U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: WAC 02 176 52055 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

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
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 a metal finishing and manufacturing business. It seeks to employ the beneficiary as a metal fabricator. The petition was accompanied by a copy of a 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 and because the petitioner had not submitted the original labor certification as required or fully responded to a request for evidence.

On appeal, counsel submits a statement.

In pertinent part, 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 August 25, 1997. The proffered salary as stated on the labor certification is $23 per hour or $47,840 per year.

With the petition, the petitioner, through counsel, submitted a copy of the ETA 750, Application For Alien Employment Certification. The director considered this documentation insufficient and on July 31, 2002, he requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of August 25, 1997 and continuing to the present. The director specifically requested that the financial documentation be in the form of copies of annual reports, copies of federal tax returns including all schedules and tables (with appropriate signature(s)), or audited financial statements. The director also requested that the petitioner provide certified tax returns for the years 1998, 1999, 2000, and 2001. In addition, the director requested the petitioner submit the original, certified labor certification and provide evidence of the beneficiary's prior experience.

In response, counsel submitted copies of the petitioner's 1998 through 2000 Forms 1120S, U.S. Income Tax Returns For an S Corporation, and a letter from the beneficiary's prior employer stating that the beneficiary worked for it for two years and six months. Counsel did not provide the original labor certification. The 1998 tax return reflected an ordinary income of $85,410 and net current assets of -$144,386. The 1999 tax return reflected an ordinary income of $44,359 and net current assets of -$112,645. The 2000 tax return reflected an ordinary income of $202,886 and net current assets of $51,982.

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 that the petitioner had not submitted the original labor certification. On June 7, 2003, the director denied the petition.

On appeal, counsel, states:

> The original ETA-750 was submitted with the I-140. Petitioner is unable to produce another original.
>
> In the REQUEST FOR EVIDENCE FORM, dated 07-31-02, the service requested tax information for the years 1998, 1999, 2000, and 2001 (see attached copy of request). The petitioner did not have the year 2001 at the time it was requested.

Contrary to counsel's assertion, the original ETA-750 is not in the record of proceeding. The regulation at 8 C.F.R. § 102.2(b)(4) states:

> *Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.

Since there is no evidence that the original ETA-750 was submitted, the appeal must be dismissed for this reason.

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 in 1997 through 2000 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets from 1998 through 2000 were -$144,386, -$112,645, and $51,982, respectively. The petitioner could not have paid the proffered wage in 1998 and 1999, but could have paid the proffered wage in 2000 from its net current assets. The 1997 tax return was not provided.

Counsel contends that the director did not ask for the 1997 tax return. However, the request for evidence clearly states, "The petitioner is requested to provide this evidence from August 25, 1997 to the present." In addition, the regulation at 8 C.F.R. § 204.5(g)(2) specifically states. "The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Therefore, the 1997 tax return is necessary to determine the petitioner's ability to pay the proffered wage from the priority date of August 25, 1997. The petitioner has not demonstrated its ability to pay the proffered wage in 1997.

The 1998 tax return reflects an ordinary income of $85,410 and net current assets of -$144,386. The petitioner could have paid the proffered wage from its ordinary income in 1998.

The 1999 tax return reflects an ordinary income of $44,359 and net current assets of -$112,645. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1999.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The 2000 tax return reflects an ordinary income of $202,886 and net current assets of $51,982. The petitioner could have paid the proffered wage from either its ordinary income or its net current assets in 2000.

The petitioner failed to submit its 2001 federal tax return in response to a request for evidence or on appeal, even though the director specifically cited the lack of the 2001 tax return as one of the reasons for his denial.

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.