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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: WAC 02 194 51338 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a sewing contractor. It seeks to employ the beneficiary permanently in the United States as a dressmaker. 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 submits a brief and additional evidence.

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 $12.00 per hour which equates to $24,960.00 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1040, U.S. Individual Tax Returns, for the years 1998 through 2000. The IRS Forms show an adjusted gross income of $20,778 for 1998; $22,231 for 1999; and $33,343 for 2000.[1]

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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because its adjusted gross income for 1998 and 1999 were less than the proffered wage and denied the petition accordingly. The director also noted that the petitioner's 2000 tax returns were submitted in duplicate but the information contained within them are inconsistent.

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[1] A duplicate IRS Form 1040, generated by the IRS, was submitted for the year 2000 showing adjusted gross income of $198,950.

On appeal, counsel asserts the following: (1) CIS failed to take depreciation into consideration; (2) CIS should consider the petitioner's total income instead of income after expenses; (3) the two inconsistent tax returns for 2000 are irrelevant; and (4) CIS failed to consider the beneficiary's ability to generate income for the petitioner.

Counsel's first two assertions fail. In *K.C.P. Food Co., Inc. v. Sava*, the court held that 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. Therefore, the director was correct to analyze the petitioner's tax returns by its adjusted gross income, which is its income after expenses. Additionally, the director was correct to not add back the petitioner's depreciation to its adjusted gross income.

Counsel further asserts that the precedent decision of *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (C.A.D.C. 1989) supports the position that the beneficiary's ability to generate income should be factored in determining the petitioner's ability to pay the wage in the future. This assertion fails. *Masonry Masters* does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The court held that CIS should not require a petitioner to show the ability to pay more than the prevailing wage, which is not an issue in this case. The holding in *Masonry Masters* states that examining a company's financial records alone is unrealistic because it fails to account for income a new employee may generate. The AAO notes that it is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). However, even if applying the holding in *Masonry Masters* to this case, the petitioner has offered no evidence that the beneficiary will generate income for the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's IRS Form 1040 for calendar year 1998 shows an adjusted gross income of $20,778. The petitioner could not pay a proffered wage of $24,960.00 a year out of this income. Thus, the petitioner cannot prove its ability to pay the proffered wage for 1998.

The petitioner's IRS Form 1040 for calendar year 1999 shows an adjusted gross income of $22,231. The petitioner could not pay a proffered wage of $24,960.00 a year out of this income. Thus, the petitioner cannot prove its ability to pay the proffered wage for 1999.

One of the copies of the petitioner's IRS Form 1040 for calendar year 2000 shows an adjusted gross income of $33,343. The other copy of the petitioner's IRS Form 1040 for calendar year 2000 generated by the IRS shows an adjusted gross income of $198,950. The director was correct in citing *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) for the inconsistencies in the petitioner's evidence.[2] On appeal, the petitioner explains that its accountant has requested an investigation by the IRS into the discrepant figures; however, the petitioner's counsel states that the inconsistent information is irrelevant because both numbers evidence the ability to pay

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[2] *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states the following: "Doubt case on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho* also states at 591-592 that: "It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice."

the proffered wage. Counsel is mistaken: any evidence that is inconsistent is incompetent evidence and therefore does little to prove what it is submitted for. Even considering both adjusted gross income amounts, however, the petition fails because the petitioner has not accounted for its monthly expenses. Individual petitioners must be able to prove its ability to pay the proffered wages after reducing its adjusted gross income by its monthly expenses. Since this information is not in the record of proceeding, it is not possible to determine if the petitioner had the ability to pay the proffered wage in 2000. If the petitioner had otherwise proven its ability to pay the proffered wages for other fiscal years and only 2000 was in dispute, the director should have requested evidence concerning the petitioner's monthly expenses. In this case, however, the petitioner has not established the continuing ability to pay the proffered wage so the case was denied on that ground. Thus, the case was denied and will now be dismissed regardless of the petitioner being able to illustrate that after it paid its own monthly expenses and its adjusted gross income was reduced accordingly, it could also pay the proffered wage to the beneficiary in the year 2000. Even if the petitioner established the ability to pay the wage in 2000, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2). Since the petitioner cannot prove its ability to pay the proffered wages in 1998 and 1999, it cannot illustrate the *continuing* ability to pay the proffered wage and its situation in 2000 is thus not dispositive.

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. The petition is denied.