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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 173 52850 Office: CALIFORNIA SERVICE CENTER Date: MAR 16 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a plumbing contractor. It seeks to employ the beneficiary permanently in the United States as a plumber/supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on April 25, 2001, and approved by the Department of Labor on October 10, 2001. 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 submitted a brief in support of the appeal, and additional evidence in the form of an unsigned letter dated December 11, 2002, from [redacted] on behalf of the petitioner's appeal.

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.

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.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $29.84 per hour, or approximately $57,292 per year.

With the petition, counsel submitted the employer's corporate tax return for 2001. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 23, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested copies of the petitioner's payroll summary and W-2's demonstrating wages paid to the beneficiary and any employees. The Service Center also requested evidence to establish the beneficiary's experience as listed on the ETA 750, to include specific information regarding the beneficiary's title, duties, and dates of employment.

In response, on or about September 28, 2002, counsel submitted an experience letter and the petitioner's Quarterly Wage Reports (DE-6) for 2001 and three quarters of 2002. The experience letter was dated

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[1] We note that the petitioner in this case is known as "Rena's Plumbing, Inc., dba Precision Plumbing" while the letter submitted by counsel is from "Rina Donick." We assume that the spelling difference is of no significance, but note it here.

September 2002 and was from Roman Estrada, President of RE Plumbing & Heating located in Sylmar, California. The letter indicated that the beneficiary had worked for RE Plumbing & Heating from April 1993 through March 1996 for 40 hours per week as a plumber. It further detailed the petitioner's job duties. The Quarterly Wage Reports did not list the beneficiary among those receiving wages from the petitioner during the 2001-2002 reporting periods. The reports did indicate, however, that the petitioner paid wages to between zero to six individuals each quarter, and that the total wages paid ranged from $0 to $39,190 per quarter.[2]

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 November 14, 2002, denied the petition.

On appeal, counsel argues that the tax information submitted in support of the petition clearly supports the petitioner's ability to pay the wage. Counsel's basic assertion is that a corporation always has a choice about whether to distribute earnings to its officers. Counsel argues that instead of distributing earnings to its officers the petitioner could have chosen to reinvest those earnings into the business using them to pay the beneficiary. Counsel also argues that the petitioner could rely upon the beneficiary's skills to generate additional income for the petitioner.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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*, the court held that the INS, now 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

As counsel recognizes, the net income figure contained in the 2001 Form 1120 Corporate Tax Return does not further petitioner's case. The petitioner's taxable income figure shows a loss of $201. Even an alternative method of comparing current assets to current liabilities, as opposed to examining taxable income, does not establish petitioner's ability to pay. When the current liabilities are subtracted from the current assets as reflected in Schedule L, the result is $20,265, an amount considerably less than the proffered wage of $57,292. Although counsel contends that the business can expect that the beneficiary will generate more income for the petitioner, there is no evidence to support this contention other than counsel's assertions. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of*

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[2] Interestingly, the quarterly report for the second quarter of 2002 reflects no individuals receiving wages, and indicates "No Payroll" on the form. It is not clear what the significance of this is, but should there be additional proceedings related to this case, the petitioner's counsel should explain the absence of a payroll for this period. The AAO believes this information is relevant given the importance of the petitioner's continued viability. The tax records reflect that it is a relatively new business, having been established as a corporation on January 22, 2001.

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although the record reflects that the beneficiary has worked for the petitioner since 1998, there is no evidence as to what the effect of the beneficiary's work has been upon the business's profitability. Presumably the beneficiary's effect on the business' profitability has been established; yet, no evidence has been submitted on this issue.

Counsel's major argument in support of the petitioner's ability to pay the wage is that the petitioner could have elected to channel distributions to cover the beneficiary's wages, and is willing to do so in the future. In support of this argument, counsel has submitted a letter from [redacted] an unidentified individual but presumably the majority owner of the petitioner corporation. The letter indicates that the officer wages are discretionary and could be used to pay a portion of the beneficiary's wages. However, the amounts available for officer compensation in 2001 were used for that purpose and were obviously not used to pay the beneficiary's wages. As for the future of similar funds, we note that in 2001 the majority and minority owners received compensation of $37,950 and $39,480, respectively. Assuming similar amounts of compensation are available in future years, the officers would need to divert an amount in excess of the compensation paid to either officer in order to pay the proffered wages of $57,292. This amount would exhaust the vast majority of the funds available for officer compensation--$77,430 in 2001. It is unlikely that the officers would forego, or could realistically afford to forego, such significant compensation. The letter submitted by counsel is vague as to the degree of commitment by the officers, even assuming that such a promise to commit the funds was sufficient. More compelling evidence of the petitioner's ability and willingness to pay the wage through the diversion of officer compensation or otherwise, would have been evidence demonstrating the payments made to the beneficiary during the period of his employment with the petitioner, particularly during the pendency of this petition. However, counsel has offered no such evidence, and the wage records submitted by the petitioner do not reflect any amount of compensation paid to the beneficiary.

The petitioner's counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.