U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

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[redacted]

PUBLIC COPY

FILE: WAC 02 190 51073 Office: CALIFORNIA SERVICE CENTER Date: JAN 22 2004

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]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a teacher. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is April 26, 2001. The beneficiary's salary as stated on the labor certification is $29,980.00 per annum.

With the petition's initial visa petition filing, counsel submitted a copy of the first four pages of the petitioner's Internal Revenue Service (IRS) Form 1120 for 2001 which reflected a taxable income of $5,692. Because the evidence was insufficient for the service center to make a determination of the petitioner's ability to pay, a request for additional evidence was issued.[1] The director specifically requested signed and complete tax returns.[2]

In response to the request for evidence, the petitioner provided a complete tax form. The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because it reflected that the petitioner's net income was substantially lower than the proffered wage and denied the petition accordingly.

On appeal, counsel submits a letter from the petitioner's certified public accountant (CPA) who asserts that bonuses were declared to the stockholders of the company which amounted to $15,000, which was deducted as management expense, and as such are considered as non-recurring expense. The CPA further asserts that depreciation is a non-cash expense and can be used for working capital. Counsel also submitted a copy of the petitioner's bank statement for the period from October 1, 2002 through October 31, 2002.

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[1] The service center also requested evidence concerning the beneficiary's qualifications. Because subsequent submissions satisfied the service center concerning this issue, it will not be discussed within this decision.

[2] The tax returns submitted with the petitioner's initial filing were unsigned and omitted schedules to the tax returns.

In determining the petitioner's ability to pay the proffered wage, CIS will 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. Thus, the director appropriately considered the petitioner's income after expenses in determining that the petitioner did not have the ability to pay the proffered wages. Additionally, based on the referenced case law, counsel's appellate assertion concerning depreciation is rejected.

Even though the petitioner submitted its commercial bank statement for October of 2002 as evidence that it had sufficient cash flow to pay the wage, there is no evidence that this bank statement somehow reflects additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's IRS Form 1120 for calendar year 2001 shows a taxable income of $5,692. The petitioner could not pay a proffered wage of $29,980.00 a year out of this income. Additionally, Schedule L to the petitioner's tax return indicates that its current liabilities are greater than its current assets. Thus, the petitioner would not be able to pay the proffered wage out of its net current assets.[3]

The petitioner's IRS Form 1120 for calendar year 2000 was also submitted but will not be considered because the priority date was established in 2001. Thus, the petitioner's financial situation in 2000 is irrelevant.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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.

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[3] Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, if the petitioner had net current assets greater than the proffered wages, this would evidence the petitioner's ability to pay the proffered wages. In this case, the petitioner does not illustrate net current assets greater than the proffered wages.