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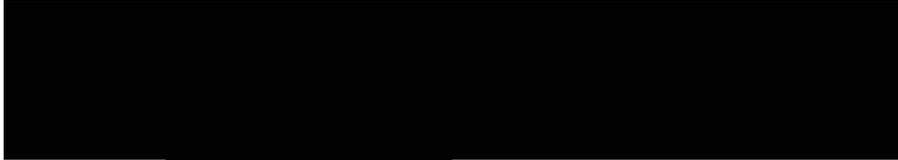
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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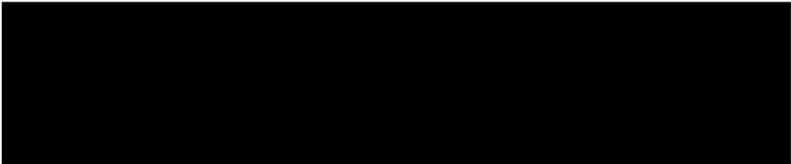


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 23 2007  
SRC 03 022 50167

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director, Texas Service Center, denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Christian day school. It seeks to employ the beneficiary permanently in the United States as a bilingual secretary. 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 that the petitioner had not established that the beneficiary had the requisite two years of work experience, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision.<sup>1</sup> Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 24, 2003 denial, the director found that the petitioner's financial statements submitted to the record were not sufficient to establish the petitioner's ability to pay the proffered wage as of the 2001 priority date and to the time the beneficiary obtains her legal permanent residence. In addition, the director determined that the petitioner had not established that the beneficiary's previous work experience as a secretary/salesperson in a perfume retail operation was the equivalent of two years of work experience as a bilingual secretary.

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 AAO will first examine whether the petitioner established its ability to pay the proffered wage, and then will examine whether the petitioner established that the beneficiary is qualified to perform the duties of the proffered position.

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<sup>1</sup> On June 26, 2003, the director issued a notice of intent to deny the instant petition. The director noted that the petitioner's counsel was [REDACTED] who was taken into custody on May 23, 2003 and charged with conspiracy to commit immigration fraud by making false representations in multiple visa petitions, knowingly accepting visas procured by fraud, and harboring illegal aliens for profit. Additionally, [REDACTED] was charged with 11 counts of making materially false, fictitious statements to Citizenship and Immigration Services (CIS) and 7 counts of harboring an illegal alien for profit, all of who worked for [REDACTED]. The director concluded that since [REDACTED] represented the petitioner, the instant petition could contain fraudulent documents, so she sent a detailed list of items she sought clarification about or additional evidence and information. Since that notice is contained in the record of proceeding, which is a public access document, it will not be recited in this decision.

With regard to the petitioner's ability to pay the proffered wage, the regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.50 per hour (\$19,760 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>.

On appeal, counsel submits a three page document entitled "Budget 2001-02" that lists the petitioner's expenses, under the headings of administrative, capital, discounts, instructional, instructional staff, and maintenance. With the initial petition, the petitioner submitted a three-page document with all three pages marked at the bottom "Read Accountant's Compilation Report."<sup>3</sup> The first page of the document listed current assets and current liabilities and fund balances as of March 31, 2001 and March 31, 2002. The remaining two pages list revenues and expenses for both a three-month period of time ending in March 31, 2001 and March 31, 2002, and an eight-month period of time ending in March 31, 2001, and March 31, 2002.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The petitioner did not submit any accountant's compilation report with this document.

In response to the director's request for further evidence dated August 8, 2003, the petitioner submitted two additional budget documents that listed categories and total expenses for the year identified as 2000-2001 and 2002 through 2003.<sup>4</sup>

On appeal, counsel asserts that the petitioner has provided sufficient evidence regarding its ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a non-profit corporation. The Florida Department of State, Division of Corporations documentation submitted in response to the director's NOID dated June 26, 2003, indicates that the petitioner's corporate name is "Guardian Shepherd Lutheran Christian Day School, Inc." The petitioner is also identified in this document as a "Florida Non Profit." On the amended I-140 petition submitted to the record by new counsel also in response to the director's NOID, the petitioner provides its IRS tax number and indicates it was established in 1985, has thirteen employees, a gross annual income of \$201,161.60, and a net annual income of \$39,126.14. Thus, the state of Florida documentation and the I-140 petition suggest that the petitioner is a corporation, rather than a tax-exempt non-profit religious organization.

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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, Citizenship and Immigration Services (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).

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement that counsel initially submitted with the I-140 petition is not persuasive evidence. The other financial statements submitted to the record in response to the director's RFE, or on appeal are also not viewed as persuasive evidence. Therefore, contrary to counsel's assertion, the petitioner has submitted no relevant evidence to

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<sup>4</sup> The budget documents submitted in response to the director's request for further evidence and on appeal all list the position of administrative assistant in the staff category with salaries of \$3,650 in 2001, \$4,200 in 2001-2002, and \$21,873 in 2002-2003. The petitioner provided no clarification as to whether the positions of administrative assistant and bilingual secretary share similar duties.

<sup>5</sup> The AAO accessed the website for the Florida Department of State, Division of Corporations, as of July 19, 2007. The website at <http://sunbiz.org> indicates that the petitioner is in inactive status, and noted an administrative "dissolution for annual report." The website also indicated that the petitioner had voluntarily dissolved itself on June 6, 2005 and then revoked that dissolution on July 28, 2005; all of which does not clarify the petitioner's current business viability.

establish its ability to pay the proffered wage, nor provided no explanation as to why it has not submitted the relevant federal tax documents for the period in question. To date, the petitioner has not provided any financial records that the AAO can examine to determine whether the petitioner has the ability to pay the proffered wage.

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. The petitioner provided no documentation that it had ever employed or paid the beneficiary. Thus, the petitioner has not established that it either employed or paid the beneficiary the proffered wage during the period of time in question. The petitioner thus is obligated to establish that it can pay the beneficiary the entire proffered wage as of the 2001 priority date year 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. 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). 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

As stated previously, the financial statements submitted by the petitioner to the record are not viewed as sufficient evidence to establish the petitioner's ability to pay the proffered wage. As noted above, there are no *audited* financial statements in the record of proceeding, as required by the regulation at 8 C.F.R. §

204.5(g)(2). The petitioner has not submitted any other evidence to establish this ability. Therefore the AAO cannot further analyze the petitioner's ability to pay the proffered wage based on its net income in 2001, 2002, or 2003.

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.<sup>6</sup> However, as previously stated, the petitioner did not submit any type of evidence, as stipulated in regulatory guidance to establish the petitioner's ability to pay the proffered wage. Thus, the AAO cannot consider the petitioner's net current assets in these proceedings. Therefore the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date year and to the present, based on either its net income or current net assets.

With regard to the second issue addressed by the director in his decision, namely, whether the beneficiary has the requisite two years of work experience, the petitioner submitted no further documentation with regard to whether the beneficiary had the requisite two years of relevant work experience as a bilingual secretary. In evaluating the beneficiary's qualifications, 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). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As noted by the director in her decision, neither the letter from the beneficiary's previous employer at Perfumania nor the subsequent affidavit submitted by the same person in response to the director's RFE, provided any details as to the beneficiary's duties while working at Perfumania, Miami, Florida as a secretary/salesperson, and how these duties would correspond to those of a bilingual secretary. Such evidence is required by 8 C.F.R. § 204.5(l)(3)(ii)(A). As also correctly noted by the director, the beneficiary's pay stubs for employment for the period of time from October 13, 1999 to April 28, 2001 submitted by the petitioner to the record in response to the director's RFE also did not document that the beneficiary worked fulltime at Perfumania during the 19 months prior to the establishment of the priority date on April 30, 2001. Therefore the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. In addition, the petitioner has not established that the beneficiary had two years of full time work experience as a bilingual secretary prior to April 30, 2001. Therefore, the director's decision dated November 24, 2003 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 appeal is dismissed.