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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 26 2006  
WAC 04 027 50150

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor 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 submitted a brief.

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 granting preference classification to 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 unavailable.

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 Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor (DOL). See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 7, 2000.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$1,800 per month, which equals \$21,600 per year.

The petitioner subsequently submitted another Form ETA 750 correctly substituting the instant beneficiary, [REDACTED] for the previous beneficiary, [REDACTED]. This subsequent filing does not affect the priority date of the petition. The priority date is the date the original Form ETA 750 was submitted, December 7, 2000.

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<sup>1</sup> The Form ETA 750 originally stated that the proffered position requires two years of experience. Subsequently, in response to a DOL finding that the two-year requirement was too restrictive, the petitioner, in a letter dated February 1, 2001, amended the Form ETA 750 to reflect that the proffered position requires only six months of experience. Later still, in a letter dated May 25, 2001, the petitioner's owner stated that she rejected Dan Campbell, an applicant for the proffered position, because he had less than two years of experience in the job offered. The Form ETA 750 labor petition should not have been approved. Because its approval was not accomplished by fraud or misrepresentation, however, this office will honor the DOL approval of the labor certification petition.

On the Form I-140 petition, submitted on November 5, 2003, the petitioner stated that it was established during October 1989 and that it employs four workers. The petition states that the petitioner's gross annual income is \$371,307 and that its net annual income is \$23,614. On the more recent Form ETA 750, Part B, pertinent to the instant beneficiary and signed by her on December 1, 2000, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Simi Valley, California.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Therefore, on December 27, 2003 the California Service Center issued a request for evidence. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted (1) the petitioner's 2000, 2001, and 2002 Form 1065 U.S. Returns of Partnership Income, (2) an unaudited 2002 Combined Profit and Loss Statement, and (3) a letter dated March 4, 2004 from the petitioner's owner/administrator.

The combined unaudited profit and loss statement shows that three enterprises, apparently with some relationship to the petitioner,<sup>2</sup> earned a total net income of \$42,307.88 during 2002.

The tax returns submitted show that the petitioner began business on January 1, 1993, and that it reports taxes pursuant to cash convention accounting and the calendar year. Those returns also indicated, on Schedule K-1, that the petitioner is a general partnership, though this is inconsistent with its name, which states that it is a limited liability company (LLC).

The 2000 return shows that during that year the petitioner declared ordinary income of \$4,690. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$13,870 and current liabilities of \$677, which yields net current assets of \$13,193.

During 2001 the petitioner declared ordinary income of \$11,760. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,695 and no current liabilities, which yields net current assets of \$12,695.

During 2002 the petitioner declared ordinary income of \$23,614. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$2,872 and no current liabilities, which yields net current assets of \$2,872.

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<sup>2</sup> The combined Profit and Loss Statement submitted shows the combined income and expenses of three enterprises. Although a comparison of the financial statement with the petitioner's 2002 tax return appears to indicate that all three entities report taxes on the same return, whether those companies are organized as individual corporations or other entities or are all held by the petitioner as a single LLC is unclear. This uncertainty leaves open the question of whether the funds of all three entities should be considered funds available to pay the petitioner's debts and obligations. However, because unaudited financial statements, as explained below, are not considered reliable evidence of a petitioner's ability to pay the proffered wage, this office need not further examine this issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this additional issue.

The petitioner's owner/administrator's March 4, 2004 letter noted that the petitioner pays a considerable sum in wages and other compensation, apparently citing the petitioner's total wage expense as an index of the petitioner's ability to pay the proffered wage. The letter also stated that the petitioner employs non-employee temporary workers due to its inability to locate a sufficient number of full-time permanent employees to fill its vacant positions. The letter states that the petitioner has "at least one temporary worker at any one time," and that the petitioner intends to replace those employees with permanent employees. The petitioner's owner/administrator thus implies that those temporary employees' compensation should be considered a fund available to pay the wages of the proffered position.

The letter further states that the petitioner previously employed [REDACTED] and [REDACTED] whom it states left the petitioner's employ on February 1, 2004. The letter asserts that their wages are also available to pay the proffered wage to the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on March 7, 2005, denied the petition.

On appeal, the counsel submitted a statement. Counsel stated that the petitioner's ability to pay the proffered wage is demonstrated by the fact that it is paying the proffered wage to the instant beneficiary and, previously, was paying the proffered wage to the original beneficiary. Counsel then submitted no evidence in support of the assertions that the petitioner paid the instant beneficiary and the original beneficiary any compensation.<sup>3</sup>

Subsequently, counsel submitted (1) the petitioner's 2003 Form 1065 U.S. Return of Partnership Income, (2) copies of the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports, (3) a 2004 W-2 form, (4) a 2004 Form 1099 miscellaneous income statement, and (5) a brief.

The petitioner's 2003 tax return shows that it declared ordinary income of \$61,140 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The quarterly wage reports provided cover the first, second, and fourth quarters of 2003<sup>4</sup> and all four quarters of 2004. Those reports show that the petitioner employed [REDACTED] during those three quarters of 2003 and paid her a total of \$14,700 during those three quarters. The reports do not show that the petitioner employed Ms. [REDACTED] during 2004. This is inconsistent with the petitioner's owner's assertion, made in her March 4, 2004 letter, that the petitioner continued to employ [REDACTED] until February 1, 2004.

The DE-6 forms do not show that the petitioner employed [REDACTED] at any time during the seven quarters they cover. That his name is not shown on the DE-6 forms pertinent to the three quarters of 2003 and

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<sup>3</sup> Even on the date of this decision the record contains no evidence that the petitioner paid the original beneficiary any wages. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

<sup>4</sup> The reason the petitioner did not provide its Form DE-6 for the third quarter of 2003 is unknown to this office.

the first quarter of 2004 is inconsistent with the petitioner's owner's assertion, made in her March 4, 2004 letter, that the petitioner employed [REDACTED] through February 1, 2004.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The Form DE-6 quarterly reports further indicate that the petitioner employed the beneficiary during the last quarter of 2004, during which it paid her \$6,400. The 2004 W-2 form confirms that the petitioner paid the beneficiary total wages of \$6,400 during that year. The 2004 Form 1099 shows that the petitioner paid the beneficiary an additional \$12,950 in non-wage compensation during that same year.

In the brief counsel asserted that prior to employing the instant beneficiary the petitioner employed the original beneficiary, then [REDACTED] now a former employee. Counsel asserts that the petitioner is paying the instant beneficiary "a salary almost equal to the proffered wage." Counsel indicates that the wages paid to those three sequential employees<sup>5</sup> demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel further asserted that the petitioner's depreciation deductions should be considered in assessing the petitioner's ability to pay the proffered wage, as they do not involve an "actual cash disbursement." Counsel asserted, further still, that most of the petitioner's assets are California real estate, which he notes has recently increased in value.

Counsel notes the amount of the petitioner's annual wage expense and asserts that the petitioner has had no difficulty meeting its payroll obligations.<sup>6</sup> Finally, counsel notes that the petitioner's gross income and its net income have increased from 2000 to 2003.

Counsel's reliance on the unaudited financial statements submitted 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. Unaudited 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 unaudited financial statements will not be considered.

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<sup>5</sup> Counsel appears to have abandoned the argument that wages paid to Nicasio Angeles should be considered in the determination of the funds available to the petitioner to pay the proffered wage.

<sup>6</sup> Counsel submits no evidence to demonstrate that the petitioner has had no difficulty in meeting its payroll. Even if ease in meeting previous and present payroll obligations were sufficient to demonstrate the ability to pay additional wages, counsel's assertion would be insufficient. Again, as per *INS v. Phinpathya supra*, and *Matter of Ramirez-Sanchez supra*, counsel's unsupported assertions are insufficient to sustain the burden of proof.

The petitioner asserts that it has employed contract labor during the salient years and that the compensation paid to its contract workers should be considered a fund available to pay the proffered wage during those years. The record contains no evidence, however, pertinent to the amount the petitioner paid for contract labor during the various salient years,<sup>7</sup> nor of what portion of that amount was paid for performance of the duties of the proffered position.<sup>8</sup> Without that information this office is unable to determine what amount, if any, of the compensation the petitioner allegedly paid to contractors was available to pay the proffered wage.

The petitioner's assertion that the amounts paid to two or three of its previous employees should also be considered a fund to pay the proffered wage is similarly unconvincing. Again, the evidence does not demonstrate that the three employees, or any of them, performed the duties of the proffered position. Further, in order for those funds to be available to pay the proffered wage during the years in which they were paid to other employees the petitioner would have to demonstrate that it was prepared to replace those other employees with the beneficiary as soon as she was granted the right to work in the United States.<sup>9</sup> The petitioner has not demonstrated this, and the wages the petitioner paid to its former employees during the salient years will not be considered.

Further still, even if the funds paid to two or three of its previous employees were shown to be available to pay the proffered wage, that would not, in themselves, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date unless they were greater than the annual amount of the proffered wage during each of the salient years.

The record does not show that the petitioner paid any wages to [REDACTED] the original beneficiary. The record does not show that the petitioner paid any wages to [REDACTED], one of the named former employees. The record shows that the petitioner paid [REDACTED] another named former employee, \$14,700 during 2003, but does not show that it paid her any wages at any other time. That amounts, even if shown to be available to pay the proffered wage, would be insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.<sup>10</sup>

Counsel's assertion that the petitioner's depreciation deductions during various years should be included in the calculations pertinent to its ability to pay the proffered wage is unconvincing.

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<sup>7</sup> If, during a given year, the amount the petitioner paid for contract labor was less than the annual amount of the proffered wage, then its payments for contract labor are insufficient, standing alone, to show the petitioner's ability to pay the proffered wage during that year.

<sup>8</sup> If the contract labor worked as kitchen help or security guards, for instance, it could not be replaced by hiring the beneficiary to fill the proffered position.

<sup>9</sup> If the petitioner intended to rely on the premise that it would have dismissed its existing workers in order to hire the beneficiary this raises an additional issue. The purpose of the instant visa category is to provide alien workers to employers to fill positions that the employers are unable to fill with U.S. workers. If the petitioner were substituting an alien for a currently employed U.S. worker out of preference, this would be contrary to the underlying purpose of the instant visa category. Because this issue was not raised in the decision of denial this office will not rely upon it, even in part. If the petitioner attempts to overcome today's decision on motion, however, it should address this additional issue.

<sup>10</sup> If they were shown to have been available to pay the proffered wage, however, the wages paid to that previous employ could, however, be considered in the aggregate with the petitioner's net income during the salient years.

Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, as was noted above, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>11</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.<sup>12</sup> In the instant case, the petitioner established that it employed the beneficiary during 2004 and paid her total wages of \$6,400 and \$12,950 in non-wage compensation for a total of \$19,350 during that year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, or that they have recently increased, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, or that its total wages have increased, is

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<sup>11</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

<sup>12</sup> CIS would also, at this point, consider wages paid to other employees, if they were shown to be available to pay the proffered wage.

insufficient. 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered.<sup>13</sup> Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>14</sup> shown on lines 16(d) through 18(d). If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is equals \$21,600 per year. The priority date is December 7, 2000.

During 2000 the petitioner declared ordinary income of \$4,690. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$13,193. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared ordinary income of \$11,760. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$12,695. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

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<sup>13</sup> Real estate is not typically a current asset unless it is held for resale. For this reason the value of the petitioner's real estate, and its asserted increase in value, are not funds available to pay wages and will not be considered.

<sup>14</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2002 the petitioner declared ordinary income of \$23,614. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2002.

The request for evidence in this matter was issued on December 27, 2003. On that date the petitioner's 2003 tax return was unavailable. The petitioner is excused, therefore, from demonstrating its ability to pay the proffered wage during 2003 and subsequent years. This office will, however, analyze evidence presented pertinent to those years.

During 2003 the petitioner declared ordinary income of \$61,140. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$19,350 during 2004. Ordinarily the petitioner would be obliged to demonstrate the ability to pay the \$2,250 balance of the proffered wage. The petitioner provided no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2004. However, as was noted above, because those documents were unavailable the petitioner is excused from that obligation.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that basis.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.