



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

B5

FILE: LIN 06 054 52021 Office: NEBRASKA SERVICE CENTER Date: FEB 04 2008

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consultancy and development company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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. For the reasons discussed below, we uphold the director's analysis and conclusions.

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 October 29, 2003. The proffered wage as stated on the Form ETA 750 is \$91,000 annually or \$1,750 per week. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2003.

On the petition, the petitioner claimed to have an establishment date in 1998, a gross annual income of \$1,539,608, an undisclosed net income and nine employees. In support of the petition, the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statements for 2004 and 2003, the beneficiary's 2003 pay stubs and the petitioner's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for 2004.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 26, 2006, 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.

In response, the petitioner submitted its IRS Form 1120 U.S. Corporation Income Tax Returns for the years 2003 and 2005 as well as unaudited financial statements for those years. Counsel asserts that the proffered wage should be prorated for 2003 since the priority date is October 29, 2003. Counsel further asserts that the unaudited financial statements are prepared using the accrual basis and, thus, reflect accounts receivable not listed on the petitioner’s tax returns. The petitioner submits a letter from its accountant regarding the petitioner’s accounts receivable.

The tax returns reflect the following information for the following years:

	2003	2004	2005
Net income	\$40,296	\$26,047	\$45,691
Current Assets	\$9,546	\$16,972	\$32,688
Current Liabilities	\$15,901	\$5,723	\$77,934
Net current assets	(\$6,355)	\$11,249	(\$45,246)

In addition, the petitioner submitted evidence of a credit line, the beneficiary’s Forms W-2 for 2003, 2004 and 2005 and 2006 pay statements.

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 through 2004, and, on May 4, 2006, denied the petition. The director’s decision addressed all of counsel’s assertions, including an explanation of why the director declined to consider the petitioner’s net income over 12 months towards an ability to pay the prorated proffered wage during a shorter period.

On appeal, counsel asserts that the director erred in failing to prorate the proffered wage and in failing to consider the compiled financial statements.

At issue is the petitioner’s ability to pay the proffered wage in 2003 and 2004. Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003, 2004 or 2005. Rather, the petitioner paid the beneficiary \$58,666.67 less than the proffered wage in 2003 and \$47,000.08 less than the proffered wage in 2004. We acknowledge that the petitioner need only demonstrate an ability to pay the proffered wage for the last nine weeks of 2003. Counsel’s request to prorate the proffered wage will be discussed below.

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). 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.

Nevertheless, 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. We reject, however, any argument that the petitioner's 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. 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>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

As stated above, the petitioner paid the beneficiary \$32,333.33 in 2003, \$58,666.67 less than the proffered wage. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. Logic dictates that if we prorate the proffered wage we must also prorate the wages paid if we are to have meaningful numbers for analysis. The proffered wage

---

<sup>1</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.

(\$1,750 per week) for nine weeks is \$15,750. During 2003, the beneficiary received \$32,333.33 over approximately 35 weeks, amounting to about \$923.81 per week or \$8,314.29 for the last nine weeks of the year. Thus, the petitioner needs to establish the ability to pay the remaining \$7,435.71 for the last nine weeks of 2003.

The petitioner's annual net income in 2003 was \$40,296. As stated by the director, however, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. Counsel's only response on appeal is that the director's refusal to consider 12 months of income towards an ability to pay the prorated proffered wage is "highly inappropriate, inaccurate and unacceptable" because such an analysis has been successfully utilized in previous cases. Counsel cites no binding legal authority, however, for the proposition that CIS must consider income over a greater period than the one over which the alien is attempting to demonstrate an ability to pay the proffered wage. Only decisions designated as precedents by this office are binding in future matters. 8 C.F.R. § 103.3(c). While CIS will prorate the proffered wage if the record contains evidence of net income specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. The petitioner's tax return for 2003 reflects negative net current assets. Thus, the petitioner's 2003 tax return does not establish its ability to pay the proffered wage during the final nine weeks of 2003.

In 2004, the petitioner paid the beneficiary \$43,999.99, \$47,000.08 less than the proffered wage. The petitioner's 2004 tax return shows a net income of only \$26,047 and net current assets of only \$11,249. The petitioner has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets as reflected on its tax return. On appeal, counsel requests that CIS combine the petitioner's net income and net current assets for 2004. Net income includes income earned over 12 months while net current assets are a "snapshot" figure representing assets as of a date certain. We are not persuaded that adding these two numbers would avoid double counting funds or otherwise produce a meaningful number.

Counsel further asserts that the tax returns were prepared using the cash method, which does not include accounts receivable, and submits financial statements prepared using the accrual method showing much higher net current assets. Counsel asserts that the petitioner cannot afford a full audit. Nevertheless, the unaudited financial statements 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.

Moreover, the petitioner's choice of accounting methods accords income either to the year during which it was earned or the year during which it was received. Counsel states that, on the petitioner's tax returns, it has reported income when it is received, consistent with cash convention, but counsel urges that we also consider income earned during a given fiscal year but not received during that year, as reflected on the compiled balance sheets prepared using the accrual method. The

petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated that changing from the cash to the accrual method would make available tens of thousands of dollars that would otherwise never have appeared on the tax returns at all.

The petitioner's line of credit will not be considered. Any existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In light of the above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond those listed on its tax returns. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2003 or in 2004. 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.