U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 202 51329 Office: CALIFORNIA 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
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 remanded to the director to request additional evidence and entry of a new decision.

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 coatings and waterproof specialist firm. It seeks to employ the beneficiary permanently in the United States as a painter/coater. 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, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has established its 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, in part, 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 January 9, 1999. The beneficiary's salary as stated on the labor certification is $23.42 per hour or $48,713.60 per year, based on a 40-hour week. The record indicates that the petitioner was established in 1987 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted a copy of a compiled financial statement produced by [redacted] As explained by [redacted] a compilation is not reviewed or audited and relies on information supplied by the management. The financial statements also represent a combination of both the petitioner's financial information and a different company called, "WPS Industries, Inc."

On November 8, 2002, the director requested that the petitioner provide additional evidence of its ability to pay the proffered wage from the priority date to the present. The director instructed the petitioner to submit either annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted copies of its Form 1120, U.S. Corporation Tax Return for 1999, 2000 and 2001. The tax returns indicate that the petitioner files its returns based on a fiscal year running from September 1st until August 31st of the following year. Its taxable income is reflected on page one and its current assets and liabilities are shown on the attached Schedule L. In determining a petitioner's ability to pay a proffered wage, CIS will examine 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). CIS will also consider net current assets because it represents the amount of liquidity that a petitioner has as of the date of filing. It reflects 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.

In this case, the petitioner's corporate tax returns contained the following information relevant to its taxable income and its net current assets:

Year	Taxable Income Before Net Operating Loss Deduction	Current Assets	Current Liabilities	Net Current Assets
1999	$46,318	$747,285	$297,077	$450,208
2000	47,521	835,590	296,757	538,833
2001	14,895	936,419	748,854	187,565

The director denied the petition, concluding that the petitioner's taxable income was insufficient to cover the beneficiary's proffered annual salary of $48,713.60. The director also concluded that the tax returns failed to show enough available assets in each of the years pay the proffered salary. The AAO concurs with the director's observation regarding the petitioner's taxable income, but disagrees with the director's finding as to the petitioner's assets. As set forth above, the petitioner could pay the beneficiary's proposed salary in 1999, 2000 and 2001 out of its net current assets.

On appeal, counsel submits copies of WPS Industries, Inc.'s 2000 and 2001 corporate federal tax returns and a letter from [redacted] stating that the petitioner and WPS Industries Inc. share the same principal shareholder. Counsel suggests that WPS's tax returns should also be considered in determining the petitioner's ability to pay the proffered wage. As the petitioner's federal tax returns for 1999, 2000, and 2001 are sufficient to establish its ability to pay the proposed salary for the time periods covered by those returns, it is not necessary to address counsel's assertion. It is noted, however, that corporations are separate and distinct legal entities and the assets of a corporation's shareholders or of other corporations or enterprises cannot be considered in evaluating a petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Although the petitioner has established its ability to pay the beneficiary's proffered salary from September 1999 through August 31, 2002, the petition is not approvable until the petitioner establishes its ability to pay the proffered wage as of the visa priority date beginning on January 9, 1999. 8 C.F.R. § 204.5(g)(2). A final decision should not be rendered until this financial information is provided. The case will be remanded to allow the petitioner to provide such evidence through either its 1998 federal tax return, an audited financial statement, or an annual report.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional financial evidence from the petitioner pursuant to the discussion above and the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.