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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

[redacted]

MAR 17 2004

FILE: WAC 02 200 53575 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: Self-Represented

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 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 a silk-screen firm. It seeks to employ the beneficiary permanently in the United States as a graphic arts designer and printer. 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.

The director determined that the petitioner had failed to establish that it had the continued financial ability to pay the beneficiary's proffered wage.

On appeal, the petitioner's owner asserts that he needs the beneficiary's services to stay in business.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. §1153(b)(3)(A)(i), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of seeking classification under this paragraph, of performing unskilled labor (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) also provides 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 October 28, 1998. The beneficiary's salary as stated on the labor certification is $8.09 per hour for a 40-hr. week or $16,827.20 annually. The petitioner is organized as a sole proprietorship.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage.

In a request dated October 2, 2002, the director required additional evidence to establish the petitioner's continuing ability to pay the proffered wage as of the priority date. The director specified either annual reports, federal tax returns, or audited financial statements.

In response, the petitioner's sole proprietor submitted copies of his Form 1040, U.S. Individual Income Tax Return for 1998, 1999, 2000 and 2001. These tax returns contain the following information:

	Adjusted Gross Income	Business Net Income (Schedule C)
1998	-$45,982	-$76,195
1999	-$16,623	-$41,906
2000	$22,004	-$ 3,623
2001	$24,780	-$ 785

The petitioner included a letter with these submissions conceding that his financial information does not favor his ability to employ the beneficiary. The petitioner also states that he was "working very hard to pay outside work" that he anticipated would lessen when the beneficiary was hired. The petitioner provided no details about this outside work, such as the dates, identities of persons hired, and description of duties performed.

The director reviewed the petitioning owner's total adjusted income as shown on the tax returns and determined that the evidence failed to establish that the petitioner had the ability to pay the proffered wage. We concur and would note that as set forth above, the regulations require that the ability to pay the proffered salary must be established beginning as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In this case, the tax returns indicate that the sole proprietor's gross income in 1998 and 1999 was clearly inadequate to support the beneficiary's modest wage offer of $16,827.20.

On appeal, the petitioner asserts that he is confident that the beneficiary will help his company increase revenue in order to stay in business. The petitioner has not, however, provided any standard or criterion for the evaluation of such future earnings. For example, as noted above, the petitioner has not specifically identified by name, wages or skills, other workers that the beneficiary would replace. Wages already paid to others are generally not available to prove the ability to pay the proffered salary to the beneficiary as of the priority date and continuing to the present. Based on the evidence presented, the sole proprietor's projections that the beneficiary's future earnings will insure the survival of his business is not persuasive. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977).

Upon review of the federal tax returns and other evidence in the record, it is concluded that the petitioner has not established that it had the continuing financial ability to pay the salary offered as of the priority date of the petition.

Beyond the decision of the director, it is noted that the minimum employment experience specified on the approved labor certification is three months in the job offered as a graphic arts designer and printer. Section 203(b)(3)(iii) of the Act designates any position that requires less than two years of training or experience as that of an "other worker," rather than a "skilled worker" as designated on the immigrant petition (I-140) by the petitioner. Therefore, the petition may not be approved as the position does not meet the requirements for the visa classification sought.

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.