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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN-01-229-56501 Office: NEBRASKA SERVICE CENTER Date: [illegible] 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien 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

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a camera repair business. It seeks to employ the beneficiary permanently in the United States as a camera repairman. 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 he determined the petitioner failed to establish its ability to pay the proffered wage.

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.

The petition's priority date in this instance is February 1, 1998. The beneficiary's salary as stated on the labor certification is $35,100 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated September 13, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing.

Counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the years 1997, 1998 and 1999. The tax return for 1997 reflected gross receipts of $533,400; gross profit of $203,435; compensation of officers of $28,050; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of $19,545. Schedule L of the return reflects net current assets (current assets minus current liabilities) of -$10,491.The tax return for 1998 reflected gross receipts of $591,686; gross profit of $189,093; compensation of officers of $44,000; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of $10. Schedule L of the return reflects net current assets (current assets minus current liabilities) of $25,190. The tax return for 1999 reflected gross receipts of $490,997; gross profit of $157,119; compensation of officers of $48,000; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of -$1,310. Schedule L of the return reflects net current assets (current assets minus current liabilities) of -$12,104.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2000 reflects gross receipts of $558,870; gross profit of $205,991; compensation of officers of $44,000; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of $4,832. Schedule L of the return reflects net current assets (current assets minus current liabilities) of $16,440.

Counsel states that in the 1997 tax year (July 1, 1997 to June 30, 1998), the petitioner paid $23,435 to "outside repairers." Counsel states that during 1998, the petitioner paid $24,696 to outside repairers, during 1999 it paid $18,489 in outside repairs and in 2000, the petitioner paid $33,964 for outside repairs. Counsel contends that, if

the beneficiary is hired, the petitioner will not have to pay outside repairmen as the beneficiary will replace them and that those funds will go towards paying the beneficiary the proffered wage. Counsel further states that the petitioner has two "in-house" technicians who will be retiring and that their combined salaries is over $60,000.

Counsel cited a previous AAO decision, submitting a summary of a decision, dated July 11, 1994. The decision stated that the monies spent for casual labor could be applied toward the beneficiary's salary since the beneficiary would be replacing the casual laborers. The decision stated that in combining the monies paid to casual laborers with the petitioner's net profit, the petitioner had the ability to pay the proffered wage. This case, however, is not established precedent. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has not demonstrated that the beneficiary will replace retiring employees, who have not been identified by name. Further, the petitioner has not demonstrated how it will save $60,000 in salaries and wages, when its tax returns do not show any amount paid for salaries and wages. There is insufficient evidence of wages paid to other employees holding a similar position whom the beneficiary would replace. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in the se proceedings. *Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg .Comm. 1972).*

In determining the petitioner's ability to pay the proffered wage, 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 the 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. *Supra.* at 1084. The court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income.

The 1997 tax returns reflected a taxable income before net operating loss deduction and special deductions of $19,545. Schedule L of the return reflects net current assets (current assets minus current liabilities) of -$10,491.The tax return for 1998 reflected a taxable income before net operating loss deduction and special deductions of $10. Schedule L of the return reflects net current assets of $25,190. The tax return for 1999 reflected a taxable income before net operating loss deduction and special deductions of -$1,310. Schedule L reflected net current assets of -$12,104. The tax return for 2000 reflected a taxable income before net operating loss deduction and special deductions of $4,832. Schedule L of the return reflected net current assets of $16,440. Accordingly, after a review of these federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary $35,100 offered as of the priority date of filing of the petition and continuing.

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.