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

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MAY 04 2007

FILE: [REDACTED]
EAC 05 137 52382

Office: VERMONT SERVICE CENTER

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:

[REDACTED]

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a doll manufacturing and distribution firm. It seeks to employ the beneficiary permanently in the United States as an operations manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has had the continuing ability to pay the proffered wage.

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) 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 that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 25, 2002. The proffered wage is set forth as \$80,000 per year. The ETA 750B, signed by the beneficiary on December 3, 2001, indicates that he has worked for the petitioner as an operations manager since September 2001.¹

¹ It is further noted that the beneficiary is listed as the petitioner's only officer on Schedule E of its corporate tax return in 2002 and 2003 and as one of two equally compensated officers in 2004. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). If and when future proceedings may involve this petitioner and beneficiary, the director should seek an advisory opinion from the DOL before making a decision. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

On part 5 of the petition, the petitioner claims that it was established in September 2000, has eight employees, and a gross annual income of \$3.1million dollars.

In support of the petitioner's ability to pay the proffered wage of \$80,000 per year, the petitioner provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001, 2002, 2003 and 2004. They indicate that the petitioner paid him the following wages:

2001	\$21,153.88
2002	\$50,000.08
2003	\$58,076.96
2004	\$79,999.95

The petitioner also provided copies of internally generated financial statements covering its financial data for 2004 and copies of its Form 1120, U.S. Corporation Income Tax Return for 2002. The tax return reveals that the petitioner files its taxes using a standard calendar year. The 2002 return shows that the petitioner reported -\$144,476 taxable income before the net operating loss (NOL). Schedule L reflects that it had \$1,217,813 in current assets and \$1,300,495 in current liabilities, yielding -\$82,682 in net current assets. Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its corporate tax return. If the petitioner'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.

In response to the director's request for additional evidence supporting the petitioner's ability to pay the proffered wage of \$80,000, the petitioner provided copies of its 2003 and 2004 federal tax returns. They contain the following information:

	2003	2004
Taxable Income before NOL deduction	-\$ 269,893	-\$ 2,633
Current Assets (Sched.L)	\$1,730,377	\$1,818,258
Current Liabilities (Sched.L)	-\$2,078,889	\$2,160,493
Net Current Assets	-\$ 348,512	-\$ 342,235

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Copies of two bank statements belonging to the petitioner were also provided to the record. A business checking account statement indicates that on December 31, 2002, the petitioner had \$42,556 on deposit and in a money market account, the petitioner's balance was \$162,344.23. The petitioner further supplied a copy of its internally generated financial statement for the period ending December 31, 2002.

The director denied the petition on September 26, 2005. The director concluded that neither the petitioner's net income nor net current assets as shown on its federal tax returns were sufficient to cover the proffered wage of \$80,000. The director also noted that the wages paid to the beneficiary in 2002 and 2003, were \$30,000 and \$21,923.04 less than the proposed wage offer.

On appeal, counsel asserts that it is unreasonable to penalize the petitioner for not paying the beneficiary the proffered wage in 2002 and 2003 when the higher salary figure was not certified until 2004. Counsel also asserts that the petitioner is only responsible for the prorated amount of the wage as of the priority date of March 25, 2002. Counsel further contends that as the petitioner is a wholly owned subsidiary of a Hong Kong parent company, [REDACTED] its accounts payables represent monies payable to its parent, and as [REDACTED] granted an extension of payment agreement on November 16, 2001, then these funds could be added back to the petitioner's assets in 2002 and 2003. Counsel submits a copy of a letter, dated November 16, 2001 from KR International to the petitioner. Counsel also cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), *rev'd in part*, 927 F.2d 628 (D.C. Cir. 1991) in support of his assertion that a new division of a business may rely on a larger related body for support to establish the company's ability to pay the proffered wage. Finally, counsel states that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004) supports a finding of an ability to pay the proffered wage if the petitioner is currently paying the proffered wage.

With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.³ The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 25, 2002. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Relevant to counsel's reliance on *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, that case involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard, in cases arising outside of the facts of the particular case. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Moreover, the same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997). In this case, the letter counsel refers to was sent to the petitioning company in November 2001, and merely states that KR International decided to extend the petitioner's payable terms and that the extended payables can be used to facilitate its working capital. It is unknown specifically to what amount of payables KR was referring or how long this extension lasted. Counsel's assertion that this fact by itself supports adding back the petitioner's current liabilities to its income is unpersuasive.

It is noted that internally generated, financial statements as proof of the ability to pay the proffered wage have been offered to the record. These do not constitute persuasive evidence. 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 probative evidence of a petitioner's ability to pay the proffered wage. On appeal, counsel submits no additional evidence, but asserts only that the obligation to pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. The AAO concurs with this interpretation but notes that the level of salary being paid to an alien may be a relevant factor in determining a petitioner's ability to pay a proffered wage. *See* 20 C.F.R. § 656.20(c)(2). Moreover, although unaudited financial statements, along with such items as bank statements, may constitute additional material, which "in appropriate cases," may be submitted or requested, the petitioner in this case has not demonstrated why the documentation such as annual reports, federal tax returns or audited financial statements, specified at 8 C.F.R. § 204.5(g)(2), is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements reveal only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect a petitioner's ability to pay a certified wage.

Regarding proration of the proposed wage offer, we reject a process whereby CIS prorates the proffered wage, in isolation, for the portion of the year that occurred after the priority date. We will not consider 12 months of income, such as that reflected on a tax return or W-2, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not at issue here.

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, as set forth above, the petitioner paid the beneficiary \$50,008 in 2002, or \$29,992 less than the proffered wage. In 2003, it paid him \$58,076.96, or \$21,923.04 less than the proffered wage.

It is noted that the obligation to pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. While this obligation may be subject to CIS or DOL regulations, pertinent to the regulation at 8 C.F.R. 204.5(g)(2), the petitioner must only show the *ability to pay* the proffered wage beginning at the priority date and continuing until the alien gains permanent residence status. In this case, the AAO does not find that the director was penalizing the petitioner for not paying the \$80,000 proffered wage, which had been amended in 2004, but was merely stating the levels of salary shortfalls as compared to the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); 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 taxable 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, in 2002, neither the petitioner's taxable income of -\$144,476 before the NOL deduction, nor its net current assets of -\$82,682 could cover the \$29,992 shortfall between the actual wages paid of \$50,008 and

the proffered wage of \$80,000. Similarly, in 2003, neither the petitioner's -\$2,633 in taxable income before the NOL deduction, nor its net current assets of -\$342,235 could cover the -\$21,923.04 difference between the actual salary paid to the beneficiary and the proffered wage of \$80,000.

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.