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



U.S. Citizenship  
and Immigration  
Services

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SEP 07 2007

FILE: [Redacted] Office: TEXAS SERVICE CENTER  
SRC 06 172 52954

Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a nursing home and health facility. It seeks to employ the beneficiary permanently in the United States as a certified nurse assistant. As required by statute, an Application for Permanent Employment Certification, ETA Form 9089, 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 maintains that the director erred in evaluating the evidence and asserts that the petitioner has established its financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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) 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 ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 CFR § 204.5(d). Here, the ETA Form 9089 was accepted for processing on November 3, 2005. The proffered wage as stated on the ETA Form 9089 is \$9.21 per hour which amounts to \$19,156.80. The approved labor certification, signed by alien beneficiary on March 23, 2006, indicates that the alien worked for "Chandler Convalescent Hospital" beginning in August 2000. The petitioner subsequently identifies this facility as one that it operates.

On Part 5 of the visa petition, filed on May 8, 2006, it is claimed that the petitioner was established in 2003, currently employs 60 workers, claims an annual gross income of \$3,500,000, and an annual income of \$200,000.

In support of the petitioner's ability to pay the proffered wage of \$19,156.80 per year, the petitioner has provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2004. This tax return indicates that it covers the period beginning September 1, 2003 and ending on August 31, 2004. In 2004, the petitioner reported gross income of \$3,482,354, \$1,715,900 in salaries or wages and ordinary income<sup>1</sup> of \$8,386. Schedule L of the tax

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<sup>1</sup> For the purpose of this review, ordinary income will be treated as net income.

return reflects that the petitioner had \$350,868 in current assets and \$443,112 in current liabilities, resulting in net current assets of -\$92,244.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> They represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets are shown on line(s) 1 through 6 and the current liabilities are shown on line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

On July 10, 2006, the director requested additional evidence from the petitioner. She asked for any evidence of a social security number, an explanation of the beneficiary's employment with Chandler Convalescent Hospital, evidence of wages paid to the beneficiary if he had worked for the petitioner, and an explanation if he did not earn the proffered wage along with the submission of all pages of the petitioner's 2005 tax return with the corresponding Wage and Tax Statements (W-2) for that year. The director further advised that if the 2005 return were unavailable, then the petitioner may substitute bank statements for all of 2005 and 2006 until the present, with the 2005 W-2s.

In response, the petitioner explained that the beneficiary did not have a social security number, but that he was employed for the petitioner at its Chandler and Glenoaks facilities. The petitioner provided the beneficiary's 2005 W-2 and last five pay stubs for 2006, noting that his salary had been raised to \$9.25 in June 2006 in conformity with the wage offer.

The director denied the petition finding that the petitioner had not established the ability to pay the proffered wage through the evidence submitted and registering doubt about social security withholding shown on the beneficiary's pay stubs without the use of a social security number.

On appeal, the petitioner suggests that it demonstrated its ability to pay the proffered salary by actually paying the salary in conformity with an 2004 CIS "ability to pay" memorandum in June 2006 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.<sup>3</sup> The petitioner explained that it had been using a tax identification number issued to the beneficiary for payroll and tax purposes.

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 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

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<sup>2</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.

<sup>3</sup> *Memorandum by William R. Yates, Associate Director of Operations, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum")*.

petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. In this matter, the record indicates that the petitioner paid the beneficiary \$17,181.35 in 2005 and raised the beneficiary's hourly rate to \$9.25 in June 2006. The CIS memorandum issued by [REDACTED], relied upon by the petitioner, provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the [REDACTED]. However, the petitioner's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the [REDACTED] memorandum as the petitioner suggests, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is November 3, 2005. Thus, the petitioner must show its ability to pay the proffered wage not only in June 2006, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage beginning in November 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but a petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.<sup>4</sup>

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. 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). 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 returns and the *net income figures* in determining petitioner's ability to pay.

If an examination of the petitioner's net 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* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources.

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<sup>4</sup> Current regulations do not actually require the obligation to pay the wage offered in the ETA -750A to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification. This may not, however, foreclose a separate obligation to pay the certified wage under the pertinent labor or non-immigrant regulations.

That said, as mentioned above, the petitioner paid the beneficiary \$17,181.35 in wages during 2005. The priority date was established as November 3, 2005. It began to pay an amount equivalent to the hourly-certified wage in June 2006. It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), may be applicable where it is appropriate to recognize that a petitioner's total circumstances should be considered where the reasonable expectations of increasing profit may be inferred. In this case, the petitioner maintained a payroll of almost two million dollars in 2004 and was employing approximately sixty workers in 2006 when it filed the preference petition. It had already paid 90 percent of the annual proffered wage to the beneficiary within five months of commencing to pay the full hourly certified wage. In such a case, it is appropriate to exercise discretion in determining that a realistic job offer has been tendered by the petitioner.

Accordingly, based on the evidence contained in the record and the foregoing discussion, it may be concluded that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning at the priority date of the petition as required by 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.