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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-02-085-51091 Office: VERMONT SERVICE CENTER Date: JUL 13 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

Redacted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

DISCUSSION: The preference 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 dismissed.

The petitioner is an asbestos abatement construction firm. It seeks to employ the beneficiary permanently in the United States as a supervisor, asbestos removal. 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 date of filing. On appeal counsel states that updated financial information supports the ability of the petitioner 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 April 26, 2001. The beneficiary's salary as stated on the labor certification is $26.82 per hour or $55,785.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence on that issue consisted of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000.

In a request for evidence (RFE) dated March 1, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date. The RFE noted that the petitioner had multiple petitions pending and requested a statement identifying any other petitions filed by the petitioner which were already approved or were pending. The RFE requested evidence of the petitioner's ability to pay the individual proffered wage in the instant petition as well as to pay the total amount of the salaries for all petitions filed within the same year. Finally, the RFE noted that the Form ETA-750B stated that the beneficiary had been employed by the petitioner since November 2000 and requested copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by the petitioner.

In response to the RFE counsel submitted a letter dated May 14, 2002 and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001.

In a second RFE dated July 3, 2002 the director noted that records of the Service (now CIS) showed that the petitioner had filed petitions for five beneficiaries, each at the same proffered wage of $55,785.60 per year. The director stated that the petitioner's evidence in the record established its ability to pay only two of those beneficiaries at that wage level. The director informed the petitioner that one of the petitions had been approved, and it requested the petitioner to designate which one of the remaining four petitions it wished to be approved. In the alternative the director stated if the petitioner did not wish to continue with the petition that had been approved, the director would reopen that case, and the petitioner could designated two of the original five petitions to be approved.

In response to the second RFE counsel submitted a letter dated September 27, 2002 and the following: copies of unaudited financial statements of the petitioner dated August 31, 2002, and a letter dated September 13, 2002 from a certified public accounting firm stating that the financial statements had been compiled by that firm based on the representations of management.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the date of filing, and denied the petition. On appeal counsel states that updated financial information supports the ability of the petitioner to pay the proffered wage.

On appeal, counsel submits a brief and additional evidence consisting of copies of unaudited financial statements of the petitioner for the year 2002; and a copy of Form 7004 Application for Automatic Extension of Time To File Corporation Income Tax Return for the year 2002 submitted by the petitioner and dated March 13, 2003.

Counsel states on appeal that the petitioner is a rapidly growing company with ample gross income and ample total current assets. Counsel states that the petitioner requests the reopening of the petition which was previously approved and requests the approval of the instant petition and one of the other petitions submitted by the petitioner which had been denied.

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 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 Form ETA 750B states that the beneficiary had been employed by the petitioner since November 2000. Nonetheless, the petitioner failed to submit any Form W-2 wage and tax statements, despite the director's specific request for any such statements in his first RFE. The evidence therefore fails to establish that the petitioner 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 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.

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 year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 the 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.

For a corporation, 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. The record before the director closed on September 27, 2002, with counsel's submissions in response to the second RFE. As of that date the petitioner's tax return for the year 2001 was the most recent one available, and it had been submitted previously with counsel's response to the first RFE.

The petitioner's tax returns shows the following amounts on line 28: $36,138.00 for 2000 and $117,747.00 for 2001. The figure for 2000 is less than the proffered wage of $55,785.60, but the figure for 2001 amount is greater than the proffered wage.

Calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L's yield figures for net current assets of $32,490.00 for the end of 2000 and -$57,833.00 for the end of 2001. The net current assets for the end of 2000 are less than the proffered wage. The net current assets for the end of 2001 are negative. The petitioner's net current assets are therefore insufficient to establish the petitioner's ability to pay the proffered wage, even if the instant petition were the only one submitted by the petitioner.

As noted above, the net income of the petitioner for 2001 was greater than the proffered wage. Therefore, if the instant petition were the only I-140 submitted by the petitioner, the evidence would establish the petitioner's ability to pay the proffered wage, based on the petitioner's net income for 2001.

CIS records, however, show that the petitioner has filed four other I-140 petitions since January 2002, two of those on January 11, 2002 and two on January 14, 2002. The instant I-140 petition was also filed on January 14, 2002. Two of those other petitions have been approved, and two have been denied. One of the denied petitions was appealed to the AAO, but was then returned to the director, for reasons which do not appear in the CIS electronic database. The database shows that the decision in that petition remains a denial.

In his decision the director cited figures on the proffered wages for other beneficiaries, information apparently obtained from the files in other petitions submitted by the petitioner. The responsibility for compiling and presenting sufficient evidence, however, lies not with the director but with the petitioner. In the instant petition, the petitioner has submitted no evidence which addresses the issue of its ability to pay the proffered wages to multiple beneficiaries.

Counsel submitted copies of financial statements of the petitioner dated August 31, 2002. But unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel asserts that the petitioner "is a rapidly growing company that needs to hire additional staff to facilitate the growth." (Brief, page 1). The evidence in the record, however, contains no documentation to support counsel's assertion on this point. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). CIS will consider a petitioner's overall business prospects when sufficient acceptable evidence is submitted on that issue. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, the record in the instant petition lacks evidence on which to base any analysis of the petitioner's business prospects or likelihood of future growth.

The petitioner must show that it had sufficient net income or net current assets to pay all the wages as of the priority date of each petition and continuing until each beneficiary obtains permanent residence. The evidence submitted prior to the decision of the director failed to establish those facts.

For the above reasons, therefore, the director was correct in concluding that the evidence failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary while also paying the proffered wages to the beneficiaries of other petitions submitted by the petitioner.

On appeal the petitioner submits additional evidence. The evidence submitted on appeal does not overcome the decision of the director. The evidence consists of copies of unaudited financial statements of the petitioner for the year 2002; and a copy of Form 7004 Application for Automatic Extension of Time To File Corporation Income Tax Return for the year 2002, submitted by the petitioner and dated March 13, 2003. The evidence newly submitted on appeal fails to address the issue of the petitioner's ability to pay the proffered wages to multiple beneficiaries. For example, the record lacks evidence of the proffered wages for each of the beneficiaries of the multiple I-140 petitions and lacks evidence on whether wages were paid previously to the beneficiaries of those petitions. Moreover, the financial statements offered in evidence are unaudited. As noted above, unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2).

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.