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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

PUBLIC COPY

B6

[redacted]

FEB 24 2004

FILE: WAC 02 198 51502 Office: CALIFORNIA 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

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Mexican restaurant/dinner theater. It seeks to employ the beneficiary permanently in the United States as a musician. 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 and continuing to the present.[1]

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

The appeal was filed on December 27, 2002. It is indicated on part 2 of the Form I-290B that the appeal would be supplemented by a brief and/or evidence within 30 days. Part 3 of the Form I-290B, providing for a brief statement of the reason for the appeal, indicated that additional information would be submitted within 30 days, noting that the holidays had affected the ability to submit further evidence with the appeal. In addition, the statement on the I-290B simply asserted that the petitioner had complied with all applicable regulations and had satisfied its burden.

Nearly one year has passed since the filing of the appeal and no additional information has been submitted in support of the appeal. The appeal fails to specifically identify an erroneous conclusion of law or a statement of fact as a basis for the appeal. The appeal must therefore be summarily dismissed.

ORDER: The appeal is dismissed.

[1] Beyond the director's decision, it appears that there may also be an issue as to whether the petitioner has adequately established that the beneficiary met the requirements of the position offered.

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U.S. Citizenship and Immigration Services

[redacted]

FEB 24 2004

FILE: EAC 02 116 50974 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 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a vacuum cleaner distributor. It seeks to employ the beneficiary permanently in the United States as a vacuum cleaner repairer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on January 14, 1998, approved by the Department of Labor May 25, 1999. 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 no brief, but did submit a cover letter dated December 27, 2002, which referenced various documents including a letter from [redacted], CPA, a letter from [redacted] President of TNT Distributors, Form 1120S U.S.Income Tax Return for an S Corporation for TNT Distributors, Bank Statements of TNT Distributors. The letter concludes that the documents demonstrate the financial viability of the employer.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is $17.44 per hour which is the equivalent of $36,275 per year.

The petition, filed by counsel on or about February 15, 2002, was submitted on behalf of the original petitioner, A.V. Associates, Inc. t/a Kirby Center of Greater D.C. With that petition, the record reflects that counsel submitted the 1998 and 1999 Form 1120S, U.S. Income Tax Return for an S Corporation, and the 1998 and 1999 Form W-2 Wage and Tax Statements reflecting wages paid to the beneficiary by A.V. Associates, Inc., and an undated experience letter signed by Alex Venditti, for the beneficiary relating to his then current employment as a vacuum cleaner repairer/helper 40 hours per week from April 1996 to "Present" Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 20, 2002, requested additional evidence pertinent to that ability. We note that the Service Center addressed only the petitioner's 1998 federal income tax returns and made no specific request for additional documents, although it did note

that it required evidence demonstrating the ability to pay from January 14, 1998 to the present (then, May 20, 2002). In addressing the 1998 documents, the Service Center noted that the evidence reflected that in 1998, petitioner had paid the beneficiary a salary of $16, 670, which fell $19,605 short of the $36, 275 proffered wage. It did not address the arguments set forth in counsel's cover letter accompanying the February 15th submission.

In response, on or about August 14, 2002, counsel submitted a letter attaching the federal tax returns (Forms 11020S) for tax years 1998, 1999, 2000, as well as the W-2 Wage and Tax Statements for 1998 and 1999 reflecting wages paid to the beneficiary by A.V. Associates, Inc. of $16,670 and $17,925 respectively. The letter noted that the 2001 tax return for the petitioner was not available. 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 27, 2002, denied the petition.

On appeal, counsel provides a cover letter accompanied by additional evidence. That evidence consists of a the previously identified letter dated December 27, 2002 from [redacted] CPA, a letter from [redacted] identified as President of TNT Distributors, Inc.. Counsel's cover letter notes that Mr [redacted] purchased A.V. Associates, Inc. in July 2001 and is continuing in the same business and is continuing to sponsor the beneficiary.[1] Additional evidence accompanying the appeal included the Form 11020S U.S. Income Tax Return for an S Corporation and copies of Bank Statements for TNT Distributors from August to November 2002 from Sun Trust Bank.[2]

Presumably counsel has submitted the letter from Mr. [redacted] in order to indicate that TNT Distributors, Inc., is the successor in interest to A.V. Associates, the original petitioner. However, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. The successor-at-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). The record does not contain proof of TNT Distributor's status as a successor-at-interest to A.V. Associates.

Aside from the successor-at-interest issue, it does not appear that petitioner has established the ability to pay the proffered wage. Petitioner's counsel has submitted various income tax returns, bank records, and a letter from an accountant in support of the ability to pay the wage. Counsel advances the argument that the petitioner's inadequate net income should not be determinative of petitioner's ability to pay the wage. At bottom, the argument being advanced by counsel, and which counsel seeks to support with the letter from the accountant, is that petitioner's net income should be augmented by deductions taken in a given tax year, and by any amounts of officer compensation, on the theory that these amounts are discretionary expenditures of the business which the business could have used instead to pay the beneficiary's proffered wage. However, counsel has provided no authority in support of such a position.

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[1] The letter dated December 23, 2002 from [redacted] President of TNT Distributors, Inc., states that it has bought A.V. Associates and that TNT is continuing to sponsor Mr [redacted] for permanent resident status under the new company name. The letter further notes that Mr [redacted] is a valued employee and TNT looks forward to his continued employment with the company.

[2] We note that the copies of the bank statements contain the first page only, but presumably are submitted to demonstrate the beginning and ending balances which appear on the first page.

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 both CIS and 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 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.

Counsel's argument that the petitioner's net income figure should be augmented by amounts attributable to improvements or officer compensation because the petitioner could have used such amounts on the beneficiary's salary is unconvincing. The fact remains that petitioner, or its predecessor, expended amounts for leasehold improvements or payments to officers. These amounts were used for those purposes and thus, were not funds available to pay the beneficiary. It is also unrealistic to believe that petitioner would choose to significantly reduce the compensation of officer/owners of the company in order to significantly enhance the wages paid to beneficiary. Even if we were, as an alternative to ordinary or net income, to examine the petitioner's net current assets as compared to petitioner's net current liabilities, the petitioner still cannot demonstrate the its ability to pay the wage. For example, turning to Schedule L of the 2001 Form 110S, the figure for the current assets is $19,542. This would be reduced by the amount of current liabilities, or $8,128, for a total of $11,414. This amount is not even one third of the proffered salary of $36, 275. Similar comparisons for tax years 1999 and 2000 yield amounts of $7,460 and $9,951 respectively, both insufficient to pay the proffered wage.

We turn next to the bank statements submitted by the petitioner's counsel. The bank statement copies generally reflect that TNT Distributors maintains a corporate checking account at Sun Trust Bank. The bank statements submitted are the monthly statements from August 2002 through November 2002. During this period, it appears that the average balance in the checking account ranges from a high of $13, 284 in August 2002 to $6,802 in October 2002.[3] Although counsel has submitted these documents, counsel has advanced no argument as to how the bank statements reflect on the petitioner's ability to pay. These amounts are insufficient to pay the proffered wage. Furthermore, assuming that the amount is intended to reflect cash on hand, this would form part of the petitioner's current assets for 2002, and would need to be compared to the petitioner's current liabilities. As such, the information does not assist in determining the petitioner's ability to pay the wage.

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.

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[3] The copy of the bank statement for November 2002 is partially illegible and does not contain the information to reflect the average balance amount for that month.

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.