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FILE: [REDACTED]  
SRC 06 137 53470

Office: TEXAS SERVICE CENTER

Date: DEC 03 2007

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-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 employment based immigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a job placement and recruitment agency. It seeks to employ the beneficiary permanently in the United States as a management analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information asserting that the petitioner's ability to pay the proffered wage has been established.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 other 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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. . . . 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's ability to pay the wage offered as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, that date is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$30.26 per hour, which amounts to \$62,940.80 per annum. Part 5 of the visa petition, filed on March 23, 2006, indicates that

the petitioner was established March 9, 1993, has two employees and reports a gross annual income of \$174,140.

On Part B of the approved labor certification (Form ETA 750), signed by the beneficiary on April 3, 2001, she claims to have worked for the petitioner as a management analyst since November 2000.<sup>1</sup>

As evidence of its ability to pay in this case and in response to the director's request for evidence, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004 and 2005. The returns reflect that the petitioner was incorporated on August 1, 1995 and files its returns based on a standard calendar year. The tax returns contain the following information:

Year	2001	2002	2003	2004	2005
Net income <sup>2</sup> (Form 1120)	\$ 4,701	\$18,175	\$10,148	\$2,378	-\$27,083
Current Assets (Sched. L)	\$15,688	\$31,610	\$11,245	\$ 760	\$ 107
Current Liabilities (Sched. L)	\$ none	\$ none	\$ none	\$ none	\$ none
Net current assets	\$15,688	\$31,610	\$11,245	\$ 760	\$ 107

As noted in the above table, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>3</sup> Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 also provided a copy of an internally generated financial statement covering the first six months of 2006 and consisting of a profit and loss statement and a balance sheet.

On September 15, 2006, the director denied the petition, concluding that the petitioner had failed to establish its continuing ability to pay the beneficiary's proffered salary. The director concluded that neither the petitioner's net income, nor its net current assets were sufficient to cover the beneficiary's certified salary in any of the

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<sup>1</sup> A biographic information form (G-325A) submitted in support of the beneficiary's application for permanent residence status and signed by the beneficiary on December 27, 2005, indicates that she has continued to work for the petitioner.

<sup>2</sup> For the purpose of this analysis, line 28 of the Form 1120 (taxable income before net operating loss deduction and special deductions) will be treated as net income.

<sup>3</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.

relevant years.<sup>4</sup> The director noted that she had requested the petitioner to provide proof of payment of wages to the beneficiary during the relevant years of 2001 through 2003, but the petitioner's response did not include such documentation. The AAO does not find a specific request for proof of payment of wages in the director's request for evidence that was issued on May 24, 2006, although the director mentions that in appropriate cases W-2 (Wage and Tax Statements) forms may be submitted by the petitioner.<sup>5</sup>

In any event, the petitioner, through its President/Administrator [REDACTED] provided copies of the beneficiary's W-2s for 2001 through 2003 on appeal. They reflect that the petitioner paid the following wages to the beneficiary:

2001  
2002  
2003

The petitioner also provided copies of its business checking account statements covering the period between December 31, 2005 and August 31, 2006, as well as copies of bank statements relating to a trust account covering December 31, 2005 to May 31, 2006 and July 1, 2006 to August 31, 2006. An additional online ledger of banking transactions is provided for June 2006, but it does not identify the name of the account holder. The checking account statements reflected beginning balances ranging from approximately \$107 to \$4,000. The trust account indicates beginning balances from approximately -\$800 to \$7,000. The petitioner further supplies another internally generated financial statement covering the first eight months of 2006, and consisting of a profit and loss statement, a balance sheet and a list of accounts receivable.

[REDACTED] asserts that the labor certification wage obligation had been amended twice and resulted in a significant increase in the proffered wage from \$12.50 per hour in 2001 to a final determination of \$30.26 per hour. He affirms that the petitioner moved to a new location in April 2005 and downsized its personnel to cover costs but expresses hope that the petition may be approved in anticipation of continuing business prosperity and expansion.

[REDACTED] assertions are not persuasive. It is noted that the Department of Labor determines whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers. This does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and whether a beneficiary meets the qualifications for the proffered position as set out on the Form ETA 750. CIS is empowered to make a *de novo* determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on

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<sup>4</sup> The director miscalculated the 2001 net current assets by citing a liability of \$2,253, which is listed under other liabilities on the Schedule L balance sheet, not under current liabilities.

<sup>5</sup> The relevant time period is from 2001 to the present.

the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

It is further noted that the proffered wage is based on a determination of the prevailing wage pursuant to the DOL's regulatory requirements set forth at 20 C.F.R. §656.40. A petitioner desiring a review of such determination may request such review from the Board of Alien Labor Certification Appeals (BALCA). *See* 20 C.F.R. § 656.41. It remains, however, that a petitioner who elects to file a preference petition supported by an approved labor certification designating a specific DOL certified wage to be paid to the beneficiary must establish that it has had the *continuing* financial ability to pay that wage beginning on the priority date. (Emphasis added.)

In examining the petitioner's ability to pay the proffered salary, CIS will first examine whether the petitioner may have 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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If the shortfall between the actual wages paid to a beneficiary during a given period can be covered by either a petitioner's net income or net current assets, the petitioner is deemed to have demonstrated its ability to pay during this period. In this case, as indicated above, the petitioner submitted the beneficiary's W-2s for 2001, 2002, and 2003. They reflect that in 2001, the actual wages of \$17,029.08 paid to the beneficiary were \$45,911.72 less than the \$62,940.80 certified wage. In 2002, the beneficiary's wages were \$44,188.17 less than the proffered wage, and in 2003, her wages were \$46,439.72 less than the certified wage. The petitioner did not provide the W-2s for 2004 or 2005.

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 or audited financial statements without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage has been well established by judicial precedent. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; *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 (S.D.N.Y. 1985)). 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.

It is noted that the internally generated financial statements that have been submitted to the record are not probative of the petitioner's ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage during a given period, those statements must be audited. Evidence reflecting a petitioner's own representations of its financial information through unaudited financial statements cannot be considered as determinative of the petitioner's ability to pay a proffered salary.

Similarly, reliance on the petitioner's bank statements is misplaced. Bank statements are not among the three types of evidence, consisting of federal tax returns, audited financial statements, or annual reports, enumerated in 8 C.F.R. § 204.5(g)(2) that are required to illustrate a petitioner's ability to pay a proffered wage. While this regulation permits 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 provides an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

In this case, the \$45,911.72 shortfall between the beneficiary's actual wages of \$17,029.08 paid in 2001 and the proffered wage of \$62,940.80 cannot be covered by either the petitioner's net income of \$4,701, nor the \$15,688 in net current assets. The petitioner's ability to pay the proffered wage has not been established for this year.

In 2002, neither the petitioner's net income of \$18,175, nor its net current assets of \$31,610 was sufficient to cover the \$44,188.77 shortfall between the proffered wage and the actual wages of \$18,752.03 paid to the beneficiary. The petitioner has not demonstrated its ability to pay the proffered wage in this year.

Similarly, in 2003, neither the petitioner's net income of \$10,148 nor its net current assets of \$11,245 was sufficient to meet the \$46,439.72 difference between the actual wages of \$16,501.08 paid to the beneficiary and the proffered wage. The petitioner's ability to pay the proffered salary has not been established for this year.

In 2004, neither the petitioner's net income of \$2,378, nor its net current assets of \$11,245 was enough to pay the certified wage or demonstrate the petitioner's ability to pay the proffered wage during this year. No W-2 was provided to adjust the calculation to include wages paid to the beneficiary.

In 2005, the petitioner's reported net income of -\$27,083 and its net current assets of \$107 were each insufficient to pay the proposed wage offer. No W-2 was provided. The petitioner has not established its ability to pay the proffered wage in this year.

Based on the evidence contained in the record and after consideration of the assertions and evidence presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

The burden of proof in these proceedings rests solely with the petitioner.<sup>6</sup> Section 291 of the Act, 8 U.S.C. §

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<sup>6</sup> It is also noted that an online search of California corporate records at <http://kepler.ss.ca.gov/corpdata/> raises a question as to the petitioner's viability. It states that the corporate petitioner's status is suspended.

1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.