

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

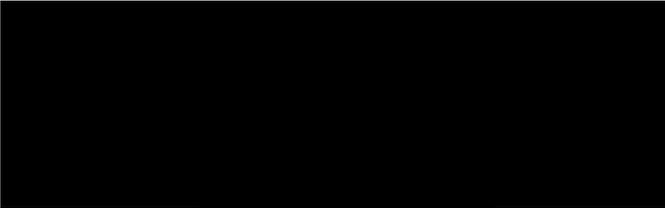
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

*BC*



FILE:

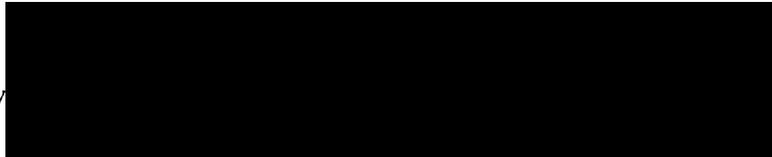
WAC-02-220-55000

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 07 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:



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 a home health agency. It seeks to employ the beneficiary permanently in the United States as an accounts receivable bookkeeper. 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 October 23, 1997. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 1997.

On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$1,447,554, and to currently employ 65 workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2000, and a form indicating it sought an extension of filing its 2001 tax return.

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 October 22, 2002, 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. The director specifically requested the petitioner's tax returns from 1997 to the present with all schedules and tables; payroll summaries; and any W-2 forms issued to the beneficiary from the petitioner from 1997 to the present.

In response, the petitioner submitted its Forms 1120 Corporate tax returns for the years 1997, 1998, 1999, 2000, and 2001.

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

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Net income <sup>1</sup>	\$6,678	-\$225,955	-\$142,370
Current Assets	\$309,160	\$82,552	\$198,353
Current Liabilities	\$334,184	\$360,978	\$587,505
Net current assets	-\$25,024	-\$278,426	-\$198,353
	<u>2000</u>	<u>2001</u>	
Net income <sup>2</sup>	-\$110,159	\$264,699	
Current Assets	-\$43,374	\$426,584	
Current Liabilities	\$474,302	\$679,172	
Net current assets	-\$517,676	-\$252,588	

In addition, counsel submitted copies of the petitioner's checking account statements for the period from December 2001 through January 31, 2002; the petitioner's quarterly wage reports from 1997 through 2001; and Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 1998, 1999, and 2000. The quarterly wage reports and Forms W-2 reflect wages of \$5,901.50 in 1998; \$25,579.14 in 1999; and \$18,306.63 in 2000. The wages paid to the beneficiary in 1999 are greater than the proffered wage but the wages paid in the other years are less than the proffered wage.

An accompanying letter from counsel asserts that depreciation should be added back to the petitioner's reported net income and consideration made of wages paid to independent accountant contractors. Also, counsel stated that the beneficiary was employed on a voluntary basis with the petitioner from July 1997 to September 1998 and does not have W-2s for that period. Additionally, counsel stated that after October 2000, the beneficiary "is not currently employed by the [p]etitioner."

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 29, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's net income was sufficient to establish its ability to pay the proffered wage in 2001; that a cost reimbursement method of payment, the beneficiary's maternity leave, and payment of \$12,000 in accounting expenses to cover the loss of the beneficiary's employment adversely impacted the petitioner's demonstration of its ability to pay the proffered wage in 2000 but that it paid \$1 million in wages that year; that the petitioner established its ability to pay the proffered wage in 1999 since it paid a wage greater than the proffered wage to the beneficiary in 1999; that the beneficiary's part-time work schedule and Medicare payment laws and regulations in effect in 1998 adversely impacted the petitioner's demonstration of its ability to pay the proffered wage in 1998 but that it paid \$500,000 in wages that year; and that depreciation, a cost reimbursement method of payment, and accounting fees paid to outside accountants illustrates its ability to pay the proffered wage in 1997. Counsel asserts that the director erred by considering "total assets and liabilities"<sup>3</sup> on the petitioner's balance sheets and failed to add back depreciation expenses.

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

<sup>2</sup> See, *supra*, note 1.

<sup>3</sup> The director mischaracterized the petitioner's net *current* assets and liabilities.

On appeal, the petitioner submits a letter from Mr. [REDACTED] (Mr. [REDACTED]), a certified public accountant, who explains that the petitioner is a Medicare certified home health agency that operated on 97-100% Medicare reimbursement from its inception through September 30, 2000. Mr. [REDACTED] explains the following:

[G]overnmental funding is such that the agency is reimbursed for allowable operating expenses and does not allow any profit or excess funds to be accumulated by the company. Any excess reimbursements must be returned to the Medicare fund. In addition, some expenses were not reimbursed by Medicare but were deductible in the income tax return. This often shows a net loss in the tax return.

\* \* \*

Under this cost reimbursement system, the best an agency can face, in terms of bottom line, is break even or incurring a loss. Therefore, the fact that a home health agency does not display a profit on its tax return does not reflect that the agency is performing unsuccessfully.

Mr. [REDACTED] details the petitioner's net income and compensation of officers to also assert that the petitioner is showing much better revenues now that it can use a different system of reimbursement, called a Prospective Payment System, which "reimburses all covered services and reasonable costs at a predetermined base payment, allowing agencies to generate income and possibly expanding the business." Counsel cites to and provides copies of the home health agency rules.

Additionally, on appeal, the petitioner submits its 2002 corporate tax return showing that its net income was \$115,448 and its net current assets were -\$128,654.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. 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 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.

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 any year but 1999. Thus, the petitioner established its ability to pay the proffered wage in 1999 because it paid the beneficiary a wage greater than the proffered wage in that year. In 1997, 2001, and 2002, the petitioner did not establish that it paid any wages so it must show it can pay \$24,960 in wages. In 1998, the petitioner paid partial wages and must show that it can pay a remaining wage of \$19,059.50. In 2000, the petitioner again paid partial wages and must show that it can pay a remaining wage of \$6,653.37.

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 contrary to counsel's appellate assertions. 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, contrary to counsel's appellate assertions<sup>4</sup>. 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 in 2001 and 2002 of \$264,699 and \$115,448, respectively, are both greater than the proffered wage of \$24,960, and thus demonstrate the petitioner's continuing ability to pay the proffered wage in those years.

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, counsel's 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>5</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 remaining years in question, 1997, 1998, and 2000, however, were

<sup>4</sup> Thus, counsel's argument concerning the beneficiary's maternity leave and the petitioner's use of outside accountants is without merit. Regardless, the petitioner did not provide evidence that those paid outside accountants performed the same duties the beneficiary did. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

<sup>5</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.

negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets in 1997, 1998, or 2000.

The petitioner has demonstrated its ability to pay the proffered wage in 1999, 2001, and 2002 either because of wages already paid to the beneficiary or because it had sufficient net income to cover the amount of the proffered wage.

The petitioner has failed to demonstrate its ability to pay the proffered wage in 1997, 1999, or 2000 out of either wages paid, its net income, or its net current assets. Counsel explains that there is a reason for the petitioner's poor financial showing on its tax returns in those years, namely that a Medicare certified home health agency regulation adversely impacted the petitioner's revenues. However, the Medicare certified home health agency regulations on cost reimbursements are simply the petitioner's form of generating business revenues, and regardless of the petitioner's means for obtaining its revenues, precedent and regulatory provisions governing the third preference employment-based immigrant visa category do not exempt any petitioning entity from establishing its financial solvency and ability to pay the proffered wage because of its form of receiving revenues and reporting its revenues on its tax returns. The explanation provided by counsel and the petitioner's accountant does not excuse or overcome the petitioner's poor performance on its tax returns.

Although the petitioner established its ability to pay the proffered wage in 1999, 2001, and 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director<sup>6</sup>, the AAO notes that the petitioner's tax returns reflect that the beneficiary owns 33.3% of the petitioner's common stock. This raises the issue of whether the proffered position is a bona fide job offer according to the regulation at 20 C.F.R. §§ 656.20(c)(8) and 656.3. Precedent establishes that if a petitioning entity is owned by the applicant applying for the proffered position, then it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) and *Matter of Kiyomi's Fitting Room*, 86-INA-469 (BALCA 1986). Any further proceedings in this matter would need to provide rebuttal information, evidence, and explanation concerning this issue.

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.

---

<sup>6</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2<sup>d</sup> Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).