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

U.S. Citizenship and Immigration Services

B6

[redacted]

SEP 17 2004

FILE: [redacted] Office: NEBRASKA 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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference 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 not-for-profit elementary school.[1] It seeks to employ the beneficiary permanently in the United States as a mathematics 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 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.

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 October 25, 2002. The proffered wage as stated on the Form ETA 750 is $60,540 per year.

With the petition, the petitioner submitted its articles of incorporation for Niagara Educational Services, Inc. (NES), lease agreement between NES and Trinity Lutheran Church for use of the premises at Science Academy of Chicago's (SCA) address, business license for NES, an application to adopt, change, or cancel an assumed corporate name of a general not for profit corporation with accompanying letter from the Office of the Secretary of State acknowledging the application has been filed, an unemployment tax filing, and an employer identification number assignment from the Internal Revenue Service (IRS) to NES of 36-4153559. The application to adopt, change, or cancel and assume corporate name of a general not for profit corporation set forth that SCA's true

[1] The actual petitioner in this case is an issue that is discussed below.

name is NES, incorporated in 1997, which adopts and conducts affairs under the assumed corporate name of SCA. The labor certification application was filed by NES at the address listed on the visa petition. The Form I-140 petition was filed by SCA at the address listed on the labor certification application and contained the IRS tax number 36-4153559.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 12, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested proof of actual wages paid to the beneficiary such as a Form W-2 wage statement.

In response, counsel submitted recent monthly pay stubs issued from SCA to the beneficiary from LaSalle bank account; a letter from the IRS acknowledging NES's exemption from federal income tax; SCA's unaudited profit and loss statement for the periods January through December 2002, January 2002 through January 2003; NES's quarterly federal tax return on Form 941 for the periods ending December 31, 2002, September 30, 2002, June 30, 2002; and bank statements of NES from Citibank and LaSalle bank accounts. Handwritten on the front of the director's request for evidence was the following message: "Pls [sic] note: 1: Company is Not for Profit[;] 2: Current Bank Balance: $122,427[; and] 3. Payroll in '02 is $174,657.57 & was paid."

The quarterly tax returns are filed by NES with the trade name as SCA using the EIN assigned to both entities with the address listed on the visa petition and labor certification application. The quarterly returns show the amount of wages paid to its employees, which range between approximately $35,000 and $55,000.

In addition, counsel submitted copies of NES's Forms W-2, Wage and Tax Statements issued to the beneficiary in 2002. The Form W-2 shows that NES paid wages to the beneficiary of only $22,916.63, $37,623.37 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 August 6, 2003, denied the petition.

On appeal, counsel asserts that SCA's profit and loss statements did not include the banking statements of NES and that SCA always raises enough funds to support itself along with the assistance of its umbrella corporation, NES. Counsel submits a letter from the vice president of NES on the letterhead of SCA; a letter from SCA's principal; a letter from SCA's accountant; an account balance statement from Citibank for NES DBA SCA; other Citibank statements; what appears to be printed screens from a computer recording of checking transactions; and a revised Profit and Loss statement for August 2002 through June 2003 for SCA.

The letter from Mr. states in pertinent part the following:

> I am the Vice President of [NES]. Our corporation runs [SCA], in addition to running a summer camp, tutoring center, cultural center, and other activities.

. . .

> [NES] has two bank accounts, which are LaSalle Bank Account and Citibank Account. LaSalle Bank Account is used to run [SCA] [sic] and to cover its expenses.
>
> The money in our Citibank Account is available for [SCA] as needed, to ensure their continued growth. The corporation has more than sufficient funding to ensure continued growth at [SCA].
>
> [NES] is a nonprofit organization and getting [sic] extreme community support for its operation. We have enough funds to cover our expenses and need dedicated hard working employees to support our operational success.

The letter from SCA's principal states in pertinent part the following:

> I prepared the Profit and Loss statement, which was submitted to [CIS] for [the beneficiary's] I – 140 application [sic]. The statement was prepared by using our accounting software, QuickBooks.
>
> Mentioned statement does not include money that {NES] currently has in a separate account. [SCA] uses the money in LaSalle bank account. However, the money in Citibank account, which was added in the revised Profit and Loss Statement is available for the school to use as needed.

The letter from SCA's accountant states in pertinent part the following:

> The attached Profit and Loss Statement was prepared internally by the principal of [SCA] and discloses calendar year income and expenses for the school's operations only.
>
> [SCA] is run by and is a division of Niagara Educational Services (NES). NES is a not for profit organization which is supported by charitable donations form [sic] the community. Losses and operating cash requirements of [SCA] are routinely funded by NES.
>
> The balance in the Citibank Business Account [redacted] is controlled by NES. The money in that account is available to fund [SCA's] operations on an as needed basis.

A memorandum from the director accompanies the appeal. The director reviewed the petitioner's evidence on appeal and "frowns upon [the] discretionary manipulation of funds" between NES and SCA. Additionally, the director states the following:

> Given the annotations made on the ETA-750 and the beneficiary's 2002 W-2 wage-earning statement, it appears that it might have been more appropriate for the corporation to file the petition instead of the academy. However, [redacted] August 21, 2003 letter states that

> the corporation funds not only the academy, but also a summer camp, a tutoring center, a cultural center, and other activities. But no profit-loss figures were provided to account for the corporation's annual business activities.

The unaudited Profit and Loss statements that SCA submitted are not 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 persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

The main issue in this case involves the relationship between the petitioning school and its "umbrella" corporation, NES. The record of proceeding contains a proper corporate registration noting the "doing business as" relationship between the two entities. Confusing the matter was the use of NES to file the labor certification application but the use of SCA to file the visa petition. Additionally, NES issued the W-2 Wage and Tax statement to the beneficiary. If NES is the actual employer of the beneficiary, then it should have filed the Form I-140 visa petition. *See Avena v. I.N.S.,* 989 F. Supp. 1, 7 (D.D.C. 1997). The AAO concurs with the director's reasoning in its memorandum accompanying the appeal concerning that issue.

The school, on its own, cannot prove its ability to pay the proffered wage since its evidence is all connected to NES. NES has provided evidence of a substantial bank balance, however, the AAO is inclined to agree with the director that a full accounting of NES's financial situation has not been submitted in this matter. NES also funds camps, a tutoring center and cultural center, and other activities. It is impossible to know how far NES's bank account funds stretch without an audited financial statement illustrating its full liabilities to other entities and activities. It is also impossible to know if NES has sponsored other aliens and would have its ability to pay a proffered wage decreased based upon its obligation to pay other proposed salaries.

Assuming NES or SCA is liable for paying the proffered wage in this case, the reliance on the balances in the bank accounts is misplaced regardless of whether the accounts are accessible by SCA or not. 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on NES's bank statements somehow reflect additional available funds that were not reflected on financial statements submitted in connection with this petition.[2]

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

---

[2] While it is urged to consider the revised profit and loss statement on appeal, which purports to include bank account funds available to it, the petitioner is reminded that the profit and loss statement was not audited, and is thus, unacceptable evidence according to the plain language of 8 C.F.R. § 204.5(g)(2).

ability to pay the proffered wage. In the instant case, the petitioner, regardless of whether the petitioner is actually NES or SCA or both, did not establish that it employed and paid the beneficiary the full proffered wage in 2002. Instead the evidence shows that NES paid the beneficiary $22,916.63 in 2002, which is $37,623.37 less than 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 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). Since NES and SCA are charities exempt from income tax return, CIS will accept documentation in lieu of federal tax returns, such as audited financial statements. As noted above, there are no *audited* financial statements in the record of proceeding.

The petitioning entity is unclear in this case. The AAO concurs that NES should file the visa petition to be properly before CIS. However, regardless of whether the petitioner is NES or SCA, both entities failed to submit evidence sufficient to demonstrate that they had the ability to pay the proffered wage during 2002. 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.