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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-03-114-54492 Office: CALIFORNIA SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 graphic printing and publication firm. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 determined that the evidence failed 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. On appeal counsel states that a full consideration of the petitioner's financial situation, including gross income, depreciation, officer compensation and expenses on outside services, establishes 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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is May 24, 2001. The beneficiary's salary as stated on the labor certification is $26.54 per hour or $55,203.20 per year.

The evidence submitted initially and in response to a request for evidence issued by the director consists of the following: a copy of a letter dated February 4, 2003 from a former employer of the beneficiary; a letter from the petitioner's president confirming a job offer to the beneficiary; a copy of the articles of incorporation of the petitioner; an undated letter from the petitioner's president describing the petitioner's net profit in 2001; a second undated letter from the petitioner's president describing the petitioner's net profit in 2002; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000; a copy of the petitioner's Form 100 California Franchise or Income Tax Return for 2000; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2001 and 2002; copies of IRS computer transcripts of the petitioner's Form 1120S tax returns for 2001 and 2002; a copy of the petitioner's Form 100S California Franchise or Income Tax Return for 2001; copies of Form W-2 wage and tax statements for the petitioner's employees for 2000 and 2001; four copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2001; and copies of statements for an account of the petitioner at Hanmi Bank, Los Angeles, California, for January through June 2001, January through June 2002, August through December 2002, and January and February 2003.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and evidence consisting of copies of Hanmi Bank monthly statements for August through December 2000, August through November 2001, and March 2003, for the same account as shown on the bank statements submitted previously. Counsel also submits additional copies of some of the tax returns and of some of the monthly bank statements which were submitted previously.

Counsel states on appeal that a full consideration of the petitioner's financial situation, including its gross income, depreciation, officer compensation and expenses on outside services, establishes the petitioner's ability to pay the proffered wage. Counsel offers a detailed analysis of the income and expenses of the petitioner for 2001 and 2002 and asserts that the tax deductions which do not represent cash expenditures by the petitioner should be counted as resources available to the petitioner to pay the proffered wage.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner's name as it appears on the ETA 750 labor certification and on the I-140 petition lacks any indication that the petitioner is a corporation. However, the tax returns in the record are in the name of the petitioner, with the addition of the abbreviation "Inc.," for "Incorporated." The IRS tax number on the I-140 petition is the same as the employer identification number on the tax returns in the record. Therefore it appears that the petitioner is a corporation, and that that the name of the petitioner on the ETA 750 labor certification and on the I-140 petition is its business name. The petitioner's federal and state tax returns for 2000 are as a regular corporation, and its returns for 2001 and 2002 are as an S corporation. The federal tax returns for 2001 and 2002 show the effective date of election as an S corporation to be January 1, 2001.

For a regular corporation, which was the petitioner's tax status in 2000, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. However, since the priority date in the instant petition is May 24, 2001 the petitioner's net income for the year 2000 is not directly relevant to establish the petitioner's ability to pay the proffered wage during the period at issue.

For an S corporation, which was the petitioner's tax status in 2001 and 2002, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show ordinary income as $356.00 for 2001, and $11,410.00 for 2002. Since each of those figures is less than the proffered wage of $55,203.20, the petitioner's net income figures fail to establish the petitioner's ability to pay the proffered wage during those years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: $12,007.00 for the beginning of 2001; $29,847.00 for the end of 2001 and $52,429.00 for the end of 2002. Since each of those figures is less than the proffered wage of $55,203.20, the petitioner's net current assets also fail to establish the ability of the petitioner to pay the proffered wage during those years.

The record also contains copies of bank statements for an account of the petitioner at the Hanmi Bank, Los Angeles, California. The record prior to the decision of the director covers the period from January 2001 through February 2003, but lacks statements for July through December 2001, May 2002, and July 2002. Those gaps in the bank statement evidence prevent any meaningful analysis of the petitioner's cash resources during the relevant period. Moreover, even for the months for which statements were provided, the closing balances do not indicate that the petitioner was accumulating cash in amounts which would have been sufficient to pay the proffered wage.

The annual proffered wage of $55,203.20 is equal to about $5,990.00 per month. In only four of the months for which statements were submitted was the closing balance greater than the monthly proffered wage. Monthly closing balances on bank statements do not represent new funds each month, but rather show the amount of the petitioner's cash reserve remaining after expenditures. If the cash reserve were used in a given month to pay the monthly wage of the beneficiary, the balance in every succeeding month would then be lower by that amount. In order to establish the ability to pay the proffered wage, bank statements would have to show a closing balance as of the priority date which is greater than the annual proffered wage or would have to show monthly increases in balances by at least the amount of the monthly proffered wage.

On the statements submitted in the record in the instant petition the closing bank balances, beginning with the month of the priority date, are as follows:

2001: $616.80 for May; and $5,605.53 for June; (July through December not submitted);

2002: $9,471.51 for January; $6,682.87 for February; $8,716.06 for March; $874.63 for April; $3,892.16 for June; $3,560.02 for August; $2,701.04 for September; $38,505.95 for October; $598.15 for November; and $1,978.63 for December; (May and July not submitted); and

2003: $13,166.14 for January; and $2,786.85 for February.

The statement for May 2001, the month of the priority date, does not show a balance greater than the annual proffered wage of $55,203.20, nor even a balance sufficient to pay the proffered wage for one month. Nor do the succeeding months show monthly increases in balances by at least the amount of the monthly proffered wage. The bank statements therefore fail to establish the petitioner's ability to pay the proffered wage during the relevant period. Moreover, apart from the considerations discussed above, the record lacks evidence that the funds shown on the bank statements represent additional funds beyond those shown on the tax returns.

In his decision, the director correctly stated the net income of the petitioner for 2001 and 2002 and correctly calculated the petitioner's net current assets for each of those years. The director correctly found that those figures failed 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 director's decision to deny the petition was therefore correct, based on the record before him.

On appeal counsel submits copies of [redacted] monthly statements for August through December 2000, August through November 2001, and March 2003, for the same account as for the bank statements submitted previously. The bank statements for the year 2000 are not relevant to the instant petition, since the priority date is May 24, 2001. The closing balances on the newly-submitted statements for 2001 and 2003 are as follows:

2001: -$37.47 for August; $1,609.13 for September; $3,168.28 for October; and $4,289.78 for November; and

2003: $22,304.50 for March.

Even with the additional bank statements submitted on appeal, the record still lacks bank statements for July and December of 2001 and May and July of 2002.

The bank statements submitted on appeal fail to provide any significant additional evidence of the petitioner's ability to pay the proffered wage during the relevant time period. The newly-submitted bank statements do not cure the evidentiary deficiencies in the bank statements submitted previously. The evidence submitted on appeal therefore fails to overcome the decision of the director.

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.