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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 14 2005

LIN 03 130 50127

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a management consulting firm. It seeks to employ the beneficiary permanently in the United States as a principal consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 22, 2001. The proffered wage as stated on the Form ETA 750 is $100,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2001.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of over $800,000, and to currently employ three workers. In support of the petition, the petitioner submitted the first page of its 2000, 2001 and 2002 Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner also submitted its bank statements for August through October 2002 reflecting balances of no more than $7,981.78.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 28, 2003, the director requested additional evidence pertinent to that ability.

In response, the petitioner submitted its most recent quarterly federal tax return (Form 941), the beneficiary's 2003 "Transaction Journal for W-2," and the beneficiary's 2001 and 2002 Forms W-2.

The petitioner's 2000 tax return relates to a period prior to the priority date and need not be considered. The petitioner's remaining tax returns, including the 2003 complete return and the Schedules L submitted on appeal, reflect the following information:

	2001	2002	2003
Net income	$3,191	$22,158	$13,141
Current Assets	-$1,868	$200	$500
Current Liabilities	$161	$3,039	$0
Net current assets	-$2,029	-$2,839	$500

The beneficiary's Forms W-2 reflect that he was paid $38,405 in 2001 and $18,000 in 2002. The petitioner's transaction journal for the beneficiary indicates that as of June 30, 2003, the petitioner had paid the beneficiary $12,000 in regular wages and no other compensation. An August 25, 2003 document indicates that as of that date, the petitioner had paid the beneficiary $16,000 in regular pay and $22,500 in "non-taxable pay."

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 March 12, 2004, denied the petition.

On appeal, counsel asserts that prior counsel should have submitted the petitioner's complete tax returns and evidence of the non-taxable income paid to the beneficiary. Counsel further asserts that we should evaluate the petitioner's ability to pay the prevailing wage, not the proffered wage. In his analysis, counsel also prorates the prevailing wage not only for the portion of 2001 after the priority date, but in 2002 and 2003 to account for the beneficiary's leaves of absence in those years.

Counsel relies on *Masonry Masters, Inc. v. Thornburgh,* 742 F. Supp. 682 (D.C. 1990) for the proposition that Citizenship and Immigration Services (CIS) must determine the ability to pay the prevailing wage, not the proffered wage. The petitioner submits a prevailing wage determination from the State of Minnesota showing the prevailing wage to be $70,533 on July 11, 2001.

First, we note that the court in *Masonry Masters* was primarily concerned with the Immigration and Naturalization Service's attempt to estimate the prevailing wage during a period where the wage had not been designated by the Department of Labor. *Id.* at 684-685. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, the Administrative Appeals Office (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.

CIS regulations specifically require that a petitioner demonstrate an ability to pay the "proffered" wage, not the prevailing wage. 8 C.F.R. § 204.5(g)(2). Similarly, the Department of Labor's regulations provide that job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly

returns reflecting employment development expenses of $51,313 in 2002 and $67,054 in 2003; and the beneficiary's 2003 Form W-2 reflecting that he received wages of $24,000 in 2003, including the alleged "non-taxable" income.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2001, 2002 or 2003.

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). 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.

Nevertheless, 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 be 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.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal

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[1] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 is only required to demonstrate an ability to pay the proffered wage as of the priority date, August 22, 2001, or for 36 percent of the year. Thirty-six percent of $100,000 is $36,000. As stated above, however, we will not consider 12 months of income or six months of actual wage payments 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), the petitioner has not submitted such evidence. Specifically, the record contains no evidence of the petitioner's net income for the period August 22, 2001 through December 31, 2001.

Similarly, while the petitioner has established that it paid the beneficiary $38,405.78 between June 2001 and December 2001, some of those wages were paid prior to August 22, 2001 and, thus, are not relevant to the petitioner's ability to pay the proffered wage after that date. The checks issued to the beneficiary between August 22, 2001 and December 31, 2001 total only $31,855, $4,145 less than the proffered wage. The petitioner's net income of $3,191 (which covers twelve months and is not an accurate measurement of the petitioner's ability to pay during only four months) and negative net current assets in 2001 cannot establish the petitioner's ability to pay the difference between the prorated proffered wage and the wages actually paid. The credit card and car lease documentation will be considered for all years below.

The petitioner has not demonstrated that it paid the full proffered wage in 2002 or 2003. For the reasons discussed above, we will not prorate the proffered wage after 2001. In 2002 and 2003, the petitioner shows a net income of only $22,158 and $13,141 respectively, negative net current assets in 2002 and net current assets of only $500 in 2003. Thus, the petitioner has not demonstrated the ability to pay the difference between the wages paid and the proffered wage, $34,887 in 2002 and $38,485 in 2003. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Moreover, the above analysis credits the petitioner with the "non-taxable" income allegedly paid to the beneficiary. The record contains no evidence that the petitioner paid the credit card bills submitted as part of its compensation of the beneficiary. Moreover, the petitioner has not established that reimbursing the beneficiary for business expenses accruing to the petitioner's business constitutes income to the beneficiary. Further, the record contains no evidence that leasing a company car for the beneficiary is a non-taxable expense to the beneficiary and, thus, would not appear on his Form W-2. Similarly, the record contains no evidence that the reimbursement of expenses for a personal trip is a non-taxable expense that would not appear on the beneficiary's Form W-2. Finally, the record contains no evidence that the beneficiary is enrolled in any classes. As such, it is not clear that the alleged non-taxable employment development expenses are being legitimately provided to the beneficiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002 and 2003. 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.