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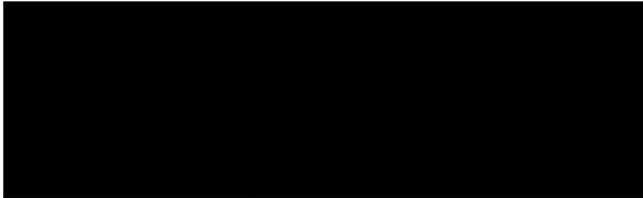
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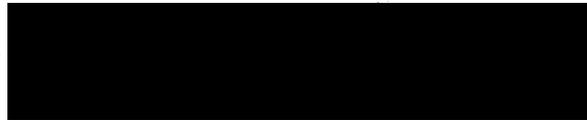
U.S. Citizenship  
and Immigration  
Services

B6



FILE: WAC 03 092 50214 Office: CALIFORNIA SERVICE CENTER Date: **JAN 13 2005**

IN RE: Petitioner:  
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: 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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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, the petitioner submits 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 granting 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.

8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on January 29, 2003. The proffered wage as stated on the Form ETA 750 is \$26 per hour, which equals \$54,080 per year.

On the petition, which the petitioner's vice-president in charge of operations signed on January 27, 2003, the petitioner stated that it was established on May 21, 1999 and that it employs 94 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated December 27, 2002, from its vice president. That letter stresses that the petitioner has 94 employees, and that from September 2001 through September 2002 it had gross income of over \$1.5 million and after tax profit of \$150,000. The letter states that the petitioner has the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 29, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted the petitioner's compiled financial statements as of June 30, 2003. The accountant's report that accompanied those financial statements made clear that they were produced pursuant to a compilation, rather than an audit.

The petitioner also submitted a copy of its 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on the calendar year. During 2002, the petitioner reported a loss of \$34,281 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$11,417 and current liabilities of \$4,370, which yields net current assets of \$7,047.

In an accompanying letter, dated July 28, 2003, the petitioner's vice-president emphasized the petitioner's gross revenue and stated that the loss during 2002 was due to the need to train new staff and expenses associated with new clients, which the letter did not further describe or explain. The letter states that because its overhead is relatively fixed, adding new nurses will generate profit.

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 August 21, 2003, denied the petition.

On appeal, the petitioner restates that the beneficiary, if the petitioner is permitted to hire him, will generate income for the petitioner. The petitioner also stated that it had net income of \$147,562.54 between January 1, 2003 and September 15, 2003. In support of the appeal, the petitioner submitted a copy of its compiled financial statements for that period.

The petitioner also submitted a letter, dated September 15, 2003, from its vice-president. That letter states that although the petitioner declared a loss on its 2002 tax return, it had "a large amount of account receivables," which were not shown on that return because the petitioner reports taxes based on the cash convention rather than the accrual convention. The letter again stated that hiring the beneficiary would generate income for the petitioner and that the petitioner has the ability to pay the proffered wage.

The petitioner's emphasis, in its response to the request for evidence, on its gross revenues, rather than its net income is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Ordinarily, unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is ordinarily obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

The petitioner submitted its financial statements for statements for two periods. 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The salaries the petitioner paid, as reported on one of those financial statements, shall be utilized, as shown below, for a limited purpose.

The petitioner states that it reports income pursuant to the cash convention rather than the accounting convention and that during 2002 it possessed considerable receivables. The petitioner's 2002 Schedule L does not report any receivables, which is consistent with cash accounting. The petitioner urges, by implication, that this office should consider those unreported receivables as evidence of its financial strength, notwithstanding that it declared a loss during 2002.

Accrual accounting does, at least arguably, provide a more accurate picture of a company's performance.<sup>1</sup> By urging that this office consider its 2002 receivables, the petitioner urges an adjustment toward accrual. However, more adjustments, both additions and subtractions, would be necessary to convert the petitioner's cash convention return to an accrual convention return. The petitioner's 2002 income, for instance, likely includes collections for services provided during previous years. The petitioner did not urge that those amounts be deducted from its income in the determination of its ability to pay the proffered wage. Similarly, the petitioner likely has some unpaid bills, but did not urge that those unreported payables should be subtracted from its income in this determination. In effect, the petitioner is urging this office to consider two years income, offset by only one year's expenses, in determining the ability to pay. Such an approach would be inappropriate. The petitioner's ability to pay, like its tax returns, must be based either on accrual or cash basis, not a convenient hybrid. Having elected to report taxes based on the cash convention, the petitioner, if it is to demonstrate its ability to pay the proffered wage with those returns, is obliged to show that ability with the numbers on that return. They may not now be amended.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp.*

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<sup>1</sup> In cash accounting, for instance, a company may adjust the timing of its tax liability by paying expenses in advance and deferring the collection of revenue.

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, then the Immigration and Naturalization Service, 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$54,080 per year. The priority date is January 29, 2003. Financial information pertinent to years prior to 2003, therefore, is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. That the petitioner's 2002 income tax return shows a loss is not directly relevant, therefore, to whether the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The appeal in this matter was submitted during September of 2003. On that date, the petitioner's 2003 income tax return was clearly not available. From the evidence in the record, the only year during which this office can examine the petitioner's ability to pay the proffered wage is 2002. Although the petitioner's ability to pay the proffered wage during that year is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date, it shall be accorded some weight.

During 2002, the petitioner declared a loss of \$34,281 as its taxable income before net operating loss deduction and special deductions. If the petitioner were obliged to demonstrate the ability to pay the proffered wage during 2002, it would be unable to show the ability to pay it out of its income. The petitioner ended the year with net current assets of \$7,047. That amount is insufficient to pay the proffered wage. The

petitioner has not demonstrated that any other funds were available during that year with which it might have paid the proffered wage.

This office notes that the petitioner reportedly employs 94 workers. If the petitioner employs a large number of workers and pays a large payroll, that factor might be included in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's financial statements show that, during the first six months of 2003 it paid \$269,499.67 in salaries. The petition, signed January 27, 2003, states that the petitioner then employed 94 workers. If the amount of the petitioner's payroll continued unchanged through the end of 2003, the petitioner would have paid \$538,999.34 in salaries during that year. That indicates that, if the petitioner continued to employ 94 workers, and continued to pay them the same wages, it would have paid a mean salary of \$5,734.04 to its employees during that year.<sup>2</sup> That is an uncommonly low salary and does not appear to indicate full employment of the 94 employees the petitioner alleges that it employs. Given these circumstances, the petitioner's claim of employing 94 workers adds no credibility to its claim of ability to pay the proffered wage.

The petitioner's vice-president indicated that the petitioner's losses have been occasioned by the need to train new staff and because of expenses associated with new clients. No evidence has been submitted, however, that those expenses will not continue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is denied.

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<sup>2</sup> In fact, the petitioner's September 15, 2003 financial statements indicate that the petitioner's salary expense actually decreased. The petitioner reports that between January 1, 2003 and September 15, 2003 it paid salaries of \$353,409.08. The rate at which the petitioner paid salaries during that portion of 2003, if continued through the remainder of that calendar year, would result in total salaries of \$446,411.47 paid during 2003. ( $\$353,409.08 / 8 \frac{1}{2} \times 12$ ) That amount divided by the 94 workers the petitioner allegedly employed on January 27, 2003, indicates a mean annual salary of \$4,749.06.