identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-02-047-56148 Office: VERMONT SERVICE CENTER Date: JUN 18 2004

IN RE: Petitioner: [redacted]
Beneficiar

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

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 private school. It seeks to employ the beneficiary permanently in the United States as a teacher. 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, counsel submits a written statement.

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

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 14, 2001. The proffered wage as stated on the Form ETA 750 is $22.18 per hour, which amounts to $46,134.40 annually.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income tax return for the year 2000[1]. The tax return reflects the following information:

	2000
Net income[2]	$-466

[1] The visa petition was filed on November 26, 2001. Thus, it would have been impossible for the petitioner to provides its 2001 corporate income tax return, which is most relevant to establishing its ability to pay the proffered wage beginning on the date of the priority date, which falls in 2001. Likewise, the director's RFE was issued in January 2002, which also made it most likely that the petitioner's 2001 tax return would have been unavailable. Thus, this case must be analyzed based upon the petitioner's financial information for the year 2000.

[2] Taxable income before net operating loss deduction and special deductions on line 28.

Current Assets	$7,071
Current Liabilities	$-377,111
Net Current Assets	$-370,040

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 25, 2002, the director requested additional evidence pertinent to that ability. The director requested evidence of any wages paid to the beneficiary by the petitioner, specifically requesting copies of the beneficiary's Form W-2 Wage and Tax Statements.

In response, the petitioner submitted a copy of the beneficiary's Form W-2 for the year 2000 reflecting wages paid of $20,000, which is less than the proffered wage.

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 May 13, 2003, denied the petition. The director, in denying the petition, referenced the petitioner's negative taxable income and negative net current assets and stated the following:

> It is also noted that for the year 2000, you have paid $268,145.00 in wages and salaries to your 8 employees., [sic], an average wage of $33,518.13. It is further noted that you have offered the beneficiary a salary 28% more than your average employee.
>
> In conclusion, [CIS] is not persuaded that, [sic] you have the ability to pay the beneficiary the additional $26,134.40. That is the difference between the offered wage of $46,134.40, and the wage/salary of $20,000.00 paid to the beneficiary during 2000 [sic]

On appeal, counsel asserts the following:

> The decision of [CIS] denying this Form I-140 Immigrant Petition for Alien Worker is contrary to the weight of the evidence that has been submitted in support of this petition. The petitioner school has clearly and strongly shown, documented and established its financial ability to pay the proffered wage of $46,134.40 per year in 2000. In 2000 [the petitioner] had $488,918. [sic] in gross receipts. In 2000 [the petitioner] paid $268,145. [sic] in employee salaries and $18,100.00 to its sole shareholder. In addition, the sole shareholder of [the petitioner] owns the building in which this school operates. In 2000 [the petitioner] paid $47,000. [sic] in rent to the sole shareholder of this business, [redacted] Both the sum of $18,000. [sic] that was paid to the sole shareholder and the sum of $47,000. [sic] that was paid in rents to the sole shareholder were monies that were actually available in the year 2000 for the payment of employee salaries, had any portion of those monies been actually needed for that purpose. [CIS], in denying this petition, makes the assumption that the eight employees of [the petitioner] all receive a salary of $33,518.13, and based upon this assumption, goes on to assume that the [petitioner] lacks the financial ability to pay the offered wage. The assumptions that [CIS] makes in denying this petition are incorrect. Not all of the eight employees of [the petitioner] are full time employees

> and not all eight employees of [the petitioner] are teachers. Some are clerical type positions. The part time and clerical positions receive a far lower salary. Given these circumstances, there is no basis whatsoever to conclude that [the petitioner] lacks the financial ability to pay the offered wage. In reality, and as the evidence supports, [the petitioner] has ample financial resources to pay the offered wage.

Counsel indicated that a brief and additional evidence would be forwarded to the AAO within thirty (30) days of filing the appeal. The appeal was filed on June 13, 2003. Almost a year has passed since the filing of the appeal and no further documentation has been received. Thus, the appeal will be adjudicated based upon the current composition of the record of proceeding.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2000.

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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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.

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. 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.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

---

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

are shown on lines 16 through 18. 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. The petitioner's net current assets during the year in question, 2000, however, were negative.

The petitioner has not demonstrated that it paid the full proffered wage in 2000. In 2000, the petitioner shows a loss of $466, negative net current assets, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel suggests that past salary and real estate payments made by the petitioner to the sole shareholder of the petitioner could have been used in the past or withheld in the future towards paying the proffered wage; however, eligibility must be established at the time of filing the visa petition, but the additional funds counsel relies upon were already spent. 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 Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel submits no corroborating evidence to support his assertions anyway. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director's assessment of the average wage paid to the petitioner's employees in connection with the beneficiary's salary has no bearing on these proceedings and was improperly set forth as an issue. This error was not prejudicial and does not alter the adverse outcome of this proceeding.

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.

---

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.