

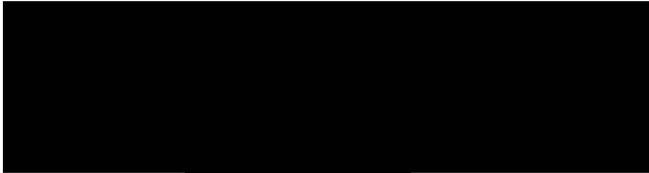


U.S. Citizenship
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FILE: [REDACTED]
EAC-04-060-51259

Office: VERMONT SERVICE CENTER

Date: MAR 29 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:

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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 school. It seeks to employ the beneficiary permanently in the United States as a religious studies 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$38,500.00 per year. On the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on March 1, 2001.

The I-140 petition was submitted on December 22, 2003. On the petition, the petitioner claimed to have been established in March 1990, to currently have 21 employees, and to have a gross annual income of \$1,327,653.00. With the petition, the petitioner submitted supporting evidence.¹

In a decision dated July 26, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

¹ Supporting evidence submitted by the petitioner includes evidence submitted along with a prior I-140 petition that the Vermont Service Center denied on July 13, 2002 and in response to a request for evidence (RFE) issued for the prior I-140 petition.

On appeal, counsel states that the petitioner has established its financial viability based on financial documents that shows the petitioner's continuously improving financial status and its capability to finance a significant staff, and the petitioner's status as a non-profit religious school needs to be taken into consideration. Counsel also states that CIS should have used the prevailing wage at the time of the filing of the Form ETA 750 instead of the amended proffered wage listed on the Form ETA 750 in calculating the petitioner's financial viability.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is a non-profit organization. The record before the director closed on December 22, 2003 with the receipt by the director of the petitioner's I-140 petition and supporting evidence. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available. The record does not contain the petitioner's Form 990 Return of Organization Exempt from Income Tax, and a letter from counsel dated May 7, 2002 states that the petitioner is "exempt from filing tax returns with the government [and this] is why the organization has no tax returns to supply to INS." CIS does acknowledge that certain non-profit entities are exempt from filing the Form 990.

Copies of the petitioner's Form 941 Employer's Quarterly Tax Returns from 1998 to 2002 and from two quarters in 2003 do appear in the record.² CIS, as stated above, relies on net income in determining the petitioner's ability to pay the proffered wage, and net income considers income after expenses were paid. The Form 941 shows the amount the petitioner paid for wages and also the petitioner's federal tax liability. It does not, however, show how much money the petitioner received and how much money the petitioner used. Thus, the Form 941 is insufficient to supplement the Form 990 used by CIS to calculate net income.

The regulations provide for the submission of annual reports or audited financial statements. While CIS does acknowledge that the petitioner may not be required to file an income tax return with the Internal Revenue Service, there is no explanation in the record for why the petitioner was unable to submit another type of required evidence.

Counsel states that "it borders on the absurd for the service center to claim that a fully functioning private school in operation continuously from 1990 to the present did not have the means to pay an additional teacher at the time [the ETA 750] was filed in 1998," and cites to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of the need to look at "context." Specifically, counsel states that "the school has established a track record" because "[it] was functioning during the seven year period prior to the filing of the application . . . and continues to do so during the six [year] period following the filing of this petition!"

Counsel's reliance on *Sonegawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that some of the years in question were uncharacteristically unprofitable years for the petitioner. The fact that the petitioner was operating in 1990 and continues to operate does not negate the fact that the petitioner has failed to show its ability to pay the proffered wage for any of the years in question.

Even though the circumstance surrounding this case is different from those in *Sonegawa*, the totality of the circumstances affecting the petitioner will still be considered if the evidence warrants such consideration. Due to the fact that the petitioner is a non-profit and tax-exempt school and the record does not contain any tax returns, the AAO finds that such consideration is warranted in this case and will closely examine counsel's assertions and evidence available in the record.

Counsel, in mentioning the need to "[take] into account appropriate context, namely that the employer is a not for profit religious school," discusses how "no school in the nation funds itself solely on its tuition" and asserts that

² The petitioner's Form 941 Employer's Quarterly Tax Return for March 31, 1999 does not appear in the record

“some of the most well established and prestigious schools in fact are often running, on an going basis, on a deficit.” Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel states that the petitioner’s bank records from March 1998 through December 1998 “clearly show that during the relevant year, during each and every month the petitioner had sufficient cash flow to pay the salary proposed.” Counsel’s reliance on the balances in the petitioner’s bank accounts is misplaced. While 8 C.F.R. § 204.5(g)(2) allows additional material “in appropriate cases,” bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, the record only contains 5 monthly bank statements for 1998, 5 monthly bank statements for 1999, 5 monthly bank statements for 2000, 5 monthly bank statements for 2001, 3 monthly bank statements for 2002, and 6 monthly bank statements for 2003.³ Contrary to the counsel’s assertion, for 1998, only the bank statements for March, July, November, and December appear in the record. Thus, even if it is appropriate to look at the petitioner’s bank statements, the petitioner’s bank statements fail to establish the petitioner’s ability to pay the proffered wage every month from January 1998 until December 2003.

Counsel also mentions the petitioner’s continuously improving financial documentation. Specifically, counsel points to a statement from Merrill Lynch regarding the petitioner’s investor account. This statement only shows the petitioner’s assets in 2002; it does not show the petitioner’s liabilities and thus does not paint an accurate picture of the petitioner’s financial situation. Moreover, this statement may indicate that the petitioner had assets in 2002, but the petitioner must establish its ability to pay the proffered wage during the entire period in question and not just 2002.

The record also contains the petitioner’s deposit records from May 2003 to October 2003. These records show the amount of donations and other forms of income the petitioner received each month. These records, similar to the Merrill Lynch statement, only show the petitioner’s assets for a limited amount of time; they do not show the petitioner’s liabilities and they do not show the petitioner’s ability to pay the proffered wage during the entire period in question.⁴

In addition, the record contains balance sheets for June 30, 2000 and June 30, 2001, which are in essence financial statements. No evidence in the record shows that these are audited financial statements. Unaudited financial statements 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 of its 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.

³ For 1998, the record includes bank statements from February, part of March, July, November, and December. For 1999, the record includes bank statements from January, February, March, July, and August. For 2000, the record includes bank statements from January, February, March, July, and August. For 2001, the record includes bank statements from January, February, March, July, and August. For 2002, the record includes bank statements from January, February, and March. For 2003, the record includes bank statements from April, May, June, July, August, and September.

⁴ The deposit records do subtract expenses from the total income to come up with the net income. However, for all 6 reports, the expenses are listed as \$0.00. The AAO finds it unlikely that the petitioner, a school, had no expense for 6 months.

Counsel states that the petitioner's quarterly payroll tax returns show that the petitioner is "[capable] of financing a significant staff." The fact that the petitioner had the ability to pay the wages of its staff is irrelevant to whether it has the ability to pay the beneficiary's proffered wage at the priority date of the petition; the petitioner must demonstrate that it has extra assets, aside from money used to pay its staff, to pay the wages of an additional staff. If the petitioner has established that the beneficiary will be replacing another staff performing the duties of the proffered position, the wages already paid to that staff may be shown to be available to prove the ability to pay the proffered wage to the beneficiary. No evidence in the record shows that the beneficiary is replacing another staff.

The petitioner's Form 941 Employer's Quarterly Tax Returns do show the total amount of wages paid per year. In 1998, the petitioner paid \$209,027.65 in wages. In 1999, the amount of wages paid cannot be determined because the petitioner's quarterly tax return for March 31, 1999 is missing from the record. In 2000, the petitioner paid \$265,992.42 in wages. In 2001, the petitioner paid \$240,305.95 in wages. In 2002 and 2003, the amount of wages paid cannot be determined because the record does not contain all the quarterly tax returns for 2002 and 2003. Based on the amount of wages paid, a wage of \$38,500.00 would be a significant percentage increase on these amounts. Specifically, the petitioner would need 18.4% in wage increase for 1998, 14.5% in wage increase for 2000, and 16.0% in wage increase for 2001.

Counsel also asserts that "the service center erred as a matter of fact and law by not analyzing the 'ability to pay' based upon the prevailing wage for the position in 1998 when the application was filed but rather on the amended prevailing wage established later when the application was ongoing." In support of his assertion, counsel states that "[t]his basic principle of financial analysis and common sense was confirmed in *Masonry Masters, Inc. v. Richard Thornburgh*, 876 F. 2d 898." The correct citation for *Masonry Masters, Inc. v. Thornburgh* is 875 F.2d 898 (D.C. Cir. 1989).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). On the ETA 750, the proffered wage was changed by the petitioner on October 26, 2000, as indicated by "YVF Oct 26, 2000" written above the correction. The ETA 750 was certified on March 1, 2001, after the correction was made. The AAO will not amend the ETA 750 after it has been certified by the Department of Labor based on the information on the ETA 750. In addition, aside from counsel's statement that "the prevailing wage at that time was in fact \$31,116.80 pursuant to the OES survey in effect at that time," no evidence in the record shows that \$31,116.80 was indeed the original proffered wage as listed on the ETA 750. The original amount, with the consent of the petitioner, was covered up with white-out, and the amount \$38,500.00 is the only proffered wage on the ETA 750. As for counsel's reliance on *Masonry Masters*, that case was decided by the District of Columbia Circuit. The petitioner is located in New York, and New York is under the jurisdiction of the Second Circuit. Thus, District of Columbia Circuit decisions are not binding, but merely persuasive.

Counsel also points to *Masonry Masters* regarding a beneficiary's potential to increase a petitioner's revenues and states that the petitioner in this case "[would become] more successful by growing and expanding." Although part of that decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a staff would result in the petitioner becoming more successful.

Counsel states on the Form I-290B that the Vermont Service Center "improperly misapplied recent guidance with regard to the issuance of 'RFEs.'" However, in the brief, counsel states that "we cannot object to the Service Center's use of the 'no RFE policy' in the instance case, given that it was in compliance with the guidelines provided and given further that the Service must have felt that it had all the information necessary before it, to

make a decision, as this was the second time a petition was filed in the instance case.” The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal. Additionally, as counsel correctly points out and as shown by evidence in the record, an RFE was issued in regards to the first I-140 petition for this case.

As stated above, the AAO will look at the totality of the circumstances if the evidence warrants such consideration. In this case, because the petitioner is a non profit and tax-exempt entity, the AAO has turned to the record to determine whether evidence, aside from tax returns, shows that the petitioner has the ability to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence. After carefully examining the petitioner’s Form 941s from 1998 to 2002, its bank statements for some of the months from 1998 to 2003, a statement from Merrill Lynch for 2002, its deposit records from May 2003 to October 2003, and its balance sheets for June 2000 and June 2001, AAO finds that the evidence in the record has not established that the petitioner has the ability to pay the proffered wage for the entire period in question. Counsel cites to *Sonegawa*, but the facts in that case are distinct from the case at hand. The decision on that case was partly based on the petitioner’s sound business reputation and outstanding reputation, and the petitioner in that case submitted other documentary evidence to show the ability to pay for the other years surrounding the year in question. Counsel also cites to *Masonry Masters*, but counsel’s hypothesis that the petitioner would continue to grow and expand as a result of employing the beneficiary is not in and of itself sufficient to show ability to pay.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.