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[redacted]

MAR 1 1 2004

FILE: EAC-02-188-52993 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as a Manager – Garage/Detailing. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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 turns, in part, 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. The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $25,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 10, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

In response to the RFE the petitioner submitted its federal tax returns for 2000 and 2001 and its Delaware state tax return for 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

On the Form I-290B counsel stated that a brief and/or evidence would be sent to the Administrative Appeals Office within thirty days. That notice was received by the Vermont Service Center on January 17, 2003, but to date no further documentation is in the file.

In his decision the director found that the petitioner's 2001 tax return shows a net profit/loss of $0.00 and that the petitioner had submitted no evidence showing that it had paid the beneficiary any wages. The director therefore found that the petitioner had failed to show that it had the ability to pay the beneficiary as of the date of filing and continuing to the present.

In his notice of appeal counsel states that the tax deductions of the petitioner include expenses of $34,000 in rent which is paid to the owner of the petitioner and more than $13,000 in dividends paid directly to the owner, as well

as depreciation expenses. Counsel argues that these items represent resources of the petitioner which would be available to pay the proffered salary to the beneficiary.

Counsel's statements about the rent and dividends payments made by the petitioner to the owner of the petitioner are not supported by evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if those statements were assumed to be true, they would not be evidence of the petitioner's ability to pay the beneficiary the proffered wage. Counsel makes no claim that the rent payments to the owner are optional payments. In addition, counsel's claim that "dividend" payments to the owner are among the deductions from the petitioner's income is not consistent with the petitioner's Form 1120 for 2001, which lists no such dividends as expenses. Moreover, the Form 1120 contains no line item for deductions of dividends, and under federal income tax law dividend payments are generally not deductible expenses for corporations.

With regard to depreciation expenses, in determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] 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. Tex. 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. supra,*, 623 F.Supp at 1084, 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp, supra.*, 632 F.Supp. at 1054.

The evidence submitted by the petitioner lacks any Schedule L's stating assets and liabilities, therefore even though net current assets may be considered as an alternative basis to net income as evidence of a petitioner's ability to pay a proffered wage, the record in the instant case lacks any evidence upon which such an analysis might be made.

Counsel asserts that the director's decision gives insufficient consideration to the policy goals of the labor certification process, which include fostering the competitiveness of American businesses. This argument is not persuasive, since counsel points to no part of the director's decision which is inconsistent with the statute, with the regulations or with precedent decisions under the Act.

Counsel also asserts in his notice of appeal that the director's decision should consider the beneficiary's ability to generate income, as well as other sources of income pledged to the petitioner, stating that documentation of those other sources would be forthcoming. Counsel relies in part on *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990). The AAO may consider the reasoning of this decision; however, the AAO 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). Moreover, in the instant case the matter arose in a different district.

Counsel has not provided any standard or criterion for evaluating the beneficiary's ability to generate additional earnings for the petitioner. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Concerning other sources of income available to the petitioner, the evidence in the record prior to the director's decision contained no evidence on that issue, nor has any such evidence been submitted on appeal.

For the foregoing reasons, the decision of the director that the petitioner had failed to establish its ability to pay the proffered wage from the priority date and continuing until the present was correct.

Beyond the decision of the director, we note that the ETA 750 requires a minimum education of six years of grade school and four years of high school, but the only evidence of the beneficiary's education is found on the ETA 750B, where the beneficiary states that he attended an unnamed "Public High School, Wilmington Delaware" from 9/95 to 5/99 and that he received a "HS Diploma." The name of the high school is not provided, nor its address, as are required by the ETA 750B, nor is a copy of the beneficiary's high school diploma among the evidence submitted by the petitioner. The record therefore lacks sufficient evidence to establish that the beneficiary has the minimum education required for the offered position.

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.