U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 03 141 53499 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is an Iranian Radio News and Entertainment Broadcasting firm. It seeks to employ the beneficiary permanently in the United States as a media correspondent. 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. The director also determined that the petitioner had failed to establish that the beneficiary possesses the requisite experience required by the position offered.

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.

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 regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The petitioner must also establish that it has had the continuing ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt by any office within the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is January 5, 2001. The visa petition indicates that the petitioner was established in 1989 and has ten employees. The proffered monthly wage as stated on the Form ETA-750 is $5,382, which amounts to $64,584 annually. As shown on Part A, item 14 of the ETA-750, the beneficiary must have two years of experience in the job offered of media correspondent

The petitioner initially submitted no evidence in support of its ability to pay the proffered wage or to document the beneficiary's employment experience as a media correspondent.

On July 16, 2003, the director requested additional evidence from the petitioner. The director instructed the petitioner to provide pertinent identifying information about the other petitions that it has filed as it previously indicated on Part 4 of the I-140, filed on behalf of the current beneficiary.

In response, the petitioner provided an amended copy of the current I-140. The first question in Part 4 asks if the petitioner is filing any other petitions or applications with the current one being submitted. On the amended copy, the petitioner has changed the answer to "no."

On August 29, 2003, the director requested the petitioner to submit evidence of its ability to pay the proffered wage of $64,584, by providing copies of annual reports, federal tax returns, or audited financial statements for 2001 and 2002. The director also advised the petitioner that CIS records indicate that the petitioner had filed at least two other immigrant worker petitions (Form I-140) and that the petitioner should establish that it has the ability to pay the proffered wages or has been paying the proffered wages to all of the beneficiaries of all immigrant petitions. The director additionally instructed the petitioner to provide evidence that the beneficiary possessed the required two years of experience in the position offered as of the priority date of January 5, 2001. The director informed the petitioner that this evidence should be submitted on the employer's letterhead and should provide the beneficiary's title, duties, dates of employment, as well as the name, address, and title of the person verifying the information.

In response, the petitioner submitted unaudited statements representing its financial position in 2002 and 2003. The petitioner also offered a copy of a 2004 budget overview. The petitioner further submitted an English translation of a letter written in Farsi from N[redacted], Senior Editor of the *Kayhan Emblem*. The letter, dated March 1988, is addressed to the beneficiary. It states that he will be promoted to "Editor of Domestic News" as of April 1986.

The director denied the petition on February 10, 2004, concluding that the unaudited financial statements provided by the petitioner were inadequate to demonstrate its ability to pay the proffered wage. The director also determined that the letter provided from [redacted] purporting to describe the beneficiary's past employment experience, did not sufficiently establish that the beneficiary had accrued two years in the position of media correspondent as of the priority date. The director noted that the petitioner had provided no explanation why the letter was dated 1988 yet referred to a promotion that would occur in 1986.

On appeal, counsel offers some copies of certificates of appreciation received by the president of the petitioner from various entities and two copies of the previously submitted financial statements for 2002 and 2003. Also provided are copies of the 2003 Wage and Tax Statements (W-2s) of five of the petitioner's employees. They show that that the highest annual 2003 wages among this group was $30,000. The petitioner additionally submitted a copy of the petitioner's 2003 federal unemployment tax return reflecting approximately $246,000 paid in wages. The petitioner further provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. These tax returns reflect the following information for the following years:[1]

	2001	2002
Net income	-$267,101	$ 24,028
Current Assets	$184,403	$133,675
Current Liabilities	$ 41,500	$ 52,717
Net current liabilities	$142,903	$ 80,958

At the outset, as noted by the director, the unaudited financial statements that counsel submitted in response to the director's request for additional evidence and on appeal are not persuasive evidence of the petitioner's ability to pay the proffered wage. 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 reviewing a petitioner's ability to pay a beneficiary's proposed wage offer, CIS generally examines the net income figure reflected on the petitioner's federal income tax returns, 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 suggestion on appeal to look at the petitioner's gross receipts and cumulative wages paid to other employees is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid a particular amount in wages to others 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.

In this case, both the corporate tax return for 2001 and 2002 show that the petitioner's net income of -$267,101 and $24,028, respectively, was insufficient to cover the beneficiary's proffered salary of $64,584 in either year. If

[1]The AAO is not required to consider the 2001 and 2002 tax returns as they were previously requested by the director. The petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record. *Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988).

a petitioner's net income is inadequate to pay a proffered wage, CIS will also 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.[2] A corporation's year-end current assets and current liabilities are shown on Schedule L. 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. As set forth above, the petitioner's net current assets of $142,903 in 2001 and $80,958 in 2002 appear to be sufficient to cover this beneficiary's annual salary of $64,584 in each of these years. What is less clear, however, is whether the petitioner is able to cover all proffered wages for multiple beneficiaries, if it has filed other petitions. Neither the director nor the petitioner has clearly provided that information with the record in this case. The director referred to a question stated in Part 4 of the I-140 in the current record, but misconstrued what the question actually asked, which is whether the petitioner is filing any other petitions "with this one." Counsel mentions on appeal that he is providing the W-2s for three employees who have been previously petitioned, but without more information provided to this record regarding the accurate number of petitions, amount of proffered wages, and priority dates, it cannot be conclusively determined that the petitioner has the ability to pay the proffered wage to this beneficiary. If the appeal were not also being dismissed for other grounds, it would be remanded to the director to pursue further investigation.

As it is, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary has accrued at least two years of past employment experience as a media correspondent, required by the terms of the labor certification, as of the January 5th, 2001, priority date. On appeal, counsel submits a revised translation of Mr. Nassiry's letter previously supplied in response to the director's request for evidence. Counsel explains that the correct date of the letter is 1985, as noted on the new translation. The writer's name has also been corrected to "Mehdi Nassirian." What is still missing, however, is a complete confirmation, pursuant to 8 C.F.R. § 204.5(l)(3), that the beneficiary has accrued two full years of experience as a media correspondent. The letter only mentions a promotion and omits any reference to job duties, length of employment, and the address of the trainer or employer. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not established that the beneficiary meets the requirements of the approved labor certification, the petition may not be approved.

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