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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File: EAC 02 036 51283 Office: Vermont Service Center Date: MAR 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]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Redacted to prevent clearly unwarranted invasion of personal privacy

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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 is a dry cleaner and tailor shop. It seeks to employ the beneficiary permanently in the United States as a garment alterer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on October 30, 1997. The proffered salary as stated on the labor certification is $23,400 per year.

With the petition, the petitioner submitted copies of the

petitioner's monthly bank statements from October 1997 to September 2001, with the exception of April 1998, May 1998, and July 2001. The petitioner indicated that those statements were unavailable, but did not specify why. In a note which accompanied those statements, the petitioner urged that because of legitimate tax accounting practices to minimize tax liabilities, its tax returns do not accurately depict its cash position. The petitioner urged that its account balances are the best indicator of its actual position and its ability to pay the proffered wage.

On December 19, 2001, the Vermont Service Center issued a request for evidence. The Service Center stated that the petitioner's monthly bank balances are insufficient evidence of the petitioner's ability to pay the bank balances. The Service Center reasoned that, although the petitioner had sufficient funds in its account to cover one month's portion of the proffered wage, that payment would reduce the next month's balance.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Service Center requested additional evidence pertinent to that ability.

In response, counsel submitted copies of the petitioner's 1997, 1998, 1999, and 2000 Form 1120 U.S. corporation income tax return.

The 1997 return shows that during that year the petitioner declared a loss of $778 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L states that at the end of that year the petitioner had a current assets of $7,974 and no current liabilities, which indicates net current assets of $7,974.

The 1998 return shows that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of $2,829. The corresponding Schedule L states that at the end of that year the petitioner had a current assets of $12,341 and no current liabilities, which indicates net current assets of $12,341.

The 1999 return shows that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of $2,969. The corresponding Schedule L states that at the end of that year the petitioner had a current assets of $12,043 and current liabilities of $445, which indicates net current assets of $11,598.

The 2000 return shows that during that year the petitioner declared a taxable income before net operating loss deduction and

special deductions of $4,631. The corresponding Schedule L states that at the end of that year the petitioner had a current assets of $14,383 and current liabilities of $717, which indicates net current assets of $13,666.

Counsel also submitted a letter, dated March 5, 2002, from the petitioner's president. In that letter the president states that, the petitioner has always paid its expenses and would otherwise have gone bankrupt. The president again stated that because of legitimate tax accounting practices to reduce tax liability, the petitioner's tax returns do not accurately reflect the petitioner's actual cash position. The president again urged that the petitioner's bank statements are the most accurate indices of the petitioner's ability to pay the proffered wage. With that letter, counsel submitted photocopies of the petitioner's bank statements from October 2001 to January 2002.

On August 1, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's tax returns do not support the proposition that it has had the continuing ability to pay the proffered wage beginning on the priority date. The director rejected the petitioner's argument that its bank balances show the ability to pay the proffered wage.

On appeal, counsel urged that the petitioner's monthly bank balances demonstrate its ability to pay the proffered wage. With the appeal, counsel submitted additional bank statements for January 2002 through July 2002, with the exception of April 2002.

Counsel also submitted a copy of the petitioner's 2001 Form 1120 U.S. corporation income tax return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $5,541 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $21,398 and current liabilities of $849, which yields net current assets of $20,549.

Finally, counsel submitted a copy of a nonprecedent decision, the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The decision submitted by counsel is of no effect.

Counsel urges that the director's decision, refusing to accept the petitioner's monthly bank balances as evidence of the ability to pay the proffered wage, ignores the fact that the petitioner's

business is ongoing, with additional cash flow each month. Counsel misses the point.

Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner must establish the amount of funds it had available to pay the proffered wage. The petitioner is obliged to show that its operations produced sufficient additional cash flow each month to pay the amount of the proffered monthly wage in addition to the expenses it actually paid.

To demonstrate the ability to pay the proffered wage, the petitioner must, consistent with 8 C.F.R. § 204.5(g)(2), choose between copies of its annual reports, audited financial statements, and federal tax returns to show its ability to pay the proffered wage. Because counsel and the petitioner have submitted no annual reports or audited financial statements, the petitioner's tax returns are the only competent and probative evidence of the petitioner's ability to pay the proffered wage contained in the file.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the petitioner's bank balances may not be accepted as competent and probative evidence of the petitioner's ability to pay the proffered wage. In any event, counsel submitted no evidence to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. 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 tax returns are the only competent and probative evidence in the record which might demonstrate the petitioner's ability to pay the proffered wage. Those tax returns do not support the proposition that the petitioner was able to pay the proffered wage during 1997, 1998, 1999, or 2000. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.