

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5



FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 24 2008

SRC 07 029 52640

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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a mortgage broker. It seeks to employ the beneficiary permanently in the United States as a operations logistics 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, the petitioner submits a statement and additional evidence. For the reasons discussed below, while the petitioner's assertions on the Form I-290B Notice of Appeal are not persuasive, the petitioner's 2006 tax return, which was unavailable as of the date the petitioner responded to the director's notice of intent to deny the petition, overcomes the director's otherwise valid concerns.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 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 ETA Form 9089 was accepted for processing on August 29, 2006. The proffered wage as stated on the ETA Form 9089 is \$2,800 biweekly, which amounts to \$72,800 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner listed June 12, 2006 as its date of establishment. The year appears to be a typographical error as the tax returns reflect that the petitioner was organized on June 12, 2003. This is the same date listed on Florida's website, www.sunbiz.org, accessed on August 2, 2006 and submitted in support of the petition. The petitioner also claimed on the petition to have a gross annual income of \$919,470, a net income of \$42,333 and eight employees. In support of the petition, the petitioner submitted its 2005 Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income.

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 December 6, 2006, the director issued a notice of intent to deny the petition requesting additional evidence pertinent to that ability.

In response, the petitioner submitted unaudited financial statements for January through November 2006 and all of 2005. The record also contains various bank statements for the petitioner's account.

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 January 19, 2007, denied the petition.

On appeal, the petitioner asserts that the director erred in considering all of the petitioner's liabilities when calculating net current assets. As will be discussed below, the director correctly used the petitioner's current assets and current liabilities as reflected on its 2005 tax return. The petitioner further asserts that the director should have considered the petitioner's 2006 financial statements. As will also be discussed below, however, unaudited financial statements carry little evidentiary weight. Subsequently, the petitioner submits its 2006 IRS Form 1065 tax return. This document, unavailable as of the date the petitioner responded to the director's notice of intent to deny the petition, overcomes the director's legitimate concerns.

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, or, in fact, any wages, in 2006.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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 be 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.¹ Year-end current assets are shown on IRS Form 1065, Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). On appeal, the petitioner asserts that the director subtracted all of the petitioner's liabilities from its current assets. In fact, the director correctly calculated the petitioner's 2005 net current assets using the lines identified above from the petitioner's 2005 Schedule L. On appeal, the petitioner relies on its total assets less total liabilities as reflected on the petitioner's unaudited 2005 balance sheet. For the reasons stated above, we will not consider the petitioner's total assets, which include depreciable assets used in the petitioner's business. Rather, if the 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 petitioner's assertion that the director should have considered the petitioner's unaudited financial statements is not persuasive. 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 addition, the balances in the petitioner's bank account have limited value. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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

	2005	2006
Net income	\$42,333	\$109,817
Current Assets	\$58,474	\$50,478
Current Liabilities	\$242,139	\$228,404
Net current assets	(\$183,665)	(\$177,926)

Based on the above numbers, taken from the petitioner's tax returns, the petitioner could not demonstrate an ability to pay the proffered wage of \$72,800 from its net income or its net current assets in 2005, the most recent year available when the director issued her decision. Nevertheless, the priority date is in 2006. Thus, the petitioner need only demonstrate its ability to pay the proffered wage in 2006. In 2006, the petitioner shows a net income of \$109,817 and has, therefore, demonstrated the ability to pay the proffered wage out of its net income during that year.

On appeal, the petitioner has now submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2006. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.