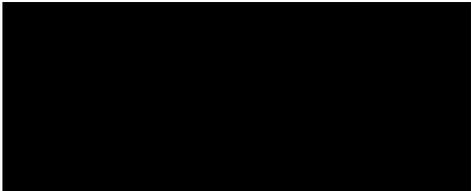


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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



FILE: SRC-02-062-51596 Office: TEXAS SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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

**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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a publisher. It seeks to employ the beneficiary permanently in the United States as an editor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel asserts that the evidence demonstrates the petitioner's ability to pay the proffered wage.

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 regulations at 8 C.F.R. § 204.5(g)(2) state 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on April 24, 2001. The proffered salary as stated on the labor certification is \$33,900 annually.

With the petition, counsel initially submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The 2000 Form 1120 is of limited probative value since it precedes the priority date.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 2, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 2001, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary, if any, for 2001.

In response, counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and the beneficiary's 2001 Form W-2 Wage and Tax Statement indicating that the petitioner paid the beneficiary \$13,500 during 2001. The 2001 Form 1120 U.S. Corporation Income Tax Return reflected gross receipts of \$140,708; gross profit of \$80,979; compensation of officers of \$0; salaries and wages paid of \$13,500; and a taxable income before net operating loss deduction and special deductions of \$4,835.

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

On appeal, the petitioner, through counsel, asserts that the W-2 and the Form 1120 for the year 2001 would only cover the period from April 24, 2001 through December 31, 2001, approximately eight months. Counsel further concluded that since the beneficiary was offered \$33,900 per year, that figure would have to include four months of 2002 in order to establish the employer's ability to pay the entire year. Counsel further noted that from January 1, 2002 to April 2002, the petitioner paid the beneficiary \$12,000.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 Immigration and Naturalization Service, had properly relied upon 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.

Counsel's argument on appeal is not persuasive. The record reflects that the petitioner's 2001 Form 1120 reflected calendar year earnings of \$4,835. The record further reflects that the beneficiary was paid \$13,500 by the petitioner during 2001. Assuming that beneficiary was hired on the priority date, April 24, 2001, there would be 252 days remaining in 2001 or .69 of the year. Thus, the petitioner must have the ability to pay .69 of the proffered wage or \$23,405 during 2001. The beneficiary was actually paid \$13,500. The petitioner's net income was \$4,853. Therefore, the petitioner did not have the ability to pay the proffered wage of \$33,900 during 2001.

During the first quarter of 2002 the beneficiary was paid \$9,000 (not \$12,000 as alluded to by counsel on appeal). However, if the beneficiary were paid at the same rate for the remaining three quarters, he would be paid a total of \$36,000 which is more than the proffered wage. It must be noted however, that the petitioner has failed to provide a regulatory-prescribed *audited* financial statement breaking down its net earnings for 2002 pursuant to 8 C.F.R. § 204.5(g)(2).

After a review of the federal tax returns, 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 the petition and continuing until the beneficiary obtains lawful permanent residence.

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.