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U.S. Citizenship  
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Services

BE

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: SEP 01 2006  
EAC 03 254 51455

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: SELF-REPRESENTED

**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, Chief  
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 church. It seeks to employ the beneficiary permanently in the United States as a director of religious education. 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, the petitioner asserts that it has had the continuing financial ability to pay the proffered salary.

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

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

*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. 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 [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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.18 per hour or \$31,574.40 per annum. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have worked for the petitioner since 1992.

On Part 5 of the visa petition, filed on August 29, 2003, the petitioner claims to have been established in 1986, have a gross annual income of \$35,000 to \$40,000 per year, and to currently employ no workers. In support of its ability to pay the beneficiary's proposed wage offer of \$31,574.40 per year, the petitioner initially submitted a copy of an Internal Revenue Service (IRS) notice, dated June 28, 2002, informing the petitioner of its assignment of an employer identification number and that it must file a Form 941 (Employer's Quarterly Federal Tax Return) by April 30, 2003.

On August 25, 2004, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage of \$31,574.40 per year. The director instructed the petitioner to submit additional evidence to establish that the employer had the ability to pay the proffered wage beginning at April 30, 2001, and continuing until the present. The director also requested that the petitioner submit copies of its 2001 and 2002 federal income tax return(s) as well as copies of its Form 941 for the relevant period.

In response, the petitioner did not provide any federal returns, but provided a letter, dated October 22, 2004, from [REDACTED], claiming that as a church, the petitioner was exempted from filing a Form 990, Return of Organization Exempt Form Income Tax. Instead, the petitioner provided some internally prepared "annual reports." They contain an itemization of income and expenses and with income exceeding expenses by \$7,347.57, and \$7,730.57 in 2002 and 2003, respectively, and indicating -\$6,006.96 in 2004. [REDACTED] also references a Massachusetts "Certificate of Exemption" that exempts the petitioner from taxation on the purchase of tangible personal property. He additionally mentions a letter, dated October 19, 2004, in which he stated that the church did not employ the beneficiary until January 2004. The October 19<sup>th</sup> letter, signed by [REDACTED] was submitted in connection with the beneficiary's application for permanent resident status and also claims that the church did not employ the beneficiary in 2001 as she had no work permit.<sup>1</sup>

The director determined that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage and denied the petition on December 13, 2004. He found that the petitioner's internally generated financial statements were of little evidentiary value as they were created by, and were representations of the petitioner's management.

On appeal, the petitioner resubmits copies of its internally prepared annual reports for 2002 and 2003, supported by copies of monthly reports. The annual figures are reflected as those previously provided to the underlying record. For the year 2004, the petitioner provides an "eight month report" showing -\$6,333.15 in net income, including \$15,937.50 paid to a director of religious education. In a letter, dated December 30, 2004, and submitted with the appeal, [REDACTED] identifies this payment as wages paid to the beneficiary between January and August 2004. The petitioner also provides similar internal monthly and annual reports of 2001, which indicate a year-end net income of \$1,465.64, as well as a letter, dated December 27, 2004, from FirstFed bank and attached statements showing that the petitioner holds a certificate of deposit (CD) first opened with \$8,000 in August 1998 and showing a current balance of \$9,928.52. Finally, the petitioner offers copies of its bank checking account statements for 2001-2004.<sup>2</sup>

On appeal [REDACTED] acknowledges that the records show that with the expenses that the petitioner had, it would have been "difficult" to pay the beneficiary. But by adding back various expenses taken that [REDACTED] characterizes as goodwill contributions to the parent church, payment of an associate pastor's rent and a pastor's health insurance, he asserts that the petitioner could have paid the beneficiary a salary of \$25,500.

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<sup>1</sup>By contrast, the beneficiary lists employment with petitioner since 1992, as stated on the ETA 750-B.

<sup>2</sup> A June 19, 2006, bank statement has also been provided, along with duplicate copies of the documents submitted with the appeal, in response to a recent facsimile inquiry.

These assertions are not persuasive. It is additionally noted that, based on the figures shown on the approved labor certification, as mentioned above, the annualized proffered wage is \$31,574.40 per year,<sup>3</sup> not \$25,500 as claimed by [REDACTED]. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether a petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. Here, although a claim of wages paid to the beneficiary in 2004 has been made, no first-hand corroboration of such payment such as a Wage or Tax Statement (W-2) or Miscellaneous Income (Form 1099) was provided to the record. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 already taken by a petitioner. 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). 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. In this case, we will not consider such expenses already taken as contributions to another church or payment of a pastor's health insurance as available funds to pay the proffered salary of \$31,574.40 per year. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The fact that the petitioner may not have had federal income tax returns to provide, does not waive the necessity that such financial statements offered to a record must be audited. As noted by the director, the internally generated financial reports submitted in this matter are not persuasive evidence of a petitioner's ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. The financial statements that have been offered to the record are a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting*

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<sup>3</sup> It is calculated as \$15.18 x 40hrs. x 52 wks.

*principles (GAAP)* and are restricted to information based upon the representations of management. As these statements have not been audited as required by 8 C.F.R. § 204.5(g)(2), they are not probative of the petitioner's ability to pay the proffered salary during the periods represented.<sup>4</sup> Even if the figures reflected as the petitioner's net income were considered as reliable, they were approximately \$21,000 less than the proffered wage in 2001 after applying the petitioner's approximately \$9,000 CD toward payment; approximately \$24,000 short of the proposed wage offer in 2002 and 2003; and approximately \$37,000 less than the proffered salary in 2004.

Nor is the petitioner's reliance on its checking account statements persuasive. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," as discussed above, it cannot be concluded that there is an automatic exemption from the requirements of the regulation because a petitioner is a church. Also, bank balances represent only a portion of a petitioner's assets during a limited period of time and do not reflect other encumbrances that may affect its financial status. Moreover, such bank balances would already be reflected as part of the petitioner's summary of income and expenses for a given period.

CIS will also review a petitioner's net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period and a possible source out of which a proposed wage offer could be paid. In this case, as noted above, the petitioner could have elected to submit audited financial statements if IRS Form 990 was inapplicable to its situation. As such, other than the approximately \$9,000 certificate of deposit balance held as of 2001, the petitioner's current assets cannot be evaluated from the documentation submitted to the record.

The petitioner has not provided the prescribed evidence as set forth in 8 C.F.R. § 204.5(g)(2). Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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>4</sup> An annual report that is presented as a comprehensive evaluation and would include a company's financial statements prepared in conformance with GAAP as well as an audit report and other explanatory data necessary to review a firm's financial position.