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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]

FILE: EAC-01-181-53720 Office: VERMONT SERVICE CENTER Date: MAR 22 2004

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.

Helen E Crawford for
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 a hair and beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist/shiatsu shampoo specialist. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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.

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 August 27, 1996. The beneficiary's salary as stated on the labor certification is $26,000 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 14, 2001, the director requested the 1996 U.S. federal tax return for the petitioner's business.

Counsel responded to the RFE with a letter dated November 14, 2001 accompanied by a letter from the petitioner explaining its financial and employment situation in 1996 and by a copy of the petitioner's Form 1120 U.S. corporate income tax return for 1996.

The director issued a second RFE dated January 7, 2002 which requested the petitioner to submit copies of its 1997 to 2000 U.S. corporate income tax returns.

Counsel responded to the second RFE with a letter dated January 31, 2002 accompanied by an additional copy of the earlier letter from the petitioner and by the petitioner's Form 1120 U.S. corporate income tax returns for 1997, 1998, 1999 and 2000.

In a decision dated May 6, 2002, the director found that the petitioner's tax records showed losses in 1996, 1999 and 2000 and failed to establish the petitioner's financial resources as of the priority date. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence in the form of a letter dated May 30, 2002 from a certified public accountant.

We will first consider the evidence which was in the record prior to the decision of the director.

The director's decision was based in part on a finding that the petitioner failed to establish its financial resources as of the priority date. On this point the director erred, since the director failed to note that the Schedule L for 1996 contains an itemization of the petitioner's assets and liabilities as of the beginning of that year. The director also erred in basing his decision in part on figures from the 1999 and 2000 returns taken from line 30 on each return, for taxable income after net operating loss deductions and special deductions, rather than on the taxable income before such deductions, as shown on line 28 of each return.

On both the 1999 and 2000 returns the petitioner had made an error by deducting a prior net operating loss from a current taxable income figure which was already negative. Since the current taxable income figures were negative, no net operating loss deduction was allowed in either year. According to tax instructions of the Internal Revenue Service, the net operating loss carryover deduction may not exceed the corporation's taxable income after special deductions. See IRS, Instructions to Form 1120, available on the Internet at www.irs.gov. The director cited losses of -$780,106 for 1999 and -$910,568 for 2000, as shown on line 30 of each return, but these figures were incorrect. In each of those years the petitioner's figures on line 28 and on line 30 should have been the same: -$101,453 for 1999, and -$130,462 for 2000. The director failed to notice this error in the petitioner's tax returns.

In any event, the director should have looked not to the taxable income figures shown on Line 30 of each return, but to the amounts shown on Line 28 of each return, for taxable income before net operating loss deduction and special deductions. The petitioner's Form 1120 U.S. corporate tax returns show the following amounts on Line 28 for the years in question: -$109,833 for 1996, -$48,812 for 1997, -$66,860 for 1998, -$101,453 for 1999, and -$130,462 for 2000. Since each of those figures is negative, the taxable income figures do not establish the ability of the petitioner to pay the proffered wage.

As an alternative basis for establishing the ability to pay the proffered wage, we look to the petitioner's net current assets, as calculated from the Schedule L attachments to each year's Form 1120 returns. The current assets and current liabilities figures on the Schedule L's yield the following amounts for net current assets: $75,913 for the beginning of 1996, $38,850 for the end of 1996, $47,206 for the end of 1997, $47,705 for the end of 1998, $12,263 for the end of 1999 and -$63,187 for the end of 2000. For the beginning of 1996 and for the end of each year in 1996, 1997 and 1998 the net current assets are more than the $26,000 proffered wage. However for the end of 1999 the net current assets are $13,737 less than the proffered wage, and for the end of 2000 the net current assets are negative. Therefore the net current assets figures fail to establish the petitioner's ability to pay the proffered wage in 1999 and 2000.

We note that the petitioner's Schedule L's show significant long-term assets during the relevant time period, including interests in buildings or other depreciable assets. The petitioner's total assets at the beginning of 1996 were $656,576 and at the end of 2000 were $246,653. Nonetheless, the petitioner's long-term assets were more than offset by long-term liabilities, notably by outstanding loans from shareholders, which appear on each year's Schedule L during the relevant period in the amount of $609,000. Because of shareholder loans and other liabilities, the petitioners net total assets at the beginning of 1996 were only $34,749. At the end of 2000, following five successive years of negative taxable income, the petitioner's net total assets were -$441,649.

We acknowledge that taxable income figures may not reflect a petitioner's actual profit under generally accepted accounting principles. Moreover, the depreciated value of long-term assets as shown on a petitioner's Schedule L's may differ significantly from the market value of those assets. Unrealized gain from increases in the market

value of items such as buildings and land will not appear on a petitioner's tax returns. Nonetheless, in the instant case the petitioner has not submitted information to establish its financial ability to pay the proffered wage notwithstanding the adverse information in its tax returns. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Despite the errors in analysis by the director noted above, the director's decision to deny the petition is correct. Neither the petitioner's taxable income figures nor the petitioner's net current assets figures establish the petitioner's ability to pay the proffered wage during the relevant time period. Nor did any other evidence in the record before the director establish the petitioner's ability to pay the proffered wage during that period.

On appeal, the petitioner submits new evidence consisting of a letter dated May 30, 2002 from a certified public accountant. The accountant states that the petitioner's losses were not as great as those stated by the director, and the accountant states that part of the tax losses were due to non-cash expenses for depreciation. With regard to the petitioner's ability to continue in business despite recurring losses, the accountant states that the petitioner "has a 20% stockholder based in Japan who has loaned them substantial monies to pay and grow the business." The accountant further states, "The repayment terms of the debt are undefined and depend upon future decisions by management."

Some of the accountant's comments regarding errors in the director's decision are analyses of matters previously in the record as evidence. But some of the statements of the accountant contain new factual information. Counsel makes no claim that the factual information presented by the accountant was unavailable prior to the director's decision.

The petitioner was given reasonable notice by regulation, by case law, and by the RFEs in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Therefore new evidence on this issue would be precluded from consideration on appeal by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988). Nonetheless, the accountant's letter would not constitute acceptable evidence even if it had been submitted prior to the decision of the director. The letter is not an audited financial statement, as called for in the regulation at 8 C.F.R. § 204.5(g)(2), quoted on page two above. Nor does the letter contain sufficient details on the basis for the accountant's conclusion that the petitioner has the ability to continue to pay all of its expenses. Notably, with regard to the substantial loans from a minority stockholder in Japan which have enabled the petitioner to remain in business, the terms of those loans are described by the accountant as "undefined" with repayment contingent upon unspecified "future decisions of management." Therefore, even if the accountant's letter is considered as evidence on appeal, it does not overcome the decision of the director.

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.