PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B6

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: EAC 02 050 52912 Office: VERMONT SERVICE CENTER Date: JAN 13 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a 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, Vermont Service Center, and is now before the Administrative Appeals Office 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 skilled worker. The petitioner is an automotive collision repair firm. It seeks to employ the beneficiary permanently in the United States as an automotive painter. 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, counsel argues that the petitioner's gross income and officers' compensation should be considered when determining the petitioner's financial ability to pay the proffered wage.

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) states in pertinent part:

> (2) *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 the Service.

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 March 28, 2000. The beneficiary's salary as stated on the labor certification is $20.00 per hour or $41,600 per year based on a 40-week. The visa petition indicates that the petitioner was established in 2000 and employs six people.

The petition was filed on November 29, 2001. As evidence of its ability to pay, the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Return for the year 1999 and a profit and loss statement for the period from January through December 2000. The profit and loss statement showed a net income of $83,976.67. The petitioner also submitted an unsigned copy of a March 2000 document titled "Massachusetts Corporation Annual Report." The information contained in this document set forth the number of shares in the corporation, identified the corporate officers, and established that the petitioner's last fiscal year ended on December 31, 1999. This document provided no additional evidence of the petitioner's ability to pay the proffered wage as of the visa priority date.

On January 25, 2002, the director requested further evidence relevant to the petitioner's ability to pay the offered wage. He noted that the previously submitted profit and loss statement was not audited or reviewed and instructed the petitioner to submit a copy of its 2000 federal income tax return or an annual report accompanied by audited or reviewed financial statements.

The petitioner responded by sending a letter from one of its accountants explaining that the level of officers' compensation was increased in order to lower the corporate tax liability. Copies of 2001 W-2s of the corporate officers and fifteen employees accompanied this letter.

The director denied the petition. He determined that the petitioner had not established its ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. The director noted that the petitioner's 1999 corporate tax return showed only $11,068 in taxable income and $9225 in net current assets. Neither figure covers the beneficiary's $41,600 proposed salary.

As noted by counsel on appeal, the director inaccurately represented that the petitioner actually employed the beneficiary in 2001. We withdraw that portion of the director's decision relying upon this assumption, but we concur with the director's conclusion that the petitioner has not demonstrated its ability to pay the proffered wage. We note that the petitioner failed to submit its 2000 federal tax return as requested, or provide any explanation as to its absence. The January-December 2000 profit and loss statement and unsigned 1999 annual report provided by the petitioner is not sufficient, standing alone, to establish its ability to pay as of the visa priority date and continuing until the present. The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the main evidentiary requirements.

On appeal, counsel contends that the petitioner's gross income should be considered when evaluating the petitioner's ability to pay. Counsel also argues that the officers' compensation figures should also be considered. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). Counsel's assertion that officers' salaries should be included in the calculation is also unpersuasive. As noted by the director, this compensation represents funds already disbursed and is not readily available to pay the wage of the beneficiary as of the filing date of the petition.

While the petitioner may currently be a going concern, it has not submitted sufficient persuasive evidence to establish its ability to pay the beneficiary's offered wage as of the visa priority date of March 28, 2000 and continuing until the present.

Beyond the decision of the director, it is noted that the approved labor certification requires an applicant to have two years in the job offered. The only evidence in the record relating to this requirement is an unsigned, undated, typed statement, purportedly from the beneficiary, asserting that he worked in his own garage, in

Lebanon, as an auto body painter and finisher from 1978 until 1986. It is noted that the regulation at 8 C.F.R. § 204.5 (l)(3)(ii)(A) requires that letters from trainers or employers describing the training or experience of the alien must support the training or experience for skilled workers. Although the statement in the record suggests that the beneficiary owned a garage, it is of limited evidentiary value as a self-serving assertion. Some further corroboration of the beneficiary's skill and experience should have been offered in order to establish that the beneficiary has met the terms and conditions of the approved labor certification.

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.