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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 29 Mass, 3/F  
Washington, D.C. 20536

JUL 24 2003

File: EAC 02 153 52219 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker, Professional or Other Worker 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 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 Bureau of Citizenship and Immigration Services (Bureau) 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant 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 originally sought to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(2) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner is a masonry contractor. It seeks to employ the beneficiary permanently in the United States as a bricklayer. The petitioner subsequently amended the petition and requested classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker, professional, or other worker. 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 the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition

On appeal, counsel submits additional evidence and requests reversal of the director's decision.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 April 16, 2001. The beneficiary's salary as stated on the labor certification is \$22.25 per hour (\$40,495 annually).

The petitioner initially submitted 2000 and 2001 bank statements and a copy of its federal Form 1120 U.S. Corporation Income Tax Return for the tax year ending 2001.<sup>1</sup> The tax return contained the following information:

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<sup>1</sup> This tax return was filed under the name of [REDACTED], although the record shows that the tax identification number is the same as the petitioner's number.

Gross receipts or sales	\$169,590
Officers' compensation	15,300
Salaries and wages	12,882
Depreciation	14,999
Taxable income (before net (operating loss deduction))	7,039
Taxable income	1,453

On June 18, 2002, the director requested additional evidence in the form of copies of annual reports, federal tax returns, or audited financial statements pursuant to the evidentiary requirements of 8 C.F.R. § 204.5(g)(2) to establish that the petitioner had the ability to pay the proffered wage. The director also requested whether the petitioner would like to amend the petition to reflect the appropriate classification in conformity with the educational and experience requirements set forth in the labor certification.

In response, the petitioner requested that the petition be amended to reflect that the beneficiary should be considered for classification under section 203(b)(3)(A)(i) of the Act, as a skilled worker. The petitioner also submitted additional bank statements purporting to show its ability to pay the wage.

The director concluded that the evidence did not establish the petitioner's ability to pay the proffered wage of \$22.25 per hour as of the priority date of the petition. The director noted that the petitioner's bank statements were insufficient to support its ability to pay and that the financial information contained on its 2001 tax return failed to demonstrate that the petitioner's taxable income would cover the beneficiary's annual salary of \$40,495.

On appeal, counsel contends that even though a tax return may show a loss, the petition should be approved if the petitioner's bank statements otherwise show a sufficient amount of cash available to pay the proffered wage. Counsel submits copies of petitions that he asserts have been approved on this factual basis.

We do not find counsel's argument persuasive. As noted by the director, bank statements may be considered as secondary evidence, but they do not reflect any information about the expenses incurred to generate the income. There is also no evidence that the bank statements for 2001 somehow reflect additional available funds that were not included on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). We also note that the regulation at 8 C.F.R. § 204.5(g) requires copies of annual reports, federal tax returns, or audited financial statements. While other material may be considered, such documentation generally cannot substitute for the primary evidentiary requirements. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. The Bureau will examine the net income reflected on the tax return or income statement without adding any expenses back to the net income. See, e.g., *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In this case, the tax return fails to show that the petitioner's taxable income of \$7039

before the net operating loss deduction covers the beneficiary's annual salary of \$40,495.

Accordingly, after a review of the evidence submitted, we conclude that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to the present.

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.

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U.S. DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE