



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B6



FILE: [REDACTED]
SRC 06 171 51611

Office: TEXAS SERVICE CENTER

Date: MAR 31 2008

IN RE: Petitioner: [REDACTED]
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:



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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is an accounting firm. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), has been provided. The director determined that the petitioner had not established its continuing ability to pay the proffered wage from the priority date onwards. The director denied the petition accordingly.

On appeal, the petitioner, through counsel,¹ submits additional evidence and maintains that the petitioner had established its continuing financial ability to pay the proffered wage.

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 or seasonal 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 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 notes that the petitioner in this matter filed an earlier Immigrant Petition for Alien Worker (I-140) on November 24, 2004 on behalf of the same beneficiary using the same labor certification that has been submitted in support of the instant I-140. The director denied that petition on November 16, 2005. She determined that the petitioner had employed the beneficiary in duties substantially more complex than those described in the ETA 750 that were consistent with those of an accountant rather than a bookkeeper. The director concluded that the record indicated that the beneficiary would continue to perform these duties rather than the job described on the ETA 750. The director determined that the petitioner had failed to establish its intent to engage the beneficiary in accordance with the terms of the job offer for a bookkeeper, and that it had failed to submit an appropriate labor certification with the I-140 that accurately described the actual job intended to be filled.

The petitioner did not appeal this decision. The issue has not been raised in the instant matter by the director's denial on August 29, 2006. Rather, the sole issue in this appeal is whether the petitioner established its ability to pay the proffered wage.

¹ Other notice(s) of entry of appearance (Form G-28) contained in the file refer to the Law Office of Michael J. Gurfinkel as representing only the beneficiary. The appeal filed by the petitioner in this matter is represented by a different law firm. This decision will be sent only to the petitioner and petitioner's counsel.

Although, for the reasons explained below, the AAO finds that the petitioner demonstrated its ability to pay the proffered wage in this case, the petition will be remanded in order for the director to articulate the effect of her November 16, 2005, decision on the current adjudication. In making this determination, the director should notify the petitioner that the previous adverse information and adjudication is being considered and permit the petitioner to offer any evidence or assertions in rebuttal.

The following discussion refers to the petitioner's continuing ability to pay the proffered wage raised on appeal in this matter.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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. 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 Form ETA 750 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, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage is stated as \$16.36 per hour which amounts to \$34,028.80.

On the ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary claims that she has worked for the petitioner since October 2000.

With the petition, as well as in response to the director's notice of intent to deny and in support of its ability to pay the proffered wage, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 through 2005. The returns reflect that the petitioner files its tax returns on a calendar year basis. They contain the following information:

	2001	2002	2003	2004	2005
Net Income ²	- \$ 45,125	-\$3,923	-\$4,720	\$8,066	\$9,550
Current Assets (Schedule L)	\$ 13,369	\$15,062	\$2,949	\$6,008	\$4,837
Current Liabilities (Schedule L)	\$ n/a	\$ n/a	\$ n/a	\$ n/a	\$3,414

² For the purpose of this review, line 28 of the Form 1120, taxable income before net operating loss deduction and special deductions, will be treated as net income.

Net Current Assets	\$ 13,369	\$15,062	\$2,929	\$6,008	-\$1,423
--------------------	-----------	----------	---------	---------	----------

As shown above, 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. 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 possible readily available resource out of which a proffered wage may be paid. As reflected on a corporate tax return the company's year-end current assets and current liabilities are shown on Schedule L. Current assets are found on lines 1(d) through 6(d) and current liabilities are specified on lines 16(d) through 18(d). If the 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.

Copies of W-2s issued to the beneficiary were also supplied by the petitioner to the director as well as on appeal. The following wages were paid to the beneficiary:

2001	\$24,210
2002	\$26,500
2003	\$33,300
2004	\$44,825
2005	\$49,875

The director denied the petition on August 29, 2006, determining that the petitioner had not established its ability to pay the proffered wage.

On appeal, the petitioner, through counsel asserts that for 2001, the petitioner had demonstrated its ability to pay the proffered wage if the proffered wage were prorated based on priority date of April 27, 2001. Counsel also asserts that the petitioner had the ability to pay the proffered wage for 2003 if the depreciation expense was added back to the petitioner's cash resources and if the petitioner's total assets were considered.

We note that in determining the petitioner's ability to pay the proffered wage during a given period, 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 either its net income or net current assets can cover the shortfall between the actual wages paid and the proffered salary, a petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer for that period. In this case, as reflected by the W-2s, the petitioner established its ability to pay the proffered wage in 2004 and 2005 because it paid the beneficiary more than the proffered wage of \$34,028.80.

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. 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. "[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*, 736 F.2d 1305 (9th Cir. 1984)); 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. If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. Similarly, depreciation will not be added back to a petitioner's 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.

As set forth above, 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. CIS rejects the inclusion of total or fixed assets in this analysis, as referred to by counsel because they 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, a 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.

In this case the petitioner established its ability to pay the proffered wage in 2001³ because the difference of \$9,818.80 between the actual wages paid of \$24,210 and the proffered wage of \$34,028.80 could be covered by the petitioner's net current assets of \$13,369.

³ As to counsel's suggestion that a prorated calculation should be used for 2001, it is noted that we would not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

In 2002, the \$7,528.80 shortfall between the actual wages paid to the beneficiary and the proffered salary could be met by the petitioner's net current assets of \$15,062.

In 2003, the shortfall of \$728.80 between the beneficiary's actual wages of \$33,300 and the proffered wage of \$34,028.80 could be covered by the petitioner's net current assets of \$2,949.

Based on the review of the petitioner's net income or net current assets for the relevant period, it may be concluded that the petitioner established that it had the continuing financial ability to pay the proffered wage. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to consider her previous adjudication relevant to the employment-based petition filed by this petitioner in that case and notify the petitioner of such consideration as adverse information affecting the current adjudication. The director may request additional evidence as required. Similarly, the petitioner may provide additional evidence or argument within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.