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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 22 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 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a statement.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 the continuing ability to pay the proffered wage 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. Here, the Form ETA 750 was accepted for processing on June 6, 2001. The proffered wage as stated on the Form ETA 750 is $29.09 per hour, which equals $60,507.20 per year.

With the petition, counsel submitted copies of the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxable income based on the calendar year.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $36,305 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date is June 6, 2001, evidence of the petitioner's income and assets during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $1,000 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had $5,231 in current assets and $1,193 in current liabilities, which yields $4,038 in net

current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 15, 2003, requested additional evidence pertinent to that ability. The Service Center specifically requested that the petitioner include evidence pertinent to 2002 and the beneficiary's Form W-2 wage and tax statements. The Service Center stipulated that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a 2002 W-2 form showing the amount the petitioner paid to the beneficiary during that year. That form shows that the petitioner paid the beneficiary $10,800 during that year.

Counsel also submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $1,768 during that year. The corresponding Schedule C shows that at the end of that year the petitioner had current assets of $6,617 and current liabilities of $1,065, which yields net current assets of $5,552.

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 August 27, 2003, denied the petition.

On appeal, counsel states, "The Director of the California Service Center erred in finding that the Petitioner did not have the ability to pay the Beneficiary the proffered wage from the time of the establishment of the priority date to the date of the Notice of Decision." No further information, argument, or documentation has been received from counsel or the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed the beneficiary during 2002 and paid him $10,800, which establishes only the ability to pay part of the proffered wage. The petitioner did not establish that it paid the beneficiary wages during any other year.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO 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 (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 CIS (then the INS) 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 CIS should consider income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages

paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is June 6, 2001. The proffered wage is $60,507.20 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 156 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 209 days. The proffered wage multiplied by 209/365th equals $34,646.59, which is the amount the petitioner must show the ability to pay during 2001.

The petitioner did not demonstrate that it paid the beneficiary any wages during 2001. During 2001, the petitioner declared income of $1,000. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of $4,038. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the salient portion of the proffered wage during 2001.

The petitioner is obliged to demonstrate the ability to pay the entire proffered wage during 2002. The petitioner demonstrated that it paid the beneficiary wages of $10,800 during that year. The petitioner must show that it had the ability to pay the $49,707.20 balance of the proffered wage during that year. During 2002, the petitioner declared income of $1,768. That amount is insufficient to pay the balance of the proffered wage. The petitioner ended the year with net current assets of $5,552. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the period from the priority date to the end of 2001. The petitioner also failed to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it 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.

ORDER: The appeal is dismissed.