

Administrative Data Received by:
Immigration and Naturalization
Division of Homeland Security
U.S. Citizenship and Immigration Services

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



U.S. Citizenship
and Immigration
Services



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FILE: WAC 02 035 54492 Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005

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:



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, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a private Korean language school. It seeks to employ the beneficiary permanently in the United States as an English as a Second Language (ESL) 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 submitted a brief and additional evidence. The AAO reviewed the appeal and also determined that the petitioner had not established that it had the ability to pay the proffered wage from 1997 to the present. On motion, the petitioner submits a series of unaudited financial statements for three of the years in question, as well as additional documentation with regard to the petitioner's owner's personal assets, as new evidence not submitted previously into the record of proceeding.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. The petitioner has submitted new documentation with regard to its financial resources, namely, financial statements that examine the petitioner's total net assets from 1997 to 2002, and letters from three banks that describe the current cash assets of the petitioner's owner, as of March 2004. This evidence is viewed as sufficient to reopen the proceedings.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 7, 1997. The proffered wage as stated on the Form ETA 750 is an annual salary of \$26,715.52.

The petitioner claimed it was established in 1994, has eight employees, and had a net annual income of \$60,000. With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax returns, for the years 1998, 1999, and 2000. The petitioner also submitted its bank statements from the Hanmi Bank, Los Angeles, California dated April 1997 to December 1997; a brochure about the school; and documentation as to the beneficiary's academic studies and work experience.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 6, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, originals of signed federal tax returns, with all accompanying schedules, statements and attachments, or audited financial statements to demonstrate its continuing ability to pay the proffered wage for the years 1997 and 2001. The director also requested state of California Form DE-6 Quarterly Wage Report for all the petitioner's employees for the last four quarters.

In response, the petitioner submitted its Form 1120 corporate tax return for the years 1997, and Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, in which the petitioner requested an extension until September 2002 to file its 2001 federal income tax return. The petitioner also submitted DE-6 Forms for the four quarters of 2001, and the first quarter of 2002.

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 5, 2002, denied the petition. The director examined each Form 1120 submitted by the petitioner with regard to yearly gross receipts, compensation to officers, salaries and wages paid, taxable income before net operating loss deductions, special deductions, and net current assets. The director then determined that the petitioner's net income and net current assets as reflected in the income tax returns from 1997 to 2000 were not sufficient to pay the proffered wage of \$26,715.52.

On appeal, counsel asserted that if the petitioner's net income, net assets, and retained earnings were combined, the petitioner would have sufficient financial resources to pay the proffered wage. Counsel submitted the petitioner's 2001 corporate income tax return, Forms DE-6 for the second quarter of 2002, and state of California Form DE 88, Payroll Tax Deposit, for 2002.

On March 12, 2004, the AAO dismissed the petitioner's appeal. The AAO determined that the petitioner did not have sufficient net income or current net assets to pay the proffered wage as of the 1997 priority date to the present time. Furthermore, the AAO determined that the petitioner's retained earnings would not be appropriately included in the calculation of the petitioner's financial assets as they did not represent funds that are available for disposition.

On motion, the petitioner submits unaudited financial statements for the years 2000, 2001, and 2002. The financial statements accompany resubmitted Forms 1120 for the respective years. The petitioner also resubmitted its income tax returns for the years 1997 to 1999. For the year 1997, the petitioner submits both a Form 1040, individual income tax return of the petitioner's president, and the petitioner's Form 1120, corporate income tax

return.¹ The petitioner states that as a sole proprietor filing a Form 1040, the petitioner had net profits of \$27,492, as reflected in the Schedule C that accompanied the Form 1040. The petitioner states that these net profits are in addition to the net profit of \$97 dollars listed on the corporate income tax return filed by the petitioner in 1997. The petitioner also submits letters from three banks that describe the petitioner's owner's assets as of March 2004 as follows:

Nara Bank, Los Angeles, California, personal TCD Account with a current balance of \$30,643.09. This account was opened in October 2002.

Nara Bank, Los Angeles, California, personal checking account, with a current balance of \$88,636.62. The account was opened in July 2001.

Hanmi Bank, Los Angeles, California, personal savings account, with current balance of \$47,233. This account was opened in October 1998.

The petitioner states that the petitioner's owner is the sole shareholder, and that the owner's personal assets of \$116,512 are currently available to pay the proffered wage.

Upon review of the record, the petitioner in its motion to reopen submits information on its owner/sole shareholder's personal assets. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is noted that the owner's personal assets from the priority date of July 1997 to the date of incorporation in September 1997 can be utilized as additional funds available to pay the proffered wage. However, the bank statements submitted to the record are all dated after this timeframe and thus are precluded from consideration because of the separate entity doctrine. Therefore, the bank account statements submitted on motion are given no weight in these proceedings. Furthermore, the bank letters only describe the owner's assets at a specific point in time, and even if this evidence were accepted as probative, the letters would not establish that the owner's assets were sufficient as of the 1997 priority date to pay the proffered wage.

On motion, the petitioner also submits unaudited financial statements for the years 2000 to 2002. Using these statements and the resubmitted income tax returns from 1997 to 1999, the petitioner states that its total net profits and assets, minus its total liabilities, leave sufficient total net assets to pay the proffered wage in each of the years in question. For example, in the year 2001, the petitioner identifies its total net profits as \$14,877, its assets as \$118,115; its liabilities as \$37,132, and its total net assets for the year as \$80,983. The petitioner then states that the sum of \$80,983 is available to pay the proffered wage. However, the AAO does not examine figures such as total net profits, or total assets, in its determination of whether the petitioner has the ability to pay the proffered wage. *See* discussion below on the petitioner's net income and net current assets. Furthermore, the unaudited

¹ The record reflects that the petitioning entity was structured as a sole proprietorship until September 1997 when it incorporated.

financial statements that the petitioner submitted on motion 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.

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. The petitioner did not claim to have employed the beneficiary as of the priority date. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1997 and onward.

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. As stated previously, neither CIS or the AAO examines figures such as retained earnings or depreciation when determining the petitioner's net income. 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 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. The petitioner's net income for the period of time from 1997 to 2002 is as follows: in 1997, \$97; in 1998, \$16,988; in 1999, \$301; in 2000, \$13,642; in 2001, \$14,873; and in 2002, \$25,639. None of these figures is sufficient to pay the proffered wage of \$26,715.²

The petitioner on appeal stated that retained earnings could be utilized when examining the petitioner's ability to pay the proffered wage. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on a corporate tax return on Schedule L and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Tessel*, 17 I & N Dec. 631 (Act. Assoc. Comm. 1980).

On motion, the petitioner states that items such as its net profits combined with total assets and liabilities can be utilized to determine the petitioner's ability to pay the proffered wage. However, the AAO rejects the petitioner's

² The petitioner's net income for 1997 noted above is only the analysis of the petitioner's ability to pay while it was structured as a corporation during 1997.

assertion that its total assets should have been 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. does not view all such figures to represent financial resources readily available to pay the proffered wage.

Nevertheless, counsel is correct that 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. In addition, 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 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 tax returns reflect the following information for the following years:

	1997	1998	1999	2000
Taxable income ⁴	\$ 97	\$ 16,988	\$ 301	\$ 13,642
Current Assets	\$ 6,063	\$ 16,623	\$ 20,345	\$ 9,046
Current Liabilities	\$ 3,520	\$ 23,723	\$ 3,377	\$ 21,951
Net current assets	\$ 2,543	\$ -7,100	\$ 16,968	\$ -12,965

	2001	2002
Taxable income	\$ 14,873	\$ 25,639
Current Assets	\$ 14,751	\$ 26,598
Current Liabilities	\$ 37,132	\$ 24,824

³ 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.

⁴ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

date and to the present time. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage from 1997 to the present time.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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 motion to reopen is granted and the decision of the AAO dated March 12, 2004 is affirmed. The petition is denied.