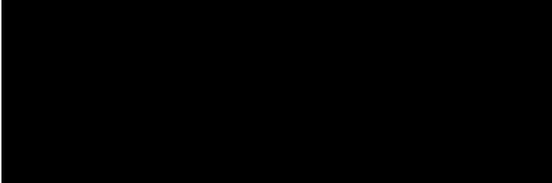


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U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy**



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FILE: WAC-02-198-53172 Office: CALIFORNIA SERVICE CENTER Date **MAY 21 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 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

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 garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sample stitcher. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel argues that the petitioner has the 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 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is August 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.50 per hour or \$23,920 per year.

With its initial petition, counsel submitted copies of the petitioner's 1998 through 2000 Form 1120 U.S. Corporation Income Tax Returns. The tax return for 1998 reflected gross receipts of \$2,686,572; gross profit of \$266,702; compensation of officers of \$61,850; salaries and wages paid of \$80,712; and a taxable income before net operating loss deduction and special deductions of \$16,580. The tax return for 1999 reflected gross receipts of \$2,022,005; gross profit of \$211,492; compensation of officers of \$60,400; salaries and wages paid of \$30,981 and a taxable income before net operating loss deduction and special deductions of (-) \$9,040. The tax return for 2000 reflected gross receipts of \$1,829,224; gross profit of \$235,855; compensation of officers of \$60,194; salaries and wages paid of \$24,544; and a taxable income before net operating loss deduction and special deductions of (-)\$8,709.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 5, 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, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary.

In response to the RFE, counsel submitted the petitioner's 2001 Form W-2 Wage and Tax Statements, its 2001 Form W-3 Transmittal of Wage and Tax Statements, and photocopies of the petitioner's 1998, 1999, and the previously submitted 2000 Form 1120 U.S. Corporation Income Tax Returns.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted specifically that Federal Tax returns for 2001 were not submitted.

On appeal, counsel submits copies of the petitioner's 2001, 2002, and 2003 monthly bank statements. Counsel argues that the bank statements reflect sufficient monthly bank balances to pay the beneficiary's monthly wage of \$1,993.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

If the petitioner's net income is insufficient to establish its ability to pay the proffered wage, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's assets, such as the cash represented on the bank statements, should be considered without reference to the petitioner's liabilities. Although counsel submitted evidence of the petitioner's monthly bank balances, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect uncommitted funds. There is also no evidence that they somehow represent additional funds beyond those represented on the tax returns. The petitioner's net current assets (current assets minus current liabilities) were \$45,449 in 1998, \$142,775 in 1999, and \$139,308 in 2000. These numbers reflect that the petitioner did have the ability to pay the proffered wage during those years. The petitioner, however, must demonstrate an ability to pay the proffered wage continuing through the time of adjustment.

Even though the director requested federal tax documents for all ensuing years subsequent to the priority date of August 14, 1998, no tax documents for 2001 were submitted. The director, in Form I-797 dated September 5, 2002, requested the petitioner's federal tax returns from 1998 to "the present," which would have included 2001 and possibly 2002 in accord with 8 C.F.R. § 204.5(g)(2). The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

From the evidence submitted it cannot be concluded that the petitioner demonstrated an ability to pay the proffered wage in 2001 and 2002. Therefore, the petitioner has not demonstrated the continuing ability to pay the proffered wage from the priority date 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.