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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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



File: WAC 01 098 52613 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 2003**

IN RE: Petitioner:   
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**PUBLIC COPY**

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 the Bureau of Citizenship and Immigration Services (Bureau) 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.

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 sustained.

The petitioner is a school of South Indian music. It seeks to employ the beneficiary permanently in the United States as a music teacher. 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.

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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is January 16, 1998. The beneficiary's salary as stated on the labor certification is \$32,760 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of Action dated May 24, 2001 (RFE), the director requested additional evidence to establish that the petitioner had the ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel submitted the petitioner's 1998, 1999, and 2000 Form 1040, U.S. Individual Income Tax Returns and certain wage and tax statements (W-2). The federal tax returns reflected adjusted gross income of \$103,122 for 1998 and \$37,013 for 1999, more than the proffered wage. The federal tax return showed a loss of (\$40,388) in 2000, but a Form W-2 evidenced payment of \$32,760 to the beneficiary in 2000, equal to or greater than the proffered wage.

The director considered Schedules C, Profit or Loss from Business (Sole Proprietorship), of the tax returns, and they reported losses, (\$23,994) in 1998, (\$23,673) in 1999, and (\$30,774) in 2000. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner paid the beneficiary the proffered wage for one (1) year, and the W-2 for 2000 supports that. That circumstance does not suffice to approve the petition.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

In fact, the adjusted gross income for 1998 and 1999 was equal to or greater than the proffered wage. All of the assets of an individual petitioner, as reported on the federal tax return, are available to satisfy the ability to pay the proffered wage. They suffice as far as being available in this record of proceedings. The petition should be approved on this record.

Nonetheless, three matters of evidence require comment in this case. The director properly disregarded the 2000 unaudited financial statement of the petitioner. Unaudited statements are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

The director, also and correctly, discounted a single bank statement with a balance of \$3,711.78, less than the proffered wage. Even though the petitioner submitted its commercial bank statement as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that it somehow shows additional funds beyond those of the tax returns and financial statement. Simply 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).

Counsel claims on appeal that the petitioner paid the beneficiary the proffered wage for "more than one year." Only one (1) W-2, for 2000, relates to the beneficiary. Those for other years name the petitioner and are irrelevant.

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).

After a review of the federal tax returns and Form W-2, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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 met that burden.

**ORDER:** The appeal is sustained.