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**U.S. Citizenship  
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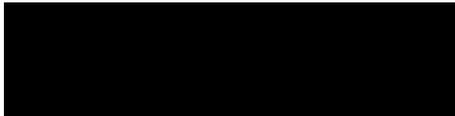


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File: EAC 02 131 51590 Office: VERMONT SERVICE CENTER

Date: **MAY 12 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:



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*  
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 dressmaking company. It seeks to employ the beneficiary permanently in the United States as a dressmaker/designer. 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.

On appeal, counsel submits a brief and additional evidence.

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.

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 eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year.

With the petition counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on May 21, 2002, the Vermont Service Center requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center specifically requested a copy of the petitioner's 2001 annual report, complete 2001 federal tax return with all schedules and attachments, or audited financial statements for the year 2001. The Service Center also requested that, if the petitioner had employed the beneficiary during 2001, it provide a copy of the Form W-2 Wage and Tax Statement showing the wages paid to the beneficiary.

In response, counsel submitted a portion of the petitioner's owner's 2001 Form 1040 individual income tax return, rather than the complete return requested. The submitted portion of the petitioner's owner's tax return included the corresponding Schedule C, Profit or Loss from Business (Sole Proprietorship) showing the petitioner's income and expenses during 2001. That Schedule L shows a net profit of \$10,221.

Counsel also submitted a letter, dated July 25, 2002, from a bank branch manager. That letter states that

as of that date, the petitioner's checking account had a balance of \$20,934.14. In a notarized letter, dated August 6, 2002, the petitioner's owner stated that he has over \$20,000 in his personal checking account, the entire balance of which is available, if necessary, to pay the proffered wage.

In another letter dated August 6, 2002, counsel argued that the petitioner's net income added to its bank balance demonstrates the petitioner's ability to pay the proffered wage. Counsel submitted no W-2 forms.

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 October 26, 2002, denied the petition.

On appeal, counsel submits a letter, dated November 20, 2002, from the bank where the petitioner maintains its checking account. That letter states that from April 1, 2001 to November 20, 2002, the petitioner maintained an average balance of \$30,000.

Counsel also submits a letter, dated November 21, 2002, from a branch manager of another bank, stating that the balance of the personal checking account of the petitioner's owner and owner's spouse on that date was \$24,597.12.

Counsel argues that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>1</sup> Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Third, although CIS may, in an appropriate case, consider bank statements, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily first 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), *affd*, 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 on the petitioner's net income figure rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS (now 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-*

<sup>1</sup> The Service Center pointed out a possible exception to this rule. The Service Center noted that bank account balances might demonstrate the ability to pay the proffered wage if the evidence showed that those balances steadily increased over time in an amount equal to the proffered wage. Because no such evidence was submitted in this case, this office need not reach that issue.

*Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In this case the petitioner is a sole proprietorship, and has been at all salient times. Because the owner of a sole proprietorship is obliged to pay the debts and obligations of his company out of his own income and assets, the income and assets of the owner can be considered in determining the ability of the company to pay a proffered wage. Conversely, however, in order to show that the profit of a sole proprietorship was available to pay wages, the owner must demonstrate that he was able to support himself and his family without those profits.

Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

In the case of a sole proprietorship, the complete tax return of the owner is necessary to demonstrate that he did not need the petitioner's net profit to support his family. In view of the necessity of demonstrating that fact, the Service Center explicitly requested that, if the petitioner was a sole proprietorship and intended to demonstrate its ability to pay the proffered wage with income tax returns, it submit complete copies of those returns.<sup>2</sup> The need to produce complete copies of those returns was not obviated by the fact that the petitioner is a sole proprietorship, as the request made explicit. Because the petitioner did not produce complete copies of the salient income tax return, this office is unable to say whether any portion of the petitioner's net income was available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it was able to contribute any amount, at any time, out of either income or assets, toward paying the proffered wage. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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.

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<sup>2</sup> The exact language of the request for evidence was,

Submit the 2001 U.S. federal income tax return, with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.