U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042,
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] CALIFORNIA SERVICE CENTER Date: JUN 21 2005

WAC 03 155 53887

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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, Director
Administrative Appeals Office

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

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as an assistant director for nurses/nurse supervisor. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.20 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Schedule A includes aliens who will be employed as professional nurses.

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 submitted additional evidence and maintains that the petitioner's financial documentation demonstrates its continuing ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g)(2) 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 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 regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A

designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is April 21, 2003. The beneficiary's salary as stated on the labor certification application is $22.00 per hour or $45,760 per annum. Part 5 of the visa petition states that the petitioner was established in 1991 and had, as of the date of filing, 131 employees. It claims a net annual income of almost six million dollars.

On Part B of the ETA 750, signed by the beneficiary on January 20, 2003, the beneficiary claims that he has been working for the petitioner since January 2001.

The petitioner initially submitted no evidence in support of its ability to pay the annual proffered wage of $45,760 per year. On June 12, 2003, the director requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that this evidence shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner, through counsel, submitted copies of unaudited petitioner's financial statements for 2001 and 2002.

The director issued a second request for evidence of the petitioner's ability to pay the proffered wage on September 12, 2003. He advised the petitioner that unaudited financial statements were not consistent with the requirements of 8 C.F.R. § 204.5(g)(2), which requires federal tax returns, audited financial statements, or annual reports in support of a petitioner's ability to pay a certified salary. The director requested that the petitioner submit evidence for 2002 until the present.

In response, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. It shows that in 2002, the petitioner declared ordinary income of -$258,719. Schedule L of the tax return shows that the petitioner had $643 in current assets and no current liabilities, resulting in $643 in net current assets. Current assets are shown on lines 1(d) through 6(d) of Schedule L. Current liabilities are shown on lines 16(d) through 18(d). The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.[1] Besides net income, CIS will examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay a proffered wage. If a corporation's end-of-year 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.

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[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.

In addition to its tax return, the petitioner resubmitted copies of its unaudited financial statements for 2001 and 2002, as well as a letter, dated November 25, 2003, from [redacted] signing as the petitioner's finance officer. [redacted] affirms that the petitioner has 123 employees, had gross income of $5,640,660 and retained earnings of $1,802,665 as of the end of 2002, and can pay the proffered wage to the beneficiary. It is noted that the gross income figure of $5,640,000 appears to be taken from the petitioner's tax return for 2002, while the retained earnings number is taken from the financial statements. The retained earnings figure appearing on the petitioner's Schedule L is noted on line 24 as -$227,345, and is part of the petitioner's declaration of liabilities and shareholders' equity.

On December 20, 2003, the director sent a third request for evidence to the petitioner requesting copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 to the present. In response, the petitioner provided copies of the beneficiary's W-2s showing that the petitioner paid him $43,090.93 in 2001 and $8,011.64 in 2002.

The director denied the petition on February 19, 2004, concluding that the petitioner's financial documentation failed to sufficiently demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel provides copies the unaudited financial statements and the finance officer's letter previously submitted to the record. Counsel maintains that [redacted] letter establishes the petitioner's ability to pay the proffered wage as it is from a financial officer of an organization with100 or more workers. Counsel also cites the retained earnings figure of $1,801,665 and current assets number of $2,355,324 appearing in the petitioner's financial statements as demonstrating the petitioner's ability to pay the proffered salary of $45,760. Counsel also states that the beneficiary has been working for the petitioner since 2001 and the petitioner has paid his wages.

As noted above, and as referenced by counsel, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). This alternative recognizes that large employers may have large net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the regulation specifically uses the discretionary "may" language in allowing the director to reject an employer's assurances and seek corroborative evidence. 8 C.F.R. § 103.2(b)(8). In this case, the director sought further documentation through the petitioner's federal tax returns, annual reports, or audited financial statements.

It is also noted that none of the financial statements offered to the record were audited. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

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 may have 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. To the extent that a petitioner's net income or net current assets can cover any shortfall in a given period between a beneficiary's actual wages and the proffer wage, then the petitioner is deemed to have demonstrated its ability to pay the proffered salary during this period. In this case, the record shows that the petitioner paid the beneficiary $43,091 in 2001, or $2,669 less than the proffered wage. In 2002, the beneficiary's wages of $8,012 were $37,748 less than the certified 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 also review 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts or cumulative wages paid to other employees exceeded the proffered wage is insufficient as it is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that income. 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.

With regard to the consideration of other assets and liabilities reflected on Schedule L of a petitioner's tax return such as retained earnings or shareholder loans, it is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) found that "[CIS] fully considered the assets section of Schedule L" and was not compelled to credit other amounts such as unappropriated retained earnings or common stock.[2] Further, as stated above, the figure cited by [redacted] as retained earnings is derived from the unaudited financial statements and as stated above, cannot be considered as probative of the petitioner's ability to pay the proffered wage.

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[2] Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on Schedule L of a corporate tax return and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of the shareholders' equity and also represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay a proffered wage. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel provides a copy of a 2003 AAO case in support of his assertion that the petitioner has established its ability to pay the proffered wage through [redacted] letter. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) merely states that the director may accept a statement from the financial officer of an employer with 100 or more workers, not that he is bound to in every case. Moreover, the facts of the case supplied by counsel are not before us now and involved a petitioner with more than 6,500 employees. Such a case is also not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

The petitioner's 2002 corporate tax return failed to reveal that either its reported net income of -$258,719 or its net current assets of $643 was sufficient to cover the $37,748 shortfall between the beneficiary's actual 2002 wages and the proffered salary of $45,760. Based on a review of the evidence submitted to the record and the evidence and argument provided on appeal, it cannot be concluded that the petitioner has persuasively demonstrated its continuing ability to pay the proffered wage.

Beyond the decision of the director, it is observed that there is no indication that the petitioner posted a notice of the certified position consistent with the regulatory requirements. *See* 20 C.F.R. § 656.10. The purpose of requiring an employer to post notice of the vacant position is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. It is also noted that the record fails to substantiate that the alien has the required experience in the offered certified position of assistant director for nurses/nurse supervisor, which requires two years of experience in the job offered obtained as of the visa priority date. The regulation at 8 C.F.R. § 204.5(l)(3) requires that verification of the required employment experience must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The only letter in the record from such an employer that was submitted in response to the director's request for evidence, is one that suggests that the beneficiary has had one year of employment in which he served as a relief RN-supervisor.

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.