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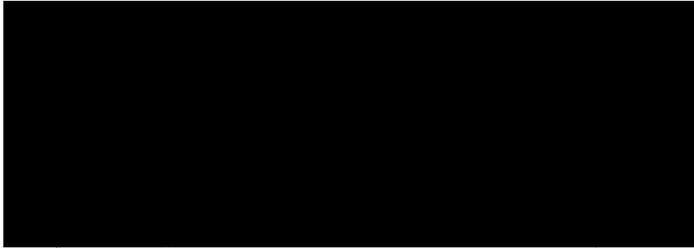
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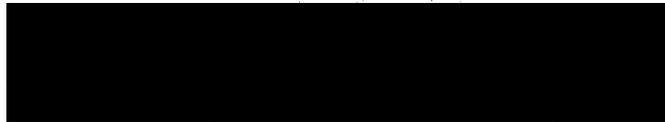
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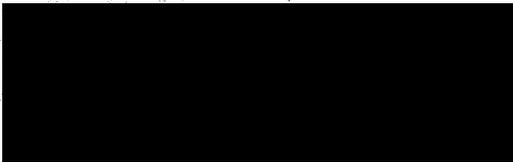
FILE: SRC-02-043-52972 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
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:



**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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a language school. It seeks to employ the beneficiary permanently in the United States as a teacher (English as a second language). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 1, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour, which amounts to \$35,360 annually.

With the petition, the petitioner submitted its Form 1120 Corporate tax return for the year 2000. The tax returns reflected that the petitioner had a net income of \$8,636 during 2000.

The AAO notes that the 2000 tax returns are not dispositive of the petitioner's continuing ability to pay the proffered wage beginning with the priority date since the priority date is 2001. It is further noted that the tax return is incomplete.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 19, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence of the petitioner's ability to pay the proffered wage in 2001.

In response, the petitioner resubmitted its Form 1120 Corporate tax returns for the year 2000. In addition, counsel submitted copies of the petitioner's earnings statements for the beneficiary, and the beneficiary's Form 1040 U.S. Individual Income Tax Returns for the years 2000 and 2001. The Forms 1040 indicated that the beneficiary earned \$13,545 during 2001 and \$13,010 during 2000. In addition, the petitioner submitted Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2000 and 2001. The Forms W-2 Wage and Tax Statements reflect wages of only \$13,010 and, \$13,545 during 2000 and 2001, less than the proffered wage of \$35,360.

In addition, the petitioner submitted an affidavit from Katherine Altamirov (Libkin), a financial analyst, who asserts that the petitioner has the ability to pay the proffered wage bases on sales and bi-weekly payment of wages.

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 April 2, 2003, denied the petition.

On appeal, counsel asserts that the petitioner had sufficient assets to pay the proffered wage during 2000, failed to consider the total amounts of wages paid to the beneficiary, failed to consider the petitioner's cash flow, and failed to give proper consideration to the financial report submitted on behalf of the petitioner. Counsel submitted the petitioner's Form 1120 Corporate tax returns for the year 2001.

The AAO notes that counsel contends that the director did not request the petitioner's tax returns for 2001. However, the director, in Form I-797, requested evidence of the petitioner's ability to pay the proffered wage during 2001 and cited the regulations, which specify tax returns as a form of proof in accord with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceeding before #Citizenship and Immigration Services (CIS). *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The tax return reflects the following information:

	2001
Net income	-\$36,071
Current Assets	\$11,351
Current Liabilities	\$2,767
Net current liabilities	\$8,584

The response to the director's request for evidence included an unaudited financial statement from [REDACTED]. While CIS may, in its discretion, accept some forms of advisory opinion statements submitted as expert testimony, unaudited financial statements are generally not considered persuasive. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000 or 2001. The petitioner paid the beneficiary \$13,010 in 2000 and \$13,545 during 2001, amounts that are less than the proffered wage of \$35,360.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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 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). Counsel's reliance on the petitioner's gross receipts and wage expense, which counsel describes as "cash flow," is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, however, were only \$8,584.

The petitioner has not demonstrated that it paid the full proffered wage in 2001. The petitioner paid the beneficiary \$13,545 during 2001 and therefore, must show the ability to pay the remaining \$21,815. In 2001, the petitioner shows a net income of -\$36,071 and net current assets of \$8,584, and has not, therefore, demonstrated the ability to pay the remaining proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion 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.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.