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U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 03 051 54808 Office: VERMONT SERVICE CENTER Date: AUG 03 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: 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, Director
for 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

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

Section 203(b)(3)(A)(i) of 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) also provides 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. . . . 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 24, 2001. The beneficiary's salary as stated on the labor certification is $20.85 per hour, which equals $43,368 per annum. The visa petition indicates that the petitioner was established in 1985.

As evidence of its ability to pay, the petitioner initially submitted a copy of its Form 1120, U. S. Corporation Income Tax Return for 2001. It shows that the petitioner reported a taxable income before the net operation loss (NOL) deduction of $10,661. Schedule L of this tax return also shows that the petitioner had $93,435 in current assets and $105,303 in current liabilities. The difference between current assets and current liabilities represents a petitioner's net current assets. Here, the petitioner had -$11,868 in net current assets. CIS will consider net current assets as an alternate source to pay a beneficiary's proposed wage offer because it represents the amount

of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet.

The petitioner also submitted a letter, dated August 9, 2002, from its accountant, Thomas R. Whelan. Mr. Whelan states that the petitioner can meet the proffered wage of $20.85 per hour. He adds that the petitioner has been in business since 1985. Mr. Whelan also provides figures showing the petitioner's gross sales of over $1,000,000 in 1999, 2000, and 2001.

The petitioner additionally provided a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that the petitioner paid him $23,145 in wages that year.

On September 10, 2003, the director requested additional evidence pursuant to the regulatory requirements at 8 C.F.R. § 204.5(g)(2). The director instructed the petitioner to submit either annual reports, federal tax returns, or audited financial statements. The director also advised the petitioner that it could either submit a copy of the beneficiary's 2002 W-2 issued by the petitioner, the petitioner's 2002 federal tax return, or annual reports for 2001 and 2002, accompanied by audited or reviewed financial statements.

In response, the petitioner submitted a copy of the beneficiary's 2002 W-2, showing that the petitioner paid him $28,130.06 in wages.

The director denied the petition on December 11, 2003, finding that the petitioner's 2001 net income as shown on its tax return was not sufficient to pay the proffered wage even when factoring in the $23,145 already paid as wages to the beneficiary. The director also determined that the beneficiary's 2002 W-2 reflected that he was paid $15,238 less than the annual proffered wage.

On appeal, the petitioner states that it can meet the proffered wage. It notes that the beneficiary was only paid on an hourly basis for the hours worked. The petitioner asserts that if the beneficiary had worked more hours, the petitioner would have billed more hours, thereby increasing its gross sales and net income.

A petitioner's gross sales and size of payroll is not determinative of its ability to pay a proffered salary to a specific beneficiary. In evaluating the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

In this case, as shown by the beneficiary's 2001 W-2, he was paid $23,145, or $20,223 less than the proffered annual salary of $43,368. This shortfall of $20,223 could not be covered by either the petitioner's 2001 net

income of $10,661, or its net current assets of -$11,868. Although the petitioner asserts that the beneficiary worked on an hourly basis, when calculating a petitioner's ability to pay a proffered salary, the calculation is based on the petitioner's ability to pay a proffered wage based on full-time permanent employment. 20 C.F.R. § 656.50. To the extent that a petitioner has employed a beneficiary, credit will be given for wages paid during the relevant period. If a petitioner can show that it has employed a beneficiary at a full-time proffered salary beginning at the priority date, CIS will consider this *prima facie* proof of its continuing ability to pay the proffered wage. As previously noted, the petitioner's 2001 tax return fails to show that its net income or net current assets could cover the difference between the wages paid to the beneficiary and the proffered wage of $43,368. This calculation is based on the 40-hour per week carpentry position as set forth on the approved labor certification. As noted by the director, the beneficiary's 2002 wages were also substantially less than the proffered salary.

It is noted that the record contains no evidence of the beneficiary's ability to increase the petitioner's profits, as asserted by the petitioner on appeal. Such a projected increase in profits or any information from which this asserted increase in business might be estimated, as hypothesized by the petitioner, is not supported by evidence in the record and cannot be considered in this case. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the continuing ability to pay the proffered wage be established as of the visa priority date.

Based on the evidence contained in the record and after consideration of the arguments further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of April 24, 2001.

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.