



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2005  
WAC-03-136-51225

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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an adult residential care facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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.

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 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 17, 1999. The proffered wage as stated on the Form ETA 750 is \$500 per week, which amounts to \$26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$858,687, and to currently employ 20 workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 1999, 2000, and 2001.

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

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income <sup>1</sup>	\$28,000	-\$2,289	\$0
Current Assets	\$44,907	\$31,420	\$20,358
Current Liabilities	\$2,433	\$4,460	\$8,551
Net current assets	\$42,474	\$26,960	\$11,807

<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 May 13, 2003, the director issued a notice of intent to deny. The director specifically noted that the petitioner's net income was zero for 2001 and negative for 2000 and thus showed insufficient funds from which the petitioner could demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner re-submitted its previously submitted tax returns. In addition, counsel submitted copies of the petitioner's quarterly wage reports for the last quarters in 1999, 2000, and 2001. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Counsel's accompanying letter states that the petitioner receives monthly financial assistance from the Regional Center of Orange County (RCOC) at an average of \$4,5000 for each patient that increases its net income. Counsel also references the petitioner's total wages paid to its employees, assets, and gross receipts as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner also submits copies of statements from RCOC evidencing its receipt of financial assistance.

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 June 25, 2003, denied the petition. The director stated that the petitioner did not have enough net income or net current assets to pay the proffered wage, and noted that the petitioner had filed another visa petition, thereby incurring an obligation to pay an additional wage.

On appeal, counsel suggests that Mr. [REDACTED] who is, in the meantime, performing some of the duties of the Residence Supervisor . . . on a part-time basis, the position being offered to [the beneficiary],” would be replaced by the beneficiary. Counsel explains that Mr. [REDACTED] was paid \$10,500 for a quarter that would leave “a mere \$8,000” per year shortfall for the petitioner to show adequate income to demonstrate its continuing ability to pay the proffered wage. The petitioner submits a copy of its organization chart and a state quarterly report of wages paid to its employees including \$10,500 paid to Mr. [REDACTED] for the quarter ending December 31, 2002.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1999, 2000, or 2001.

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.

The petitioner's net incomes of \$28,000, -\$2,289, \$0 in 1999, 2000, and 2001, respectively, only cover the proffered annual wage of \$26,000 in 1999. Thus, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net income in 2000 or 2001. The petitioner established its ability to pay the proffered wage out of its net income in 1999.

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. 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>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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. The petitioner's net current assets during the years in question, 2000 and 2001, were \$26,960 and \$11,807, respectively. As such, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets in 2001. The petitioner established its ability to pay the proffered wage out of its net current assets in 2000.

The petitioner has established its ability to pay the proffered wage in 1999 and 2000. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$0 and net current assets of only \$11,807 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel inferred that the beneficiary would replace one worker. The record, however, is incomplete with respect to this otherwise plausible assertion. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. The record of proceeding shows an organizational chart that gives M [REDACTED] the same job title as the proffered position but does not provide a job description. The petitioner only presented evidence of wages paid in the final quarter of 2001 and not the entire year. The petitioner did not address the director's concern about another petition filing and liability to pay an additional wage. While replacing employees who assume the same position for wages already paid is a viable means to prove a

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<sup>2</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.

petitioning entity's continuing ability to pay the proffered wage, the petitioner has not adduced sufficient evidence to establish the wages paid to Mr. [REDACTED] for what specific type of work performed and that Mr. [REDACTED] employment will be terminated. 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 has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

Although demonstrating its ability to pay the proffered wage in 1999 and 2000, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001. 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.