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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
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U.S. Citizenship  
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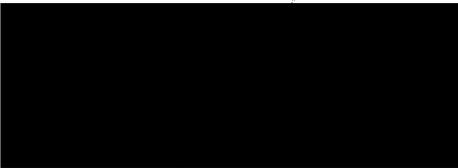
FILE: EAC-02-087-53873 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: 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:



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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Taekwondo School and Training Center. It seeks to employ the beneficiary permanently in the United States as a Taekwondo Instructor. 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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 October 16, 2000. The beneficiary's salary as stated on the labor certification is \$16.32 per hour or \$33,096.96 per year.

Counsel initially submitted insufficient evidence regarding the petitioner's ability to pay the proffered wage. The only evidence submitted initially on that issue was an unaudited financial compilation prepared by a certified public accountant and an inventory list for the petitioner dated November 26, 2001. In a request for evidence (RFE) dated February 25, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE specifically requested a United States federal income tax return for the year 2000 for the petitioner's business.

In response to the RFE the petitioner submitted a copy of the first page of the Form 1120 U.S. corporate income tax return for the petitioner for the tax year December 14, 1999 to November 30, 2000; copies of certificates of recognition issued by various local government agencies in New York and Massachusetts and by other organizations for Mr. Yeon H. Park, the person who signed the Form ETA 750 and the I-140 petition on behalf of the petitioner; and copies of various newspaper articles about Mr. Park. Mr. Park's title as shown on the ETA 750 is Grand Master.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, counsel submits a brief and no additional evidence.

In his decision the director found that the financial statement submitted in evidence covered the first nine months of 2001 and that the financial statement had no relevance to the petitioner's ability to pay the proffered wage in the year 2000, which was the year of the priority date. The director was correct in not relying on the financial

statement, since it is an unaudited statement. The regulation at 8 C.F.R. § 204.5(g)(2) quoted above refers only to audited financial statements as acceptable evidence.

The director found that the first page of the petitioner's tax return for the period December 14, 1999 to November 30, 2000 showed net income of \$1,851.00 and depreciation of \$4,803.00. The "net income" figure cited by the petitioner appears on line 28 of the return, for taxable income before net operating loss deduction and special deductions. The director correctly looked to that figure as an initial measure of the petitioner's ability to pay. The director also cited the figure shown on line 21b for depreciation. The director found that the "net income" and the depreciation combined were insufficient to pay the proffered wage of \$33,097.00.

The director erred in adding the figure for depreciation to the figure for taxable income in evaluating the petitioner's ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, 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 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

The director's error in analysis, however, was not significant to the director's decision, since even with depreciation added to the taxable income, the result is still far less than the proffered wage. The director's finding that the petitioner's net income was insufficient to pay the proffered wage was correct as it is less than the proffered wage.

The director noted that no balance sheet had been submitted for the petitioner, apparently referring to the absence of a Schedule L attachment from the partial copy of the petitioner's Form 1120 corporate tax return which was submitted in evidence. The director correctly found that the absence of a balance sheet prevented any analysis of whether the petitioner's net current assets as of the priority date were sufficient to pay the proffered wage.

The director said that the petitioner's letter in response to the RFE stated assets of \$182,840. The director said that the source of this figure could not be determined.

Counsel in his brief states that the assets of the petitioner include items shown on the inventory list submitted in evidence. That list shows items with individual sale prices and with a column labeled "total price" showing the item price multiplied by the number of units of each item in inventory. At the bottom of "total price" column is shown the overall total \$182,840.10. This figure appears on the back side of the inventory list and it was apparently overlooked by the director.

The inventory list shows items which appear to be current assets. Nonetheless, as the director correctly noted, any analysis of assets must also include an analysis of liabilities. Even assuming that the petitioner's inventory list is sufficient to establish current assets of \$182,840.10, lacking evidence of the petitioner's current liabilities no finding can be made on the petitioner's net current assets. Therefore the petitioner's evidence on its assets fails to establish its ability to pay the proffered wage.

Counsel asserts in his brief that the director failed to give sufficient weight to the petitioner's goodwill, as evidenced by the many certificates of recognition and newspaper articles about the petitioner's Grand Master, Yeon H. Park which were submitted in evidence. Counsel states that the financial problems of the petitioner are temporary ones caused by a reorganization of the petitioner. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of his position on this issue.

Counsel also quotes language from *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in which the D. C. Court of Appeals states that the reliance of CIS on income and assets information from tax returns fails to adequately consider the potential increase to a petitioner's income from hiring an additional worker. By quoting language from *Masonry Masters, Inc.* counsel implicitly asserts that in the instant case hiring the beneficiary will generate sufficient additional income for the petitioner to allow the petitioner to pay the proffered wage.

Counsel's explicit and implicit assertions on the above points are supported by no evidence in the record. 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). Although the certificates of recognition and newspapers articles about the petitioner's Grand Master indicate a very favorable opinion of that individual in the communities where he has worked, counsel has provided no regulatory-sanctioned evidence on which to base an evaluation of the financial significance of the favorable reputation enjoyed by the petitioner's Grand Master. Nor do any documents in evidence indicate that the petitioner's weak financial situation at the time of filing was caused by a temporary difficult period, or that hiring the beneficiary would increase the income of the petitioner.

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.