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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE: [Redacted]
LIN 07 012 53626

Office: NEBRASKA SERVICE CENTER

Date: **JUL 30 2008**

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is home health services. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by 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 denial dated November 7, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of 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 either 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 23, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$29.74 per hour (\$61,859.20 per year).

¹ It has been approximately five years since the Application for Alien Employment Certification has been

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2003, 2004, and 2005; W-2 Wage and Tax Statements for 2003, 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$38,253.02, \$38,505.71, and \$35,868.69 as well as pay statements from the petitioner to the beneficiary for the period June 16, 2006 through September 15, 2006 at the hourly rate of \$17.86; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 29 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were <\$23.00>³ and \$1,500,000.00 respectively. On the Form ETA 750, signed by the beneficiary on June 19, 2003, the beneficiary did claim to have worked for the petitioner since December 2002.

The director issued a request for evidence to the petitioner on October 18, 2006. In response counsel submitted an explanatory letter dated October 24, 2006; W-2 Wage and Tax Statements for 2003, 2004 and 2005 issued by the petitioner to the beneficiary; and the petitioner's bank checking account statements for the periods ending June 30, 2004 through September 29, 2006.

On appeal, counsel asserts that the director misapplied the regulations governing the use of the petitioner's cash assets to determine its ability to pay the proffered wage.

Counsel contends that certain non-precedent decisions by the AAO support counsel's contention on appeal but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act,

accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Accompanying the appeal, counsel submits a legal brief and resubmits the petitioner's tax returns and bank statements already part of the record. The petitioner, through counsel, also submits a "Revision of [the petitioner's] Financial Statement for the year ending 12/31/2005" from Healthcare Financial Management as dated December 5, 2006; a listing of claims and appealed claims for healthcare services rendered as appealed by the petitioner and paid in 2006; and three "Final Claims Aging" reports for 2003, 2004 and 2005.

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 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). 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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel submitted W-2 Wage and Tax Statements for 2003, 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$38,253.02, \$38,505.71, and \$35,868.69 as well as pay statements from the petitioner to the beneficiary for the period June 16, 2006 through September 15, 2006 at the hourly rate of \$17.86, reflecting a year-to-date total of \$28,009.84 as of September 15, 2006. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$61,859.20 per year, the petitioner must establish that it can pay the beneficiary the differences between wages actually paid and the proffered wage, which are \$23,606.18, \$23,353.49 and \$25,990.51 respectively.

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. *See 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc.*, 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. 632 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120 stated net income of \$77,565.00.
- In 2004, the Form 1120 stated net income of \$12,389.00.
- In 2005, the Form 1120 stated net income of <\$23.00>.

Since the proffered wage is \$61,859.20 per year, the petitioner did have sufficient net income to pay the proffered wage or the difference between wages actually paid in and the proffered wage for in 2003 but not in years 2004 and 2005.

If the net income the petitioner demonstrates it had available during the 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. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage,

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2003, 2004 and 2005 were \$223,088.00, <\$96,130.00> and \$3,808.00.

Therefore, for the period for which tax returns were submitted, the petitioner did have sufficient net current assets to pay the proffered wage in 2003, but not in years 2004 and 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel contends that the "existing cash" in the petitioner's bank accounts for years 2004 and 2005 could make up the difference between wages actually paid the beneficiary and the proffered wage, which is \$23,353.49 in 2004 and \$25,990.51 in 2005. 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 cannot show a continuous ability to pay the difference between wages paid and the proffered wage in this case because any wages expended to pay the proffered wage in one month would no longer be available to pay the proffered wage in subsequent months. 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, used above in determining the petitioner's net current assets.

On appeal, counsel has submitted a letter from [REDACTED] of Healthcare Financial Management, advising the petitioner that its appealed claims from 2005 were granted and that Medicare has begun paying these claims, which must now be reflected on the petitioner's financial statements for 2005. The petitioner also submits a listing of claims and appealed claims for healthcare services rendered as appealed by the petitioner and paid to it in 2006, three "Final Claims Aging" reports for 2003, 2004 and 2005 and a "Revision of [the petitioner's] Financial Statement for the year ending 12/31/2005" from Healthcare Financial Management dated December 5, 2006. Counsel's assertion is "these claims were monies that should have been received in 2005, the employee has revised its profit and loss statements and balance sheet for this year."

According to counsel these statements were audited but there is no indication in the record that the statements were audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited

⁵ 8 C.F.R. § 204.5(g)(2).

financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The letter from [REDACTED] is dated December 5, 2006, after the petition was filed and, in fact, after the director denied the petition. A petition cannot be approved at a future date after the petitioner establishes eligibility under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). That decision further cites *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), for the proposition that we cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176. As the decision on the appealed Medicare claims postdates the filing of the petition and, in fact, the denial, we cannot consider these newly available funds.

Even if we accepted the funds paid to the petitioner in 2006 as having been available to pay the proffered wage in 2005, the new evidence submitted on appeal cannot establish that the petitioner had the ability to pay the proffered wage in 2004.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.