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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

B6

[redacted]

MAR 29 2004

File: EAC 02 155 53016 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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 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 on appeal. The appeal will be dismissed.

The petitioner is a power equipment sales and service company. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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, the petitioner submits a statement 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 nature, for which qualified workers are not available in the United States.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on March 21, 2001. The proffered wage as stated on the Form ETA 750 is $802 per week, which equals $41,704 per year.

With the petition the petitioner submitted no evidence of its ability to pay the proffered wage. Therefore, on July 1, 2002, the Vermont Service Center requested evidence pertinent to that

ability. The Service Center stipulated that the evidence should be copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested that, if the petitioner employed the beneficiary during 2001, it provide a copy of the beneficiary's 2001 W-2 form.

In response, the petitioner submitted the 2001 Form 1040 joint income tax return of the petitioner's owner and the owner's spouse, including Schedule C, Profit or Loss from Business (Sole Proprietorship). The Schedule C shows that the petitioner suffered a loss of $3,749 during 2001. The Form 1040 shows that the petitioner's owner and owner's spouse declared a loss of $3,547 as their adjusted gross income during 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 9, 2002, denied the petition.

On appeal, the petitioner submitted Form 941 Quarterly Returns for all four quarters of 2001, 2001 Form W-3 transmittals, and 2001 Form W-2 Wage and Tax Statements for all of its employees. The W-2 forms submitted do not include one for the beneficiary. Subsequently, the petitioner provided receipts for 2001 Federal income tax payments. The petitioner submitted no argument, but implied that the evidence submitted demonstrates the ability to pay the proffered wage.

The petitioner's reliance on the amount of its wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that INS (now 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 INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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.

The petitioner is a sole proprietorship. The owner of a sole proprietorship is obliged to pay the debts and obligations of the company out of his or her own income and assets, as necessary. Therefore, the income and assets of the owner may be considered in determining the petitioner's ability to pay the proffered wage.

The priority date is March 21, 2001. The proffered wage is $41,704 per year. During 2001, the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any part of the proffered wage out of its income. The petitioner's owner declared a loss as his adjusted gross income. The petitioner has not demonstrated that its owner could have paid any portion of the proffered wage out of his income. The petitioner has not demonstrated that its owner had any assets and has not demonstrated that any other funds were available with which to pay the proffered wage.

The petitioner has not demonstrated the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.