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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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 employment based immigrant visa petition was denied by the Director, Texas 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 skilled worker. The petitioner is a food store. It seeks to employ the beneficiary permanently in the United States as a retail manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and contends that the director failed to adequately consider the petitioner's financial documentation and maintains that the evidence demonstrates the petitioner's ability to pay the proffered wage.

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) also provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is November 14, 2001. The beneficiary's salary as stated on the labor certification is $21.71 per hour or $45,156.80 per annum, based on a 40-hour week. The record indicates that the petitioner is organized as a corporation.

As evidence of its ability to pay, the petitioner, through counsel, initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It shows that the petitioner files its taxes based on a standard calendar year. In 2001, the petitioner declared $314,066 in gross receipts or sales, no officer compensation, $3,000 in salaries and wages, no labor costs, and $23,934 in ordinary income. Schedule L of this tax return also shows that the petitioner had $42,910 in current assets and $1,186 in current liabilities, resulting in $41,724 as net current assets. CIS will consider net current assets because it represents the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet.

On December 4, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit a copy of the Wage and Tax Statements (W-2s) issued for each employee in 2001, copies of the petitioner's federal quarterly tax return for each quarter in 2002, and copies of the petitioner's bank statements from November 2001 to the present.

In response, the petitioner submitted the requested documentation, which, consistent with the petitioner's 2001 tax return, also showed $3,000 paid as wages to the petitioner's principal shareholder in 2002.

The director denied the petition, finding that neither the petitioner's 2001 corporate tax return, nor the petitioner's cash flow, as represented by its checking account statements, demonstrated a continuing ability to pay the proffered wage.

On appeal, counsel submits a copy of the petitioner's 2002 federal corporate tax return. It shows that petitioner had $288,997 in gross receipts or sales, no officer compensation, $3,000 in salaries and wages, no labor costs, and $42,112 in ordinary income. Schedule L of the tax return reflects that the petitioner declared no current assets and no current liabilities. Counsel also submits copies of a statement of income and expenses for the period ending December 31, 2002 showing the same net income as the 2002 tax return and copies the petitioner's checking account statements previously submitted to the director, including the petitioner's bank statements through October 31, 2002.

In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

Counsel maintains that the documentation submitted to the record is sufficient to demonstrate the petitioner's ability to pay the proffered wage. Counsel represents that the petitioner's net income in the year of filing was equal to or greater than the proffered wage. The AAO does not agree. Whether counsel means 2002 as the year of filing the Immigrant Petition for Alien Worker (I-140) or 2001 as the year the priority date of November 14, 2001 was established, the petitioner's net income did not equal to or exceed the proffered wage of $45,156.80 per annum. In 2001, as shown on the corporate federal tax return, the petitioner's net income was $23,934. In 2002, as shown on the federal tax return submitted on appeal, it was still over $3,000 less than the proffered wage. Although it may be considered that the petitioner could pay the proffered wage in 2001, if calculated on a prorated basis to represent its obligation to pay the remaining 1 ½ months in 2001, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay a proposed wage offer. (Emphasis added). As the petitioner has not shown that it could pay the proffered wage in 2002, it has not established the beneficiary's eligibility for the visa classification.

Although the regulation at 8 C.F.R. § 204.5(g)(2) requires federal tax returns, annual reports, or audited financial statements as the fundamental forms of acceptable evidence to establish a petitioner's ability to pay

the proffered wage, the AAO also concurs with the director's observation as to the fluctuating balances shown by the petitioner's 2002 checking account statements contained in the record. Bank statements show only a portion of a petitioner's financial picture and do not identify other liabilities or encumbrances that may affect its position. It is also noted that there is no proof in this case to show that the bank statements, covering the same period as the petitioner's 2002 tax return, somehow represent additional funds beyond those shown on the tax return.[1]

Counsel also asserts that the beneficiary will contribute to an increase in business for the petitioner. It is noted that the record contains no evidence of this projected increase in profits or any information from which this asserted increase in business might be estimated. The prospective increase in profits hypothesized by counsel is not supported by evidence in the record and cannot be considered in this case.

Based on the evidence contained in the record and after consideration of the evidence and assertions presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.

[1] It is further noted that the petitioner's 2002 federal tax return is checked as the petitioner's "final return." Thus, it is not even clear that the petitioner still exists.