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

U.S. Citizenship and Immigration Services

[redacted]

JAN 30 2004

FILE: EAC 02 159 53241 Office: VERMONT SERVICE CENTER Date:

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

PUBLIC COPY

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), as a skilled worker. The petitioner is an architectural metal installation firm. It seeks to employ the beneficiary permanently in the United States as a metal panel and trim installation mechanic. 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 asserts that the director misinterpreted the petitioner's financial data and maintains that the petitioner's evidence established its ability to pay the proffered wage.

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 other 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) 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 whether the petitioner's continuing ability to pay the wage offered has been established 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 April 23, 2001. The beneficiary's salary as stated on the labor certification is $25.85 per hour or $47,047 per year, based on a 35-hour week. The visa petition, filed in April 2002, indicates that the petitioning business was established in 1982 and has three employees. Part B of the approved labor certification (ETA-750) reflects that the petitioner has employed the beneficiary since 1997.

The petitioner, through counsel, initially submitted copies of its 2001 checking account statements. On July 2, 2002, the director requested additional evidence from the petitioner to support its financial ability to pay the beneficiary's wage offer as of the priority date and continuing until the beneficiary obtains lawful permanent resident status. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner to submit federal tax returns, audited financial statements or annual reports. The director also specifically instructed the petitioner to

submit a copy of the petitioner's 2001 federal tax return with all schedules and attachments or a 2001 annual report accompanied by audited or reviewed financial statements. The director further advised the petitioner to submit copies of the beneficiary's Wage and Tax Statement (W-2) for 2001.

In response, the petitioner provided a partial copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, as well as a copy of the beneficiary's W-2 issued by the petitioner. The W-2 reflects that the petitioner paid the beneficiary $38,660.64 in 2001. Credit will be given to the wages paid to the beneficiary in evaluating a petitioner's ability to pay the proffered wage. To the extent that a petitioner has employed a beneficiary at the proffered wage, it constitutes *prima facie* proof of the petitioner's ability to pay the beneficiary's proposed wage offer.

The corporate tax return shows that the petitioner files its returns based on a standard calendar year. In 2001, it declared -$81,283 in ordinary income. Pages 3, 4, and 6, including the petitioner's Schedule L balance sheet showing its current assets and liabilities, are missing from the petitioner's corporate tax return. The difference between current assets and current liabilities reflect the petitioner's 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 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.

The director denied the petition, finding that the petitioner's 2001 net income, as shown on its corporate tax return, was not sufficient to pay the proffered wage.

On appeal, counsel asserts that the petitioner's checking account statements were sufficient to establish its continuing ability to pay the beneficiary's proposed wage offer of $47,047 and cites a 1991 case in which the AAO sustained an appeal based on a similar theory. That case is not before the AAO here and does not constitute a precedent decision as set forth in the regulation at 8 C.F.R. § 103.9(a). The regulation at 8 C.F.R. 204.5(g)(2) requires federal income tax returns, audited financial statements, or annual reports as evidence of a petitioner's ability to pay the proffered wage. Although additional documentation may be considered, it generally cannot substitute for the required evidence. It is further noted that bank statements only offer a portion of a petitioner's financial status as they do not reflect all liabilities and encumbrances that may affect a petitioner's financial standing. Moreover, in this case, there is no proof that the petitioner's 2001 checking account statements represent additional funds beyond those incorporated within the petitioner's 2001 tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In determining a petitioner's continuing ability to pay a proffered salary, CIS will examine the net income figure 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. Texas 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. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

In this case, the difference between the $38,660.64 paid to the beneficiary as wages in 2001 and the proffered wage of $47,047, is $8,386.36. The petitioner's 2001 net income of -$81,283 could not cover this shortfall.

The petitioner has failed to persuasively establish its continuing financial ability to pay the proffered wage as of the visa priority date of April 23, 2001.

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 met that burden.

ORDER: The appeal is dismissed.