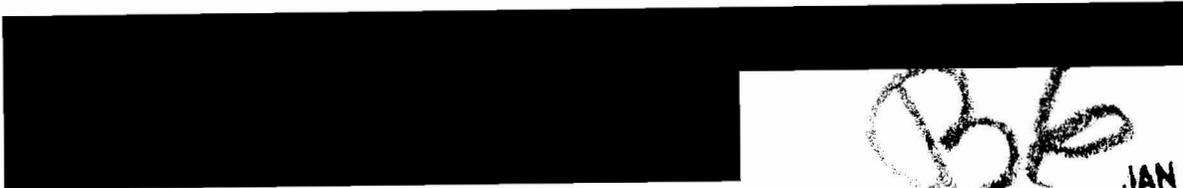




U.S. Citizenship  
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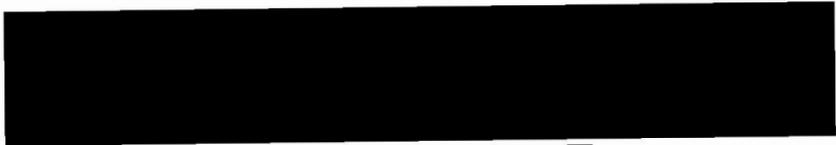
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PUBLIC COPY



FILE: WAC 05 033 53407 Office: CALIFORNIA SERVICE CENTER Date:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that 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 a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

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

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 completed, signed petition, including all initial evidence and the correct fee, was filed with Citizenship and Immigration Services (CIS). See 8 CFR § 204.5(d). Here, the petition was filed with CIS on November 18, 2004. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,200 per year.

On the petition, the petitioner stated that it was established on July 10, 1989 and that it employs 21 workers. The petition states that the petitioner's gross annual income is \$707,255 and that its net annual income is

\$252,837.<sup>1</sup> On the Form ETA 750, Part B the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in San Jose, California.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2001, 2002, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 1999 and 2000, the first, second, and fourth quarters of 2001, the first and second quarters of 2002, and the fourth quarter of 2003, and (3) the petitioner's California Form DE-6 Quarterly Wage and Withholding Report for all four quarters of 1999 and 2000, the first, second, and fourth quarters of 2001, the first and second quarters of 2002, and all four quarters of 2003. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 15, 1991, and that it reports taxes pursuant to cash convention accounting and a fiscal year that runs from April 1 of the nominal year to March 31 of the following year.

The petitioner's 2001 return, which covers the fiscal year from April 1, 2001 to March 31, 2002, shows that the petitioner declared a loss of \$127,507 as its taxable income before net operating loss deductions and special deductions during that fiscal year. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 return, which covers the fiscal year from April 1, 2002 to March 31, 2003, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$85 during that fiscal year. At the end of that fiscal year the petitioner had current assets of \$10,230 and current liabilities of \$1,376, which yields net current assets of \$8,854.

This office notes, however, that the priority date of the petition is November 18, 2004. Evidence pertinent to the petitioner's finances prior to that date is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2004 return, which covers the fiscal year from April 1, 2004 to March 31, 2005, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$19,338

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<sup>1</sup> This office is unable to find confirmation of those figures on the petitioner's tax returns or elsewhere in the record.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

during that fiscal year. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's Form DE-6 wage reports show that the petitioner employed between 11 and 57 workers during the periods they cover, but do not show that it employed the beneficiary. The petitioner employed 57 workers, 45 workers, 40 workers, and 31 workers during the four quarters of 1999, respectively. The petitioner employed 38, 33, 33, and 22 workers, during the four quarters of 2000, respectively. During the first, second, and fourth quarters of 2001 the petitioner employed 22, 16, and 21 workers. The petitioner employed 18 workers during both the first and second quarters of 2002. The petitioner employed 12, 11, 11, and 12 workers during the four quarters of 2003. This office notes that the petitioner's business appears to be shrinking.

The director denied the petition on August 3, 2005. On appeal, the petitioner asserted that the amount it charges for its nurses' time is sufficient to pay their wages, that it has been forced to turn away business because of the lack of qualified nurses, and it will thus be able to pay the proffered wage in the instant case if it is permitted to hire the beneficiary.

The petitioner also cited the content of a speech given to an immigration lawyers' association by an associate director of CIS for the proposition that, in order to establish its ability to pay the proffered wage, the petitioner need merely demonstrate that it is a *bona fide* company, rather than merely existing "on paper."

The associate director's speech to the immigration lawyers' association is less authoritative than the regulations governing the instant visa category. To the extent that they conflict this office will rely on the regulations. The regulation at 8 C.F.R. § 204.5(g)(2) does not state that a petitioner must merely demonstrate that it is a *bona fide* company, but that it must show, with copies of annual reports, federal tax returns, or audited financial statements, that it has had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner projects that it will employ the beneficiary and others and bill clients at whose facilities they work for more than the hourly wages of the beneficiaries. The petitioner implies that, therefore, it will earn a profit. That assertion rests on various assumptions that must be considered.

That the petitioner's business will be successful and able to meet its wage obligations depends not only upon the ability to bill clients for more than it pays its employees, but also the petitioner's ability to cover various overhead items with the difference. Some of those expenses, such as rent, are fixed. That is, the cost of the petitioner's rent payments for office space will not generally fluctuate based on the number of nurses it currently employs. If the petitioner is able to employ and place several hundred nurses that fixed cost will be covered more easily than if the petitioner is able to employ and place fewer. The number of nurses the petitioner will be able to recruit in the instant case is unclear; as is the number it will be able to place.

The petitioner's business will incur other expenses that will vary with the number of nurses it recruits. Those expenses may include, for instance, airfare for nurses and expenses for employees' health insurance. The petitioner's gross receipts must also be sufficient to cover those expenses.

If the petitioner were to hire the beneficiary, the additional overhead incurred would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages has not been mathematically demonstrated.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. (Reg. Comm. 1967).

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 a given 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. 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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>3</sup> shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,200 per year.<sup>4</sup> The priority date is November 18, 2004.

The petitioner's 2004 return covers the fiscal year from April 1, 2004 to March 31, 2005. The priority date fell within that fiscal year. During that fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$19,338. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during its 2004 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on November 18, 2004. On that date the petitioner's 2005 tax return, which would cover the fiscal year from April 1, 2005 to March 31, 2006, was unavailable. A request for evidence was issued in this matter on April 28, 2005, asking that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during its 2005 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2004 fiscal year.<sup>5</sup> Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage

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<sup>3</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>4</sup> This office notes that during the pendency of the instant petition the petitioner had at least four other alien worker petitions pending. In order to demonstrate that it could have paid the proffered wage during a given year the petitioner would be obliged to show the ability to pay the proffered wage to all pending beneficiaries. Because the petitioner is unable in the instant case to demonstrate the ability to pay the proffered wage to even the instant beneficiary, however, this office will not complicate matters with the additional calculations pertinent to the other beneficiary or beneficiaries.

<sup>5</sup> This office has stated, above, that evidence pertinent to the petitioner's finances prior to the priority date is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date. This

beginning on the priority date. The petition was correctly denied on that basis, which basis has not been overcome on appeal.

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 dismissed.

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office notes, however, that if they were considered relevant, the petitioner's 2001 and 2002 tax returns were insufficient to show that the petitioner was able to pay \$31,200 in additional wages during those years. The petitioner's 2003 tax return was not submitted.