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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: SRC 02 038 51683 Office: VERMONT SERVICE CENTER Date: MAY 28 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant 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 on appeal. The appeal will be dismissed.

The petitioner is an auto shop. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on February 20, 2001, and approved by the Department of Labor on September 15, 2001. 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.

On appeal, counsel submitted a brief statement in support of the appeal, and additional evidence in the form of three Forms 941 (Employer's Quarterly Federal Tax Returns) for the first three quarters of 2002, and related documents showing wages paid by petitioner to the beneficiary in each quarter, and a balance sheet pertaining to Zeca's Auto Repair, Inc. as of September 30, 2002, prepared by Business Choice of South Florida, Inc.

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

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on February 20, 2001. The proffered wage as stated on the Form ETA 750 is $16.43 per hour, which equals $34,174.40 per year.

With the petition, counsel submitted a letter from [redacted] President of Zeca's Auto Repair relating to the job offer; a letter from the beneficiary's prior employer attesting to the beneficiary's experience with a former employer; Form 1120S 2000 Corporate Tax Return for Zeca's Auto Repair, Inc., the petitioner; and a set of unaudited financial statements as of August 31, 2001 providing information regarding Zeca's Auto Repair, Inc.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on April 8, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested information demonstrating that the petitioner had the ability to pay the wage/salary of $16.43 per hour ($34,174.40 per year) as of February 20, 2001. The Service Center noted that the unaudited financial statements provided did not demonstrate the ability to pay the wage, and noted that the 2000 U.S. Income Tax Return 1120S showed a net income of $3,621 and $353 in depreciation. The Service Center noted that while the petitioner maintained that it employed the beneficiary, no evidence was submitted in support of this contention.

In response, on May 31, 2002, counsel submitted the petitioner's 2001 Form 1120S Corporate Tax Return, the petitioner's owner's individual income tax return, and the beneficiary's wage statements for the years 2000 and 2001. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on September 5, 2002, denied the petition.

On appeal, counsel asserts that various documents submitted establish the petitioner's ability to pay the wage. However, he does not specifically identify what information in the documents submitted demonstrates such ability. In general, counsel argues that since the documents that have been submitted demonstrate that the petitioner is employing the beneficiary, it follows that the petitioner has the ability to pay the proffered wage. The only specific assertion on appeal is that the financial statement for 2002 shows that the corporation's assets exceed the amount of the salary being offered, and that such information, along with the fact that the company employs and pays the beneficiary is "sufficient proof of the company's past and future ability to pay the salary offered." Counsel also asserts that the director erred in failing to consider the individual tax return of the owner of the company.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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. Texas 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. v. Sava*, the court held that the INS, 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. *Supra* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The net income figures contained in the corporate tax returns do little to further the petitioner's case. The petitioner's net income figure for the 2000 return is $3,621, and the amount for the 2001 return is $4,246. Both amounts are significantly less than the offered salary.

Turning to the wage records, these records are likewise deficient. The beneficiary's W-2 records demonstrate, at best, wages of $10,600 paid in 2001, again, far less than the offered salary of $34,174.40.

The additional Forms 941, Quarterly Federal Tax Returns are similarly unhelpful. They demonstrate that on a quarterly basis, the petitioner pays approximately $10,000 in wages. Even if this amount were paid solely to the beneficiary, it would still fall short of the offered yearly salary, but the records reflect that the wages are paid to three individuals, including the beneficiary. The beneficiary's quarterly wages for the third quarter of 2002 are noted as $2,600, or $10,400 on an annual basis—or the amount equal to the beneficiary's wages for 2001. Again, this amount is significantly less than the proffered wage of $34,174.40.

Counsel also relies upon the unaudited financial records as of September 30, 2002, submitted to show that the assets of the corporation exceeded the proffered wage. Counsel does not specifically identify which figures from these financial records should be considered. Furthermore, the cover letter from the preparer makes clear that the records, which fail to conform to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2), do not reflect any opinion or other form of assurance as to the financial position of the company. Even if these records were satisfactory, the records themselves reflect a net income of $14,936.77, an amount below the proffered wage even if added to wages already paid.

Finally, counsel for the petitioner finds fault with the director's failure to consider the individual Form 1040 for [redacted] the President of Zeca's Auto Repair, Inc. The implication is that such financial information is relevant to the petitioner's ability to pay the wage.[1] However, counsel has provided no authority in support of such a petition. Moreover, authority exists that such records are not within the scope of documents to be considered. *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass, Sept. 18, 2003). In *Sitar*, the court was faced with a similar argument, wherein petitioner argued that the personal assets of a "director" should be considered in determining the ability to pay the proffered wage. The court responded as follows:

> Petitioner fails to adequately counter Respondent's main argument on this issue: that nothing in the governing regulation, 8 C.F.R. § 204.5 permits the INS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. Absent a legal obligation by Singh, the INS had no need to determine whether his income was sufficient to pay Avtar's salary...At bottom, Petitioner has not submitted evidence of its own ability to pay the proffered wage. Accordingly, the court cannot say that the INS's decision to restrict itself to an examination of assets under Petitioner's legal control was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'

Id.

Counsel has failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2002 or 2001. Therefore, he has not established that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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[1] It appears from a review of the record that the petitioner's counsel believed that the director had specifically sought such information as pertinent to the ability to pay the wage. However, the Notice of Action dated April 8, 2002, seeking additional evidence notes that an individual tax return was requested if the business was organized as a sole proprietorship, as opposed to being organized as a corporation. In the latter case, it is the corporate tax return that was sought.

ORDER: The appeal is dismissed.