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

U.S. Citizenship and Immigration Services

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[redacted]

PUBLIC COPY

FILE: EAC 02 146 50747 Office: VERMONT SERVICE CENTER Date: JAN 22 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]

identifying [illegible] deleted to prev[illegible] unwarranted invasion of personal privacy

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 offers mailbox packing, shipping and computer services. It seeks to employ the beneficiary permanently in the United States as a computer graphic designer. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the beneficiary did not have the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and the petitioner's written statement.

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 first issue in this proceeding is whether the beneficiary has established that he has the requisite experience to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* -- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
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> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on March 5, 2001, indicates that the minimum requirement to perform the job duties of the proffered position of computer graphic designer is two years of experience in the job offered. In response to Item 15 eliciting "Other Special Requirements," QuarkXpress 4.0, PageMaker 6.5, Illustrator 9.0, and Photoshop 6.0 are listed.

With the initial visa petition filing, counsel submitted a letter of experience from JSB Star Press which stated that the beneficiary was employed by them as a Computer Graphic Designer from June 1, 1992 to September 30, 1995.

Because the evidence was insufficient for the service center to ascertain the beneficiary's qualifications with respect to the special skills listed as "Other Special Requirements" on the Form ETA 750, a request for evidence was issued. In response to the request for evidence, two letters were submitted that did not detail the beneficiary's professional experience.

Therefore, the director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training of two years and denied the petition accordingly. The director noted that the letter of experience did not state that the beneficiary had knowledge of the required computer programs listed on Item 15.

On appeal, counsel submits an affidavit from JSB Star Press which states that the beneficiary used Pagemaker, QuarkXpress, Photoshop, and Illustrator during his employment with the company. These are the specific skills listed as part of the proffered position's "Other Special Requirements" on Form ETA 750's Question 15 on Part A. Therefore, the petitioner has overcome this portion of the director's decision. The beneficiary has established that he is qualified for the proffered position as required under the regulations at 8 C.F.R. § 204.5(l)(3).

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage. 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 March 5, 2001. The beneficiary's salary as stated on the labor certification is $61,859 per annum.

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. 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).

With the petitioner's initial visa petition filing, counsel submitted a copy of the petitioner's Internal Revenue Service (IRS) Forms 1120S for 2000.[1] The service center determined that the tax return was insufficient evidence of the petitioner's continuing ability to pay the proffered wage and requested additional evidence.

In response to the request for additional evidence, counsel submitted a letter from the owner of the petitioning entity which stated that the petitioner filed for an extension on its 2001 tax return and the tax return should be completed by September 2002. Additionally, the petitioner explained that "[o]n the average our gross sale has increased by 10-15% above the figured shown in the 2000 tax return."

The director concluded that the petitioner failed to establish its ability to pay the proffered wages because its income after expenses was not sufficient to also pay the proffered wage to the beneficiary. Additionally, the director determined that the petitioner's explanation about its increase in gross sales was inconclusive because precedent establishes analysis of a company's income after expenses.

On appeal, counsel submits a copy of the petitioner's 2001 IRS Form 1120S which show an ordinary income of $45,289. The petitioner could not pay a salary of $61,859 a year from this amount. Additionally, Schedule L to

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[1] It is noted that the tax returns do not reflect the petitioner's name as used on the visa petition filing, however, the address is the same and the signature on the tax return matches the signature of the petition on the Form I-140.

the petitioner's tax returns indicates that its current liabilities exceed its current assets during 2001.[2] Thus, the petitioner's net current assets are not evidence of its ability to pay the proffered wages in 2001.

Also in the record of proceeding is a copy of the petitioner's 2000 IRS Form 1120S which shows an ordinary income of $13,893. The petitioner could not pay a salary of $61,859 a year from this amount. Additionally, Schedule L to the petitioner's tax returns indicates that its current liabilities are $43,655 and its current assets are $69,549 resulting in net current assets of $25,894 during 2000. The petitioner could not pay a proffered wage of $61,859 a year from this amount. Thus, the petitioner's net current assets are not evidence of its ability to pay the proffered wages.

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. The petition is denied.

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[2] Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, CIS will examine net current assets to determine if the petitioner has the ability to pay the proffered wages from the petitioner's net current assets. The net current assets would have to be greater than the proffered wage in order to evidence the ability to pay.