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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D. C. 20536



File: EAC 01 250 52208 Office: Vermont Service Center Date: FEB 24 2003

IN RE: Petitioner: [Redacted]
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]

PUBLIC COPY

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an electronics parts sales company. It seeks to employ the beneficiary permanently in the United States as a sales representative, electronic parts. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 October 27, 1997. The beneficiary's salary as stated on the labor certification is \$31.90 per hour or \$66,352.00 per annum.

Counsel submitted copies of the petitioner's bank statements for

the period from October 1997 through December 2001 and copies of the petitioner's 1997, 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1997 reflected gross receipts of \$1,768,253; gross profit of \$130,763; compensation of officers of \$16,800; salaries and wages paid of \$15,600; and a taxable income before net operating loss deduction and special deductions of \$2,643. The tax return for 1998 reflected gross receipts of \$1,678,863; gross profit of \$156,130; compensation of officers of \$16,800; salaries and wages paid of \$39,600; and a taxable income before net operating loss deduction and special deductions of \$2,410.

The tax return for 1999 reflected gross receipts of \$1,008,981; gross profit of \$147,262; compensation of officers of \$16,800; salaries and wages paid of \$39,600; and a taxable income before net operating loss deduction and special deductions of -\$1,451. The tax return for 2000 reflected gross receipts of \$1,217,413; gross profit of \$204,343; compensation of officers of \$16,800; salaries and wages paid of \$39,600; and a taxable income before net operating loss deduction and special deductions of \$47,557.

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

On appeal, counsel submits a copy of the beneficiary's Form 1099 which shows he was paid \$26,400.00 in 2001 and argues that:

Proof of the employer's ability to pay the prevailing wage at the time of establishment of a priority date may not be based simply upon whether the balance sheets or financial statements (i.e. tax returns or the beneficiary's W-2 Forms) indicate that the employer's gross income less expenses leaves sufficient net profit to pay the proffered wage because the balance sheet is only a snapshot of the employer's assets at a given moment, and because it would be unrealistic to expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages. See Masonry Masters, Inc. v Thornburgh, 277 US App DC 341, 875 F2d 898 (1989).

Matter of Masonry Masters, Inc. v. Thornburg, 875 F.2d 898. D.C. circ. 1989 is a decision that is not binding outside the District of Columbia. It does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The court held that the Service should not require a petitioner to show the ability to pay more

than the prevailing wage. Counsel has not provided evidence that there is a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. 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).

The petitioner's Form 1120 for calendar year 1997 shows a taxable income of \$2,643. The petitioner could not pay a proffered wage of \$66,352.00 a year out of this income.

Additionally, the tax returns for the years 1998 through 2000 continue to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition.

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.