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U.S. Citizenship
and Immigration
Services

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FILE:

WAC 05 203 51275

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 27 2008**

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:

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, California Service Center. The Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted and the petition will be denied.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as an assistant facility administrator. 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 motion, the petitioner, through counsel, submits additional information asserting that the petitioner's ability to pay the proffered wage has been established because the petitioner paid various expenses on behalf of the beneficiary's son. The petitioner requests an additional thirty days to submit a brief and/or additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(5) provides:

(ii) Service motion with decision that may be unfavorable to affected party.

When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

The appeal was initially rejected for untimeliness by the AAO, based on the director's denial of the Immigrant Petition for Alien Worker (I-140), dated November 10, 2005, which is contained in the record. With a motion to reconsider, the petitioner provided a copy of the director's decision denying the I-140, dated November 21, 2005. The text of this decision is identical to the earlier one. The date of November 21, 2005, relating to the I-140 denial was mentioned in the director's subsequent November 21, 2005, decision to deny the Application to Register Permanent Residence or Adjust Status, (Form I-485).

Pursuant to 8 C.F.R. § 103.5(a)(5)(ii) and in the interests of fairness, because it is unclear when the director's decision was issued, the appeal will be considered timely. In response to a facsimile inquiry, counsel has advised that no additional evidence or brief was submitted.

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 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) 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 priority date. The priority date of the petition is the date the Form ETA 750, Application for Alien Employment Certification was accepted for processing by any office within DOL's employment 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 May 3, 2002. The beneficiary's salary as stated on the labor certification is \$21.90 per hour, annualized to \$45,552. Part 5 of the visa petition, filed on June 30, 2005, claims that the petitioner was established in 1986, has six employees and reports a gross annual income of \$400,000.

On Part B of the approved labor certification (Form ETA 750), signed by the beneficiary on April 20, 2002, she claims to have worked for the petitioner since August 1997.

As evidence of its ability to pay in this case, the petitioner initially submitted copies of its Form 1120, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, and 2004. They indicate that the petitioner files its returns based on a standard calendar year. The tax returns contain the following information:

	2001	2002	2003	2004
Net income ¹ (Form 1120S)	\$44,253	\$ 9,227	-\$25,441	\$7,283
Current Assets (Sched. L)	\$ 2,830	-\$ 9,741	-\$ 5,007	\$ 619
Current Liabilities (Sched. L)	\$ 5,240	\$ 5,509	none listed	\$ none listed
Net current assets	-\$ 2,410	-\$15,250	-\$ 5,007	\$ 619

Because the priority date in this case is May 3, 2002, the returns covering the years 2002-2004 are more relevant. As noted in the above table, besides net income, the corporate tax return shows the petitioner's current assets and current liabilities on Schedule L. The difference between current assets and current liabilities is the value of the

¹For the purpose of this analysis, line 21 of the Form 1120S (ordinary income) will be treated as net income for 2001, 2002 and 2004. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule k has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 of Schedule K. *See* instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003, the petitioner's net income is found on Schedule K of its tax return for 2003.

petitioner's net current assets at the end of the tax year. Besides net income, CIS will consider net current assets as an alternative method of reviewing a petitioner's ability to pay the proffered salary because it reflects a petitioner's liquidity during a given period. It represents cash or cash equivalent assets that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. If a petitioner's net current assets exceed the proffered wage during a designated period, it is deemed to have demonstrated its ability to pay during that period of time.

The record also contains copies of the beneficiary's Wage and Tax Statements (W-2s) and her individual federal income tax returns. On each return, the beneficiary claimed her daughter as the only dependent. No other income other than that reported on line 7 for wages, salaries, tips, etc. was declared. Her stated wages for those years as shown on the W-2s issued by the petitioner and on the beneficiary's own tax returns were:

	Wages
2002	\$27,720
2003	\$27,720
2004	\$18,840

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 noted the level of wages paid to the beneficiary and concluded that neither the petitioner's net income, nor its net current assets was sufficient to cover the beneficiary's proposed salary of \$45,552 per year.

On appeal, counsel asserts that petitioner has paid more than the beneficiary's proffered salary because her compensation included payment of her son's college tuition, car allowance and educational expenses. Counsel attaches a letter, dated December 10, 2005 from the petitioner explaining that these costs are paid as part of an agreement with the beneficiary in order to compensate her for the agreed upon salary of \$21.90 per hour. Copies of two letters from the petitioner to the beneficiary referring such an arrangement dated in 1999 and 2002 are also submitted along with a summary of expenses prepared by the petitioner representing outlays on behalf of the beneficiary's son.

Counsel cites no legal authority obliging CIS to include such expenses paid as part of the beneficiary's wages. CIS will not consider such expenses as part of the beneficiary's compensation paid by the petitioner. The proposed salary on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary or her family. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2003). Additionally, the regulation at 20 C.F.R. § 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly

basis.” Moreover, as noted above, no record of such monies paid by the petitioner is reported as compensation or as any other kind of income on the beneficiary’s tax returns or W-2s.²

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. In this case, as noted above, the record indicates that the petitioner paid the beneficiary \$27,720 in wages in 2002 and 2003. This amount is \$17,832 less than the certified wage of \$45,552. In 2004, the beneficiary’s reported wages were \$18,840 or \$26,712 less than the proposed wage offer.

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.

The \$17,832 shortfall between the beneficiary’s actual wages of \$27,720 paid in 2002 and the proffered wage of \$45,552 cannot be covered by either the petitioner’s net income of \$9,227, nor the -\$15,250 in net current assets. The petitioner’s ability to pay the proffered wage has not been established for this year.

In 2003, neither the petitioner’s net income of -\$3,788 nor its net current assets of -\$5,007 was sufficient to cover the \$17,832 shortfall between the proffered wage and the actual wages paid to the beneficiary or demonstrate the petitioner’s ability to pay the proffered wage in this year.

Similarly, in 2004, neither the petitioner’s net income of \$7,283 nor its net current assets of \$619 were sufficient to meet the \$26,712 difference between the actual wages paid to the beneficiary and the proffered wage. As discussed above, CIS will not consider other unreported expenses as part of the beneficiary’s wages during the relevant period.

² Copies of various checks drawn on the petitioner and issued to the beneficiary’s son, [REDACTED], are contained in the record. Notations of “yard maintenance” and “independent contractor caregiver” appear on some of the checks suggesting that he was also one of the petitioner’s employees during part of the period.

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. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider is granted. The petition is denied.