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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 1 7 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 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 real estate company. It seeks to employ the beneficiary permanently in the United States as a credit analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement.

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 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 April 30, 2001. The proffered salary as stated on the labor certification is $27.50 per hour or $57,200 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 100, California Corporation Franchise or Income Tax Return and a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The income tax return reflected a taxable income before net operating loss deduction and special deductions of $4,654 and net current assets (current assets minus current liabilities) of $33,298. This evidence was considered insufficient by the director, and, on September 5, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from 2000 to be in the form of copies of annual reports, signed and certified federal tax returns, or audited financial statements. The director also requested that, if the petitioner employs more than 100 workers, a statement from a financial officer be submitted that establishes the petitioner's ability to pay the proffered wage.

In response, counsel submitted another copy of its 2001 Form 1120, U.S. Corporation Income Tax Return, audited financial statements for 2000 and 2001, and copies of bank statements for April 24, 2000, May 22, 2000, December 22, 2000, April 23, 2001, May 22, 2001, July 24, 2001, December 24, 2001, and October 31, 2002.

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 March 19, 2003, denied the petition.

On appeal, counsel states:

> The Service Center committed grave abuse of discretion in not properly evaluating all evidence submitted by Petitioner to prove its capacity to pay the proffered wage to the alien worker. Hence, the decision to deny the I-140 Petition is without factual and legal basis. Based on decided cases, other evidence such as financial and bank statements may be used in determining Petitioner's ability to pay. Gross annual income of Petitioner is over $3,000,000. Its monthly bank deposits exceed the proffered wage to alien worker.

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 provide evidence that it employed the beneficiary in 2001.

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.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. 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

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 2001 tax return reflects a taxable income of $4,654 and net current assets of $33,298. The petitioner could not pay the proffered wage of $57,200 per year out of either the taxable income or the net current assets.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). It is noted that even though the bank statements do show a large cash flow, those statements only represent four months in 2001 and one month in 2002. Most of the ending balances are less than the proffered wage.

While the copy of the audited financial statement for 2001 clearly shows that the petitioner paid $2,540,771 in commissions to its sixty real estate agents, this fact is not sufficient evidence of the petitioner's ability to pay the beneficiary's wage in 2001. There is no evidence that any of the $2,540,771 would be available to pay the beneficiary and it is unlikely that those real estate agents who earned their commissions would forgo any of it so that the beneficiary could be paid. 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).

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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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, 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.