March 1, 1999. The beneficiary's salary as stated on the labor certification is $5,428.80 per month or $65,145.60 per year.

Counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The documentary evidence initially submitted with the I-140 petition consisted of the following:

1. Certificate and transcript showing a Bachelor of Arts degree obtained by the beneficiary at Osaka Gakuin University;
2. Educational evaluation from the International Education Research Foundation, confirming the equivalency of the beneficiary's degree with a U.S. Bachelor of Arts in Foreign Language;
3. Letter and transcript from the Travel and Trade Institute of Long Beach, CA showing a diploma in Foreign Trade and Transportation obtained by the beneficiary from that institute;
4. Letter dated May 7, 2002 from [redacted] former colleague of the beneficiary at Worldstar Imports, confirming the beneficiary's experience with that firm; and
5. Form 1120 federal tax return for the petitioner for 2000.

In a request for evidence (RFE) dated August 16, 2002, the director required additional evidence to establish the beneficiary's experience and 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. With regard to the petitioner's ability to pay the proffered wage the RFE stated the following:

> Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns (with appropriate signature(s)), or audited financial statements. If the petitioner's company has one hundred (100) or more workers a current statement from a financial officer will suffice.

> The petitioner is requested to provide this evidence from 1999 to 2001. In the case of a company that has over one hundred (100) or more workers a current statement from a financial officer will suffice.
>
> Note: The petitioner must provide evidence to pay the beneficiary's wage. Federal tax returns must have the appropriate signature(s).

In response to the RFE, counsel submitted a letter dated September 20, 2002 and the following documents:

6. Form 1120 federal tax returns for the petitioner for 1998, 1999 and 2000;
7. Certified English translation of a letter, dated August 30, 2002, from [redacted] former manager of the beneficiary's former employer, World Star Import, Santa Fe Springs, CA, confirming the beneficiary's experience with World Star Import (no copy of the Japanese original of this letter was submitted); and
8. Certified English translation of a letter, dated September 16, 2002, from Hideo Endo, former manager of Analisa Corporation, Yokohama City, Japan, a former corporate customer of World Star Import, confirming the beneficiary's experience with World Star Import. (No copy of the Japanese original of this letter was submitted).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because its taxable income was negative for 1998 and 1999, and denied the petition.

On appeal, counsel submits a brief and the following documents:

9. Copy of the Japanese original of a letter, dated August 30, 2002, presumably from [redacted]
10. Copy of the Japanese original of the letter, dated September 16, 2002, from [redacted]
11. Additional copies of Form 1120 federal tax returns for the petitioner for 1998, 1999 and 2000;
12. Forms 940 EZ and 940 federal unemployment (FUTA) tax returns for the petitioner for 1999, 2000 and 2001; and
13. Bank statements of the petitioner from October 31, 1998 through October 31, 2002.

Counsel states on appeal that the evidence as a whole shows the ability of the petitioner to pay the proffered wage.

An analysis of the evidence follows:

An initial question concerns the evidence submitted by counsel for the first time on appeal. With the exception of the additional copies of Form 1120 federal tax returns for the petitioner for 1998, 1999 and 2000, all of the evidence submitted with counsel's Notice of Appeal is being submitted for the first time on appeal. 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 issues of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The petitioner was put on notice by the director of the need for evidence on these issues by regulations which specifically address each issue.

Concerning the experience of the beneficiary the applicable regulation at 8 C.F.R. § 204.5(g)(1) states the following:

> *(g) Initial evidence -- (1) General.*
>
> . . .
>
> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Concerning the ability of the petitioner to pay the proffered wage the applicable regulation at 8 C.F.R. § 204.5(g)(2), which is quoted in part on page two above, states in full as follows:

> *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 regulations, 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 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 August 16, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the beneficiary's experience and concerning the petitioner's ability to pay the proffered wage. The RFE specifically requested evidence on both of those issues. With regard to the petitioner's ability to pay, the RFE mentioned that evidence on certain years was required, namely evidence on the years 1999, 2000 and 2001.

The RFE did not mention any of the newly-submitted documents by name or category. But the director would have had no way of knowing of the existence or the relevance of specific documents prior to receiving them as evidentiary submissions. Therefore the fact that the RFE did not mention by name certain documents or types of documents, such as bank statements or federal unemployment tax returns, does not relieve the petitioner from its burden of proving its case before the director. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed.

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 beneficiary's experience and 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 those issues 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 before the director.

In his decision, the director found that the petitioner's income tax return Form 1120 for the year 1998 showed a taxable income of negative (-)$475, 583, for the year 1999 a taxable income of negative (-) $813,113, and for the year 2000 a taxable income of $290,035. The director found that this information failed to establish that the petitioner had the ability to pay the proffered wage from the March 1, 1999 priority date and continuing until the beneficiary obtains permanent residence. The director's decision correctly summarized the information on those returns. It should be noted that the figures cited by the director were for the petitioner's net income before deductions for net operating loss and special deductions.[1]

In counsel's brief, counsel asserts that the negative income figures for 1998 and 1999 were not typical of the petitioner's business history and that the petitioner should be evaluated based on its full term of existence, which counsel states was nearly fifteen years. No evidence in the record mentions those facts asserted in counsel's brief. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The tax returns state 1988 as the date of incorporation. However, we have no evidence that the petitioner has a 15-year history of profit making.

Counsel also offers assertions based on evidence submitted for the first time on appeal, including assertions referring to bank statements of the petitioner. However, for the reasons stated above, that evidence is not being considered in this appeal.

The director's decision did not mention the petitioner's net current assets in the years covered by the petitioner's tax returns. The 1998 return covers the period from October 1, 1998 through September 30, 1999, and it therefore includes the March 1, 1999 priority date. The Form 1120 for 1998 submitted in evidence contains no schedule L, therefore no analysis of net current assets is possible. The Form 1120's for 1999 and 2000 similarly contain no Schedule L's as attachments, though the returns do contain explanatory statements on some of the items of assets and liabilities on the Schedule L. But those explanatory statements do not address all Schedule L line items, and therefore no evaluation of net current assets can be made from the 1999 and 2000 tax returns.

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[1]In determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] will examine the net income figure 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. supra,* 623 F.Supp at 1084, 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.

The director's decision that the evidence failed to establish the ability of the petitioner to pay the proffered wage is therefore correct.

Beyond the decision of the director, the evidence in the record before the director lacked copies of the Japanese-language originals of the letters from the beneficiary's former employer and from the former corporate customer of the beneficiary's former employer. The documents then in evidence were the English translations of those documents, with certificates of translation. An English-language letter from a former colleague of the beneficiary was also in the record. The letter from the former colleague explained that the former employer had gone out of business. But the former colleague's letter was insufficient to establish the beneficiary's experience, since it was not from the beneficiary's former employer and since it lacked the specific dates of employment of the beneficiary, his hours of work per week, and a specific description of the duties the beneficiary performed. The translations of the letters from [redacted] did contain those details. But the petitioner failed to submit copies of the Japanese originals of those letters in its response to the RFE or to offer any explanation for the absence of copies of the Japanese originals. Absent those documents or any explanation for their absence, the English translations of the letters from [redacted] and from [redacted] were deficient as evidentiary documents. *See* 8 C.F.R. § 103.2(b)(3). Therefore the evidence in the record prior to the director's decision failed to establish the beneficiary's prior experience.

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.