

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

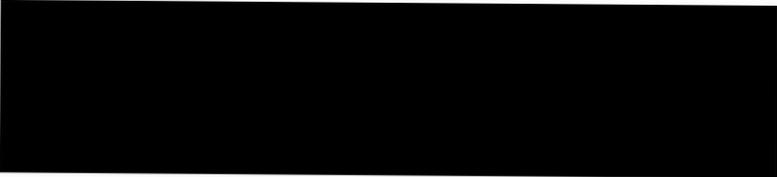
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

36



FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 12 2007
EAC 06 003 51369

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker or 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, it was accepted for processing on July 19, 2005. The proffered wage as stated on the ETA Form 9089 is \$7.35 per hour, which amounts to \$15,288 per annum. On the ETA Form 9089, signed by the beneficiary on August 22, 2005, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on October 4, 2005, the petitioner claims to have been established in 1991, to currently employ two workers, and to have a gross annual income of \$61,936. In support of its ability to pay the beneficiary's proposed wage offer of \$15,288 per year, the petitioner provided a copy of its Form 1065, U.S.

Return of Partnership Income for 2004. It indicates that the petitioner is a domestic general partnership and files its tax returns using a standard calendar year. In 2005, it reported ordinary income of \$2,740 on page 1 of the partnership return. No assets and liabilities were identified on Schedule L. 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. 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.¹ A petitioner's year-end current assets and current liabilities are generally shown on Schedule L of a partnership return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 15 through 17. If a petitioner'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.

It is also noted that the petitioner, as the prospective U.S. employer, must establish its own ability to pay the proffered wage to the beneficiary. As a general partnership, the petitioner is structured as an entity in which the general partners participate fully in the profits, losses and management of the partnership and who are personally liable for its debts. See *Black's Law Dictionary* 582 (5th Ed., West 1983).

When reviewing partnership returns, as *pass-through entities* to the individual general partners, CIS should focus on a partnership's compiled income, not just the income generated through the ordinary course of business and requires an examination of all sources of income, both active and passive. In such a case, it is instructive to examine the petitioner's total net income reported on Schedule K, Analysis of Net Income, (page 4) of Form 1065. In this case that income is \$3,802.

The petitioner also provided a copy of an unaudited (compiled) financial statement in the form of a balance sheet covering the period as of September 30, 2005, prepared by "[REDACTED], Accountant."

The director denied the petition on April 17, 2006, determining that the petitioner's reported ordinary income of \$2,740 was insufficient to cover the proffered wage of \$15,288. The director also declined to consider the accountant's compiled financial statement as it was based on the owner's representations.

On appeal, counsel submits a copy of the petitioner's partnership return for 2005. It shows that the petitioner reported ordinary business income of \$5,544 and total net income of \$11,133. No current assets or current liabilities are shown on Schedule L.

Counsel maintains that the petitioner's 2005 tax return clearly indicates that the petitioner had net current assets of well over \$276,000. Counsel also provided a copy of another compiled balance sheet prepared by [REDACTED] presenting information as of May 31, 2006, as well as a copy of a letter, dated June 12, 2006, signed by [REDACTED]. [REDACTED] states that the petitioner can pay the proffered wage and suggests that the petitioner's

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

amortization and depreciation deduction(s) be added back to its net income as a non-cash expenses as well as other expenses such as approximately \$4,525 for payments on a debt.

Counsel's arguments are unpersuasive. 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 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 any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the evidence does not suggest that the petitioner had employed the alien.

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 generally examines the net taxable income figure reflected on the petitioner's federal income tax return, 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 is 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. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that

these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. Counsel's reference on appeal to the petitioner's total assets shown on Schedule L, line 22 (and line 14) of its 2005 return is misplaced. This figure refers to the total assets shown on the Schedule L balance sheet that was omitted from consideration in this matter. A 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, as explained above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage because they represent cash or cash equivalent readily available resources.

It is noted that the unaudited (compiled) balance sheet for a five-month period in 2006 submitted on appeal cannot be considered as determinative of the petitioner's ability to pay the proffered salary. 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, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). As noted by the director, it is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 37071 (3rd ed. 2000).

In this case, the petitioner's reported total net income of \$11,133 was insufficient to cover the beneficiary's proposed wage offer of \$15,288 per year. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated that it has maintained a continuing financial ability to pay the proffered wage as of the priority date of the petition pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).

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.