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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 155 50163 Office: VERMONT SERVICE CENTER Date: APR 26 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
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer supervisor. 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits a Form I-290B with a brief statement alleging that the director's decision was erroneous.

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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $29.73 for a forty-hour workweek, which equates to $61,838.40 per annum.

With the petition, counsel for the petitioner initially provided incomplete copies of the petitioner's 1998, 1999, and 2000 tax returns.[1] In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments and the beneficiary's W-2 forms in the event that the petitioner had employed him, counsel submitted a request for additional time to respond with appropriate evidence. Counsel never submitted a formal response to the director's request, and consequently the petition was denied on February 13, 2003.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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.*

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[1] Counsel for the petitioner also provided experience verification letter from the beneficiary's prior employer. The director did not base his decision to deny the petition upon the beneficiary's qualifications, and thus the issue will not be discussed within the scope of this decision.

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).

A review of the file shows that the petitioner submitted incomplete copies of its federal tax returns for 1998, 1999, and 2000. The petitioner had net incomes for these years as follows:

1998:	$23,528.00
1999:	$ 7,792.00
2000:	$21,893.00

Since the proffered wage on the labor certification is $61,838.40, the petitioner's income as set forth on the tax returns is insufficient to establish its ability to pay. Noting that the petitioner had not met its burden, the director requested that the petitioner supply additional financial documentation in support of its ability to pay. Although counsel for the petitioner responded by requesting additional time in which to respond to the director's request, no additional information was provided.

As an alternate means of determining a petitioner's ability to pay, CIS will examine a petitioner's net current assets. Net current assets, which are the difference between the petitioner's current assets and current liabilities, are set forth on Schedule L of the federal tax return. Since Schedule L did not accompany the petitioner's returns for 1998, 1999, and 2000, the director requested that the petitioner provide *complete* copies of its returns in the request for evidence. No additional documentation was submitted. Therefore, the director was unable to look at the petitioner's net current assets as an alternative means of establishing that the petitioner had sufficient funds available to pay the proffered wage.

Another method used by CIS in determining the petitioner's ability to pay the proffered wage is 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 previously employed the beneficiary. Although the labor certification states that the petitioner has employed the beneficiary since August of 1997, the petitioner provided no documentary evidence to corroborate this claim. In addition, the director specifically asked the petitioner to submit copies of the beneficiary's W-2 forms as evidence of its ability to pay the proffered wage. The petitioner failed to submit such documentation.

On appeal, the petitioner alleges that:

> . . . we have complied with all the documentary requirements in a timely and reasonable manner which would show that our company had the capacity to pay the proffered wage. A review of the file would reveal such.

No additional evidence was submitted in support of this statement.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. *See* 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). Although the director provided the petitioner with ample opportunity to submit additional evidence in support of its ability to pay, the petitioner failed to do so.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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.