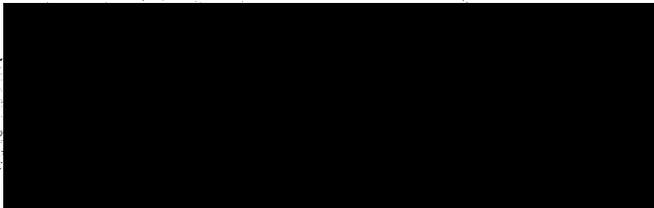


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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

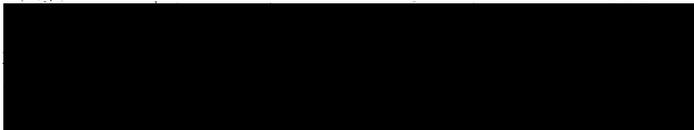


FILE: WAC 02 220 54787 Office: CALIFORNIA SERVICE CENTER

Date:

APR 23 2004

IN RE: Petitioner:  
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: SELF-REPRESENTED

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**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 dismissed.

The petitioner is a television and computer repair service. It seeks to employ the beneficiary permanently in the United States as an electronic technician. 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, the petitioner submits a Form I-290B with a brief 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 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.

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 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. Here, the petition's priority date is April 30, 2001. The beneficiary's proposed salary is \$25.62 per hour for a forty-hour workweek, which equates to \$53,289.60 per annum. An additional issue raised by the director is the validity of the beneficiary's claims of prior work experience.

With the initial petition, the petitioner provided copies of its 2001 federal tax return, copies of its bank statements for the period from April 2001 through March 2002, and a letter from a former employer of the beneficiary verifying his past work experience. The director found the evidence in the record insufficient and issued a request for evidence on October 30, 2002, where he requested the following information:

1. Clarification of a qualifying relationship between the named petitioner and the entity named on the 2001 tax return;
2. Copies of the petitioner's quarterly wage reports for the previous four quarters;
3. An experience verification letter; and
4. Copies of the petitioner's business license(s).

In response to this request, the petitioner submitted copies of its payroll register evidencing that it employed no more than two persons, copies of its business licenses, a second experience verification letter, and a cover letter from the petitioner explaining its relationship with the entity named on the tax return.

Upon review of the newly-submitted documentation, the director found that the evidence was insufficient to warrant an approval of the petition. The director determined that the petitioner had not established that it had the ability to pay the proffered wage during the relevant period, and additionally found that the beneficiary had not met the experience requirements as set forth on the labor certification due to unexplained discrepancies in the evidence provided. Consequently, the petition was denied on March 12, 2003.

The petitioner appealed the director's decision, and submitted a Form I-290B on April 11, 2003. Although the petitioner indicated that a brief and/or additional evidence would follow within thirty days, no further documentation has been received by this office.

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 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).

The petitioner's 2001 tax return shows a net income of \$6,697.00, and net current assets of \$6,708.00.<sup>1</sup> Since the proffered wage is \$53,289.60 per year, the petitioner has not demonstrated that it had funds available to pay the proffered wage in 2001. Additionally, the petitioner provided copies of its bank statements for the period from April 2001 through March 2002 in an attempt to demonstrate that it had sufficient cash flow to pay the proffered wage. These statements, however, are not adequate to establish the petitioner's ability to pay the wage offered because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. 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). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

The petitioner submitted its payroll registers as additional evidence, and the director noted that the petitioner employed no more than two employees during the period covered by these documents. Although documentary evidence that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage would be considered prima facie proof of the petitioner's ability to pay the proffered wage, the records provided did not list the beneficiary as an employee.

Thus, the director was correct in denying the petition for finding that the petitioner failed to establish its ability to pay the proffered wage. This portion of the director's decision is affirmed.

Finally, the director raises an issue regarding the experience qualification letters from the beneficiary's prior employer. Upon review of the record, the AAO determines that the first letter submitted was adequate to establish that the beneficiary possessed the required professional experience for the position. The second letter provided in the response to the request for evidence reconfirms the dates of the beneficiary's

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<sup>1</sup> The director determined that the relationship between Ferbak Flowers, the entity listed on the tax returns, and the petitioner, was sufficient to overcome the apparent inconsistencies in the record. The AAO concurs, noting that the EIN number for the petitioner on the visa petition matches the EIN numbers provided by Ferbak Flowers on the tax returns.

employment, and merely lists additional duties and functions of the beneficiary while working for this employer. Since these additional duties are consistent with the description of duties provided on the labor certification, the AAO finds no need to discredit these verification letters. Additionally, the content of the letters meets the regulatory requirements set forth at 8 C.F.R. § 204.5(1)(3)(ii). Thus, the portion of the director's decision denying the petition based upon the beneficiary's qualifications is withdrawn.

Based on the evidence contained in the record, however, it cannot be concluded that the petitioner has demonstrated the continuing ability to pay the proffered wage as of the priority date 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 director's decision is withdrawn in part and affirmed in part. The appeal is dismissed.