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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 01 238 56178 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) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

for Robert P. Wiemann, Director
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 (AAO) on appeal. The appeal will be sustained and the petition approved.

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 professional or skilled worker. The petitioner is a construction business. It seeks to employ the beneficiary as a welder/fitter. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and asserts that the petitioner is able to pay the 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) 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day 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). Here, the request for labor certification was accepted on December 22, 1997. The proffered salary as stated on the labor certification is $16.24 per hour, which equals $33,779.20 per year.

With the petition, counsel submitted a letter from the petitioner's accountant stating, "Primer Construction Corp. is engaged primarily in performing construction work for the City of New York. These contracts require Primer to pay prevailing wages to all their employees. Primer Construction Corp. has the work and the financial ability to pay this employee at least $16.66 per hour." In another letter, the accountant states "Primer Construction Corp. has been in business since 1985. They normally maintain a medium six-figure cash balance. There certainly are sufficient funds to employ Wladyslaw Lapinski." The director considered this documentation insufficient, and, on September 25, 2001, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage in the form of copies of annual reports, federal tax returns, or audited financial statements. The director specifically requested a copy of the petitioner's 1997 United States federal income tax return with all schedules and attachments for the business and also a copy of the beneficiary's 1997 form W-2, Wage and Tax Statement.

In response, counsel submitted a letter requesting a thirty-day extension to file the requested financial documentation. Counsel stated that the employer had tried but failed to retrieve the pertinent tax documents and had contacted his former accountant and bookkeeper who would provide the documentation in the near future.

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 January 16, 2002, denied the petition.

On appeal, counsel states that the delay in providing the proof of the petitioner's ability to pay the proffered wage was due to the petitioner's accountant's unavailability and difficulty in locating relevant documentation. Counsel also provides a copy of the petitioner's 1997 Form 1120, U.S. Corporation Income Tax Return for fiscal year September 1, 1997 through August 31, 1998. The federal tax return for fiscal year 1997 reflects a taxable income before net operating loss deduction and special deductions of $13,803 and net current assets of $211,309.

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 provide any evidence of the wages paid to the beneficiary.

As an alternative 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 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 CIS 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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the present case and for the time of filing the petition, the petitioner's 1997 federal tax return shows net current assets of $211,309. This amount is more than enough to pay the proffered wage. Therefore, the petitioner has overcome the basis of the director's decision.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.