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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 02 092 50670 Office: VERMONT SERVICE CENTER Date: DEC 30 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 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 on appeal. The appeal will be dismissed.

The petitioner is a printing company. It seeks to employ the beneficiary permanently in the United States as an art director. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief.

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 nature, for which qualified workers are not available in the United States.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also

demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 21, 1997. The proffered wage as stated on the Form ETA 750 is $59,813.52 per year. The Form ETA 750 states that the position requires two years of experience.

On the petition, the petitioner stated that it was established on February 1, 1982 and that it employs "5+" workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

With the petition, counsel stated that he was submitting evidence in support of the beneficiary's claim of qualifying employment and evidence that the petitioner pays over $72,000 per year to contract out the services of the proffered position.

Counsel provided a letter in Farsi and a certified English translation. The translation relates that the letter is from Gutenberg Printers, of Tehran, Iran, and that it states that the beneficiary worked there full-time from February 1991 to November 1993 as their art director.

Counsel also provided a copy of the petitioner's 1997 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 $21,942 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. An addendum to Schedule A of that return states that the petitioner paid $72,980 for "Subcontracting/Foreign Graphics."

On March 18, 2002, the Vermont Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and additional evidence that the beneficiary has the requisite two years work experience.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The Service Center noted that the employment verification letter previously submitted contained no indication that it was provided by the beneficiary's previous employer. The Service Center also noted that the translation of that employment verification letter was not accompanied by a certification that it was complete and accurate as required by a certification by the translator that the translation is complete and accurate and that he or she is competent to translate from the foreign language into English as required by 8 C.F.R. 103.2(b)(3).

In response, counsel submitted a copy of the petitioner 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on a fiscal year that runs from July 1 of the nominal year to June 30 of the following year.

The 1998 return, which covers the fiscal year from July 1, 1998 through June 30, 1999, shows that the petitioner declared a loss of $2,405 as its taxable income before net operating loss deduction and special

deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return, which covers the fiscal year from July 1, 1999 through June 30, 2000, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $4,772 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return, which covers the fiscal year from July 1, 2000 through June 30, 2001, shows that the petitioner declared a loss of $187 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel provided a letter, dated May 3, 2002, from a studio with which the petitioner contracted for design services. That letter states that the petitioner paid $77,205 during its 1997 fiscal year, $63,544 during its 1998 fiscal year, $75,564 during its 1999 fiscal year, and $65,968 during its 2000 fiscal year for the design of various greeting cards and advertising graphics. Counsel also provided a letter, dated May 15, 2002, from the petitioner's accountant. That letter states that the petitioner paid that same contractor $72,980, $63,544, $77,931, and $63,601 during those same years, respectively. The accountant acknowledges that the petitioner's figures do not precisely accord with those of the contractor, but states, in correctly, that "the totals are in balance."

Counsel argued that the evidence of amounts the petitioner paid to that outside contractor establishes its ability to pay the proffered wage, notwithstanding its losses and low profits during the salient years. Counsel submitted no additional evidence of the beneficiary's qualifying employment, although the Service Center made clear, in the March 18, 2002 Request for Evidence, that the evidence previously submitted was insufficient.

The director denied the petition on January 24, 2003, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel submits an additional copy of the beneficiary's employment verification letter and the original translation. The translation does not contain a certification, as required by 8 C.F.R. 103.2(b)(3), that it is complete and accurate and that the translator is competent to translate from the foreign language into English. Further, the translation does not reveal the name and title of the person attesting to the beneficiary's employment history.

Counsel cites a non-precedent decision for the proposition that a petitioner may demonstrate its ability to pay the proffered wage by showing payments made to contractors for performing the duties of the proffered position. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), and *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986), for the proposition that a petition may be approved notwithstanding that the petitioner's net income is less than the proffered wage. Counsel is correct.

Ordinarily, 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, 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 assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $59,813.52 per year. The priority date is March 21, 1997. During each of the salient years, the petitioner either suffered a loss or reported taxable income before net operating loss deduction and

special deductions less than the amount of the proffered wage. The petitioner has not shown the ability to pay the proffered wage during any of the salient years out of its net income. At the end of each of the salient years, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during any of the salient years.

However, the petitioner has demonstrated that it made payments to a contractor during each of those years for performing the duties of the proffered position. Although the exact amount paid during some of those years is disputed, the evidence demonstrates that the amount paid during each of those years exceeded the amount of the proffered wage. Had the petitioner been able to employ the beneficiary during each of those years, it could have used those same funds to pay the proffered position. The petitioner has, therefore, demonstrated the ability to pay the proffered wage during each of the salient years.

The other basis for the decision of denial is the sufficiency of the evidence provided in support of the beneficiary's claim of qualifying employment. The Form ETA 750 states that the position requires two years of experience. The evidence in support of the claim of qualifying experience is a document in Farsi and what purports to be a translation of that document. The regulation at 8 C.F.R. 103.2(b)(3) requires that any document containing foreign language submitted to CIS be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The translation submitted contains no certification that the translator is competent to translate from Farsi into English and no certification that the translation is true and complete. Further, the letter does not state the name and title of the person attesting to the beneficiary's employment claim, as required by 8 C.F.R. § 204.5(l)(3)(ii) (A), which is set out above. For both of those reasons, the petitioner's employment verification letter is unacceptable as evidence of the beneficiary's claim of qualifying employment experience.

The March 18, 2002 request for evidence stated the regulatory requirements pertinent to employment verification letters and translations and listed the deficiencies of the employment verification letter and translation submitted in the instant case. The petitioner, however, has never addressed those deficiencies.

An additional issue exists in this case beyond those cited in the decision of the director. On the Form I-140 petition the petitioner stated that it employs "5+" workers. The 1997, 1998, 1999, and 2000 corporate tax returns submitted show that the petitioner paid no salaries or wage during any of those years. The corresponding Schedules A submitted with those returns show Cost of Labor of $16,040, $12,916, $7,141, and $1,430, respectively. Those returns show Compensation of Officers of $50,500, $22,680, 21,840, and $17,880 during those same years.

This office questions whether payment of those amounts is consistent with the petitioner's claim of employing five or more workers. However, because the petitioner has never been accorded an opportunity to reconcile that apparent discrepancy, it plays no part in today's decision.

The evidence submitted does not credibly establish that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.