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

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-274-51694 Office: CALIFORNIA SERVICE CENTER Date: [illegible]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant 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 painting contractor. It seeks to employ the beneficiary permanently in the United States as a construction painter. 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.

The 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.

Eligibility in this matter hinges 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 January 22, 2001. The beneficiary's salary as stated on the labor certification is $18.40 per hour or $38,272 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated January 8, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified evidence of the beneficiary's experience as well as the petitioner's 2001 federal income tax return.

In response to the RFE, the petitioner submitted its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The federal tax return for 2001 reflected gross receipts of $166,128; gross profits of $95,392; compensation of officers of $11,200; salaries and wages of $0; and ordinary income of $58,646. In addition, the petitioner submitted a letter of experience from Dave Morrison Custom painting indicating that the beneficiary had been employed for 2 years.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition The director specified that the petitioner had the ability to pay one painter, but that records indicated that two I-140's (Immigrant Petition for Alien Worker) had been submitted and that one had been approved.

On appeal, the petitioner states that he had a net income of $58,646 during 2001 and $98,710 during 2002. The petitioner submits a tax summary for 2001 and 2002.

In denying the petition, the director referenced an already approved petition for the petitioner and that the petitioner could not pay two painters. Service records indicate that two petitions were filed with the priority date of January 22, 2001, and that one was approved. Thus, we concur with the director that the petitioner must

establish its ability to pay both beneficiaries. In the absence of evidence to the contrary, it must be concluded that both beneficiaries were proffered the same or approximately the same wage at the time the petitions were filed. The petitioner has not established that it has employed either beneficiary in 2001.

The proffered wage for this beneficiary is $37,272 per year. The petitioner's Form 1120S reflects a net income of $58,646 for 2001. Assuming that the current employee's proffered wage was approximately $37,272 per year, the proffered wage in this petition, the petitioner could not pay the proffered wage for both beneficiaries out of its net income for 2001.

After a review of the evidence 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.