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U.S. Department of Homeland Security

Citizenship and Immigration Services

OFFICE OF ADMINISTRATIVE APPEALS
425 I Street, N.W.
CIS AAO, Rm 3042
Washington, DC 20536

[redacted]

File: WAC 01 289 52575 Office: CALIFORNIA SERVICE CENTER Date: DEC 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 sustained.

The petitioner is a garment-manufacturing firm. It seeks to employ the beneficiary permanently in the United States as a pattern maker. As required by statute, the petition is accompanied by an individual labor certification 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.

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 hinges 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is $15.80 per hour or $32,864 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence dated February 2, 2002 (RFE), the director requested evidence to 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. Specifically, the RFE mentioned the petitioner's annual reports, federal tax returns, or audited financial statements from 1998 to the present, its quarterly wage report for the last four quarters (Form DE-6), and its business payroll summary (W-2 and W-3) for 2001.

Counsel submitted the requested documents both in response to the RFE and on appeal. The director reviewed the petitioner's 1998 to 2001 Form 1120, U.S. Corporation Income Tax Return, and found ordinary income to be, respectively, $28,272, $21,047, $24,463, and $30,627, less than the proffered wage.

The director determined that the petitioner did not show sufficient financial viability to warrant or support a permanent, full-time position and denied the petition.

On appeal, counsel argues that insufficient net income is no reason to conclude that the petitioner's cannot pay the proffered wage. On the contrary, in determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) 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 both CIS and 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. v. Sava*, 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Counsel claims that selected bank balances clearly verify sufficient income and resources to pay the proffered wage, but none exceeds $3,103.41. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972).

Counsel argues that consideration of the beneficiary's potential

to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. 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).

Notwithstanding these errors, the record justifies the review of net current assets, the difference of current assets minus current liabilities. Schedules L of Forms 1120S for 1998-2001 show net current assets of, respectively, $49,028, $40,317, $64,904, and $50,850, equal to or greater than the proffered wage.

Finally, the visa petition (Form I-140) indicated that the proffered position was not a new position, thereby implying that the beneficiary would be replacing a previously hired employee. Although the director did not inquire into this question in the RFE, the validity of the job offer would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization. However, as the record is devoid of evidence regarding the identity and actual salary of the previous employee, this factor may not be a basis of this decision. Regardless, a review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. *See Matter of Great Wall*, 16 I & N Dec. 142 (Acting Reg. Comm. 1977).

After a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

ORDER: The appeal is sustained.