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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 27 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.

Robert P. Wiemann, Director
for Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 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 an apparel manufacturing company. It seeks to employ the beneficiary as a tailor, dressmaker, and custom sewer. 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.

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 February 21, 2001. The proffered salary as stated on the labor certification is $14.35 per hour, which equals $29,848 per year.

With the petition, counsel submitted a copy of the petitioner's 1999 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, showing a taxable income before net operating loss deduction and special deductions of $1,313 and net current assets of -$25,583. Counsel also submitted a copy of the petitioner's 2000 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, showing a taxable income before net operating loss deduction and special deductions of -$7,073 and net current assets of -$30,419. In addition, counsel provided a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, showing a taxable income before net operating loss deduction and special deductions of -$21,141 and net current assets of -$30,673.

The director considered this documentation insufficient, and, on March 14, 2003, he issued an Intent To Deny explaining his reasons for denying the petition and requesting additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel provided additional copies of the previously submitted tax returns, a letter from the owner and president of the corporation, personal bank statements for the owner of the corporation, the owner's household expenses, and a grant deed for property owned by the corporation's owner.

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 April 24, 2003, denied the petition.

On appeal, counsel submits a letter from the corporation's owner stating:

> My company has been operating for over thirty years and shown a profit for a major part of the thirty years. However due to general poor business conditions nationally for the past two years our business has been unable to show a profit. We expect conditions to change and hopefully we can show a profit once again.
>
> is the skilled worker my company needs to insure that our customers and client's relationship continue in the future as they have in the past. The beneficiary is very important part of my business and losing him would jeopardize our entire clientele.

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 establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage.

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.

A further means of determining the petitioner's ability to pay the proffered wage includes reviewing the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Net current assets identify the amount of "liquidity" that the petitioner has as of the date

[1] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable,

of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 1999 and 2000 tax returns reflect a taxable income before net operating loss deduction and special deductions of $1,313 and -$7,073, respectively. Because the priority date of the petition is February 21, 2001, the petitioner's 1999 and 2000 tax returns have no direct relevance to the petitioner's ability to pay the proffered wage and will not be considered as evidence of the petitioner's ability to pay the wage beginning on the priority date and continuing.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of -$21,141 and net current assets of -$30,673. The petitioner could not pay the proffered wage in 2001 from either its taxable income or its net current assets.

The petitioner's statement that it has been in business for thirty years and has shown a profit for a major part of those thirty years and that due to poor business conditions, it was unable to show a profit for the last two years is not evidence of the petitioner's ability to pay the proffered wage at the priority date and continuing.

The mere fact that a corporation shows a profit is not enough evidence to establish the ability to pay the wage. The small profit shown on the 1999 tax return is not enough to pay the proffered wage and earlier tax returns that could possibly have shown a continued pattern of the ability to pay the proffered wage were not provided. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In summary, the petitioner has not established that it had the ability to pay the proffered wage at the priority date 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.

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inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.