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FILE: EAC 03 008 50792 Office: VERMONT SERVICE CENTER

**AUG 30 2005**  
Date:

IN RE: Petitioner: [REDACTED]  
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:



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 employment based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a maintenance supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the petitioner's financial information establishes its continuing ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of 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) provides 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. . . . 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 Citizenship and Immigration Services [CIS].

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 17, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 per year. On the Form ETA 750B, signed by the beneficiary on March 17, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed in October 2002, the petitioner states that was established in 2000, has a gross annual income of \$40,000, a net annual income of \$3,000, and currently has one employee.

As evidence in support of its continuing ability to pay the proffered salary, the petitioner initially submitted copies of two bank accounts covering eleven months in 2001, omitting the May statement. One account is in the petitioner's name and the other is held by "FALGA Development and Charity (FALGA)." As subsequently noted by the director, the average balance in both accounts was approximately \$1,600. The petitioner also included a copy of a letter, dated June 5, 2000, from the Internal Revenue Service (IRS), indicating that it had determined from the information supplied that the petitioner was exempt from the requirement of filing a Form 990, Return of Organization Exempt from Income Tax.

On July 23, 2003, the director requested additional evidence from the petitioner in support of its ability to pay the beneficiary's proposed wage offer of \$24,960 per annum. Pursuant to the regulatory requirements at 8 C.F.R. § 204.5(g)(2), the director informed the petitioner that the evidence must demonstrate its ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence status. The director advised the petitioner that the evidence must consist of copies of annual reports, federal tax returns or audited financial statements. She also requested that the petitioner submit copies of the beneficiary's Wage and Tax Statements (W-2s) if it employed the beneficiary in 2001 or 2002.

In response, the petitioner provided copies of the petitioner's and FALGA's bank statements for December 31, 2002, as well as April 30<sup>th</sup> and May 31, 2003. The petitioner also submitted a reviewed financial statement for the period ending December 31, 2001 and December 31, 2002. A review is less in scope than an audit and represents analytical procedures performed by a CPA based on inquiries of the petitioner's personnel responsible for financial and accounting matters. The information contained in the petitioner's report indicates that its revenue exceeded its expenditures in 2001 by \$3,634.03. In 2002, its net revenue was \$12,323.96.

The petitioner also provided a letter, dated August 24, 2003, from its pastor, E.O. Olaleye. He indicates that the petitioner's financial position is improving. He additionally states that as the petitioner has not yet employed the beneficiary, it cannot provide any W-2s.

The director denied the petition on January 5, 2004, concluding that the petitioner's evidence failed to demonstrate its continuing ability to pay the proffered salary as of the visa priority date of April 17, 2001. The director determined that neither the petitioner's bank statements nor its financial statements reflected sufficient available funds to pay the certified wage.

With reference to the petitioner's bank statements provided to the record, it is noted that while a petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, they generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage and that are better illustrated on a petitioner's tax returns or audited financial statements. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Part IV as will be discussed below. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Further, as noted by the director, the relatively modest levels of the bank statement balances do not independently establish the petitioner's ability to pay the proffered wage.

On appeal, counsel contends that the director did not consider all of the petitioner's assets and that as the beneficiary is the only employee on the payroll, the petitioner has flexibility in assigning funds to various expense categories.

Counsel submits additional documentation on appeal. Provided are copies of the petitioner's Form 990s for 2001, 2002, and 2003. They are all signed in January 2004. Similar to the sums reported in the 2001 and 2002 financial statements previously supplied to the record, along with the 2003 reviewed financial statements provided on appeal by counsel, the tax returns show that the petitioner's revenue exceeded its expenses by \$3,634 in 2001 and by \$12,324 in 2002. In 2003, its revenue exceeded expenses by \$17,977.

On Part IV of the respective tax returns, the petitioner reports its assets and liabilities. Besides net income, CIS will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current

liabilities.<sup>1</sup> They represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a petitioner's year-end 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.

For this purpose, the petitioner's 2001 current assets as reflected on Part IV of its tax return consisted of \$631 in cash-non-interest bearing funds (line 45) and \$4,700 in inventories for sale or use (line 52), totaling \$5,331. As it declared no current liabilities, its net current assets were \$5,331.

In 2002, the tax return indicates that the petitioner had \$8,585 in cash-non-interest-bearing funds (line 45) and \$3,665 in inventories for sale or use (line 52), totaling \$12,250 in net current assets as no current liabilities are listed.

Part IV of the 2003 tax return reflects that the petitioner had \$8,842 in cash-non-interest bearing funds (line 45), accounts receivable of \$16,500 (line 47a), and \$4,885 in inventories for sale or use (line 52), totaling \$30,227 in net current assets, as no current liabilities were reported.

Counsel's assertion that the petitioner's evidence has established its continuing ability to pay the proffered wage is not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In this case, for the first time on appeal, as stated by Pastor Olaleye's letter, dated January 26, 2004, and submitted with the appeal, it is claimed that the petitioner has employed the beneficiary. The pastor does not state when the employment began. He only states that although the beneficiary has not been paid the full wages proffered, "he has been paid in form of allowances for helps rendered." It is unclear exactly what this statement means or how this comports with earlier claims that the petitioner had not employed the beneficiary. As such, consideration for such remuneration cannot be considered. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is also noted that the proposed wage on an approved labor certification is expressed in U.S. currency based upon a determination of the prevailing wage determined pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. § 656.20 (c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

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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.

If the petitioner does not establish that it may have 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). 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 the Immigration and Naturalization Service, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

For purposes of this review, although the petitioner's net current assets of \$30,227 could cover the beneficiary's proffered wage in 2003 and thus demonstrate its ability to pay during this period, the record fails to demonstrate that it could pay the proffered wage out of either its net revenue or net current assets in either 2001 or 2002. In 2001, neither its net revenue of \$3,634, nor its net current assets of \$5,331 was sufficient to pay the certified salary of \$24,960. Similarly, in 2002, the proffered wage could not be met by either the petitioner's net revenue of \$12,324 or its net current assets of \$12,250. Eligibility for the visa classification must be established at the time of filing the petition. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

Based on the evidence contained in the record and after consideration of the financial data and argument further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition as required by 8 C.F.R. § 204.5(g)(2).

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.