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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG [illegible] 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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

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 pool plastering business. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 from 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). This petition's priority date is March 20, 2001. The beneficiary's salary as stated on the labor certification is $26 per hour or $54,080 per year.

The petitioner initially submitted its 2001 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year (FY) from May 1, 2001 to April 30, 2002. The director deemed it insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 13, 2003, 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, for March 20, 2001 to the present, the petitioner's federal income tax return with all schedules, attachments, and statements, as submitted, annual report, or audited financial statement, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary.

Counsel submitted the petitioner's calendar year 2001 and 2002 Forms W-2, reporting wage payments to the beneficiary of $24,055 and $24,070, respectively. An additional copy of the FY 2001 Form 1120 reflected taxable income before net operating loss deduction and special deductions as a loss, ($28,363). Schedule L of Form 1120, the balance sheet, showed net current assets as a deficit, ($23,536). Net current assets equal the difference of current assets minus current liabilities.[1] All amounts were less than the proffered wage.

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[1] Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

Quarterly wage reports for 2002 offered cumulative evidence as to Forms W-2 in response to the RFE. The director made no further issue of the beneficiary's prior experience in the job offered, after a previous employer issued a letter of business recommendation on October 7, 2002, also in response to the RFE.

The director issued a further notice of intent to deny on April 15, 2003 (NOID). It insisted on evidence of wages paid to the beneficiary, equal to, or greater than, the proffered wage, and on an FY 2000 Form 1120 inclusive of the priority date. Kevin Kelley responded to the NOID in a letter dated May 14, 2003 (Kelley letter). The Kelley letter stated that the FY 2002 Form 1120 was not yet due, that the petitioner was on a cash, not accrual, basis, of accounting, and that depreciation of $68,000 explained apparent losses. The Kelley letter said that the petitioner "was extremely solvent and well equipped to maintain and support [the beneficiary's] employment."

The director considered the petitioner's gross receipts, officers' compensation and salaries that the petitioner paid, including the beneficiary's, and the taxable loss and deficit of net current assets, as set forth in the FY 2001 Form 1120. Also, the director noted different methods of accounting, but concluded that none established the ability to pay the proffered wage from the priority date through the present under any of them, and denied the petition.

On appeal, counsel resubmits the Kelley letter and states:

> . . . The adjudicating officer did not take into consideration the methodology of accounting used by the employer. That corporate loss is due to depreciation of assets, not actual cash expenditures. Therefore, the petitioning employer has sufficient income to pay the proffered wage for the qualifying period . . . .

The director rejected the accounting principle that the Kelley letter stated, viz., that depreciation is not an expense since it involves no cash expenditure. Counsel cited no precedent for this novel point, and several authorities contradict it.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure 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.*, 623 F.Supp at 1084, 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. 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.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng*

Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

The Kelley letter voices concern that the director did not understand that the petitioner FY 2002 Form 1120 was unavailable. The petitioner never explained or addressed the determinative omission of evidence, namely, that the record contained no FY 2000 Form 1120 related to the priority date.

The FY 2000 Form 1120 surely existed, since the FY 2001 Form 1120 states that the petitioner incorporated May 10, 1994. The federal tax return is required.

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The contention that losses are artifacts of accounting lacks a specific basis and credible evidence. Quarterly wage reports reveal no source of funds other than those already discussed. In determining the petitioner's ability to pay the proffered wage, CIS will examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established the payment of $24,055 to the beneficiary in 2001, less than the proffered wage. In the alternative, AAO will consider wages that the petitioner paid to the beneficiary plus the petitioner's net income. In this case, the petitioner had a taxable loss of ($28,363) for FY 2001, paid the beneficiary $24,055 in 2001, and the difference is a deficit less than the proffered wage. In FY 2000, no credible evidence, such as a federal tax return, supports the ability to pay the proffered wage at the priority date. *See* 8 C.F.R. § 204.5(g)(2).

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, Forms W-2, quarterly wage reports for 2002, and the Kelley letter, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition 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.