identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2007

WAC 02 248 50928

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.

for Robert P. Wiemann, Chief
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 rehabilitation services provider. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I.[1] 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. The director also determined that the petitioner is a staffing agency and that it had not established that the beneficiary had full-time employment available at the designated client facility.

On appeal, counsel submitted additional evidence and maintains that the petitioner's financial documentation demonstrates its continuing ability to pay the proffered salary and that its numerous client facilities establish its ability to provide full-time employment to the beneficiary.

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

---

[1] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to employment-based petitions which have a priority date on or after that date. However, the instant petition has a priority date of August 2, 2002 and is governed by the prior regulations. Thus, the citations referred to here and those which follow are to the DOL regulations as in effect prior to the PERM amendments.

> 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 August 2, 2002. The beneficiary's salary as stated on the application for labor certification application is $20.00 per hour or $41,600 per annum. The visa petition claims that the petitioner was established on January 6, 1995 and had, as of the date of filing, 150 employees. It claims a gross annual income of approximately seven million dollars. On the Form ETA 750B, signed by the beneficiary on July 17, 2002, the beneficiary claimed no previous employment with the petitioner.

On the Form ETA 750A, the address where the alien will work is shown as [redacted] This address is not the same as the petitioner's location. The name of the facility at this location is not listed.

In support of its ability to pay the proffered salary of $41,600 per year, the petitioner initially included copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000 and 2001. They reflect that the petitioner files its tax returns using a standard calendar year. The returns contain the following information:

	2000	2001
Gross Receipts or Sales	$4,123,749	$6,006,434
Salaries and Wages	$2,804,228	$4,251,168
Ordinary Income (loss) from trade or business (line 21, Form 11120S)	$ 4,029	-$ 60,422
Schedule K Income (line 23)[2]	$ 5,079	-$ 63,247
Current Assets (Schedule L)	$ 315,141	$ 73,406
Current Liabilities (Schedule L)	$ 264,934	$ 89,495
Net Current Assets	$ 50,207	-$ 16,089

[2] Where an S corporation has additional income and expenses (deductions) from sources other than a trade or business, it reports them on Schedule K of the corporate tax return on line 23. CIS will treat this as net income in this case.

As the priority date is in 2002, the 2001 tax return information is more relevant to determining the petitioner's financial ability to pay the beneficiary's wage offer. The above table also reflects the petitioner's net current assets. Net current assets represent the difference between current assets and current liabilities.[3] Besides net income, and as a measure of its liquidity during a given period, a petitioner may alternatively demonstrate its ability to pay a proffered wage through its net current assets because they represent cash or cash equivalent resources out of which a proffered wage may be paid. A corporate petitioner's current assets are shown on lines 1 through 6 of Schedule L of its corporate tax return. Current liabilities are shown on lines 16 through 18. 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.

In a notice of intent to deny the petition issued on December 4, 2002, the director noted that the petitioner's 2001 tax return did not reflect sufficient net income (line 21 of Form 1120S) or net current assets to support payment of the beneficiary's proffered wage of $41,600 per year. The petitioner was afforded thirty (30) days to provide additional evidence or argument in opposition to the director's intent to deny the petition.

In response, the petitioner, through counsel, submitted a copy of its accounts receivable aging summary as of January 31, 2002, and a copy of what appears to be an unaudited, internally generated profit and loss statement for the period from January to October 2002. Counsel also provided a copy of the petitioner's bank statement for November 30, 2002, and a copy of the petitioner's state quarterly wage report for the quarter ending September 30, 2002.[4] Counsel asserted in her transmittal letter that the petitioner has paid wages in excess of the proffered salary to its employees and that its overall successful operation and gross income justify approval of the petition. Counsel additionally provided a letter, dated December 18, 2002, from the petitioner's principal shareholder, [redacted] who identifies himself as the petitioner's "head coach" on the letter. He states that the company has 150 employees, that the 2001 tax return showed insufficient income because it was prepared on a cash basis, because unexpected growth caused the company to invest more capital up front, and because payment to the petitioner or cash flow is delayed by 60 to 90 days, which is standard in the petitioner's field.

The director denied the petition, concluding that the petitioner's evidence did not outweigh the figures reflected as the petitioner's net income and net current assets on the 2001 tax return which did not support the petitioner's ability to pay the proffered wage.

The director also found that the petitioner is a staffing agency. He concluded that there was insufficient evidence of available full-time employment for the beneficiary as the petitioner had failed to provide any copies of a contract with a facility that will actually provide the beneficiary with employment.

---

[3] 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.

[4] The beneficiary's name is not listed as one of the petitioner's workers.

On appeal, counsel provides a letter, dated February 11, 2003, from [redacted] who is identified as the petitioner's chief financial officer. The letter simply states that the petitioner has 157 employees and a gross income of $7.2 million dollars and that it has the ability to pay an unnamed beneficiary an unspecified wage. Counsel also submits copies of unaudited profit and loss statements for January through December 2002 (Accrual Basis), duplicate copies of the petitioner's third quarter 2002 state wage reports, a copy of a summary of the petitioner's fourth quarter 2002 wage reports, duplicate copies of its 2000 and 2001 corporate tax returns, copies of its July through December 2002 bank statements, and copies of an internal list of client facilities. One of the names appearing on this list is that of "Town and Country Manor," coupled with the same address as the location that is identified on the ETA 750A as place of the beneficiary's employment as a registered nurse. Counsel also provides copies of approximately seven, one-page internal 2002 documents on the petitioner's letterhead that are designated as "contract forms." They give basic biographic data about various client facilities such as the name, phone number and type of contract, such as skilled nursing facility contract or assisted living facility contract. The petitioning business provided no copies of specific contracts between the petitioner and its client facilities establishing that the client facilities had specific full-time registered nurse position(s) to be filled by the petitioner.

Counsel asserts on appeal that the director's decision ignored the information on the submitted income tax returns and audited financial statements. Counsel also emphasizes that the regulation at 8 C.F.R. § 204.5(g)(2) provides for the acceptance of a statement from a financial officer of an organization that employs 100 or more workers that the organization has the ability to pay the proffered wage. Counsel asserts that the nature of the petitioner's business in providing foreign nurses to fill an occupational shortage and its growth in gross revenue from 2000 to 2001 justifies approving the petition. Counsel cites as her authority for this the expectations of increasing business as outlined in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's arguments are not persuasive. It is noted that CIS authority includes a review as whether the petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the proffered position and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS,* 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

At the outset, it is noted that contrary to counsel's assertions, none of the financial statements offered to the director or submitted on appeal are audited. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the proffered 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. Unaudited financial statements are the representations of management, and are not sufficient to meet the burden of proof in these proceedings.

Also in general, 8 C.F.R.. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. It further provides: "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." (Emphasis added.)

Given the record as a whole, we find that CIS need not exercise its discretion to accept the letter from the petitioner's chief financial officer (CFO) which indicates that the petitioner has the ability to pay an unnamed beneficiary's wage. CIS records indicate that the petitioner has filed over 40 Form I-140 petitions with CIS since 2000. Six were filed from 2000 until 2002, the year of the priority date in this matter. In addition, the petitioner has also filed over 125 Form I-129 nonimmigrant petitions since 1998. The CFO's letter does not indicate which beneficiary and which proffered wage the petitioner has the ability to pay. It also does not indicate the date from which it has been able to pay that wage. As such, CIS must also take into account the petitioner's ability to pay all the beneficiaries' proffered wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed these petitions on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. The CFO letter submitted into the record gives no indication that the petitioner has the ability to pay the combined wages of these beneficiaries, or even that it has the ability to pay the specific proffered wage of the instant beneficiary from the priority date onwards. Given the large number of immigrant and nonimmigrant petitions filed by this petitioner, we cannot rely on a letter from the petitioner's CFO referencing the ability to pay a single unnamed beneficiary, whose proffered wage is not specified, as sufficient proof that the petitioner has the ability to pay the instant wage from the priority date onwards.

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. There is no evidence of such employment contained in this record.

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 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, its deposits and filings or its cumulative wages paid to other employees exceeded the proffered wage is insufficient, contrary to counsel's assertions. Similarly, showing that the petitioner expended other monies such as bonuses or officers' compensation in excess of 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. 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 537.

While the balances in the petitioner's bank statements may also be reviewed, it is noted that bank statements offer a partial profile of a petitioner's financial status as they do not reflect other encumbrances which may affect the petitioner's available resources. Also, 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. That evidence is annual reports, federal tax returns and *audited* financial statements. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why an *audited* financial statement or annual report would be inapplicable or otherwise would present an inaccurate financial picture of the petitioner during 2002. Also, the various statements submitted show the amount in the petitioner's account on a given date. Such statements alone cannot show an ability to pay the wage from the priority date onwards.

Further, the petitioner provided no documentation to support the assertion that its 2001 tax return failed to show an ability to pay the proffered wage because its taxes were prepared using a cash-basis method of accounting, rather than an accrual-basis. There is no evidence in the record that the very large losses reflected in the 2001 tax return would have been transformed into significantly high net income or net current assets if the tax return was prepared using an accrual-basis method of accounting. Similarly, no documentation was submitted into the record to show that 2001 was an unusual year in that significant growth occurred that forced the petitioner to invest large amounts in expansion related investment which in turn led to significant losses being reported on the 2001 tax return as suggested by the petitioner. Finally, there is no evidence in the record to support the assertion that the 2001 tax return failed to show funds available to pay the wage because the petitioner's client facilities do not pay the petitioner immediately, but instead take 60 to 90 days to pay. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel cites *Matter of Sonegawa, supra,* in claiming that the petitioner's increased gross revenue and expectations of future profitability establishes its ability to pay the proffered wage. In *Matter of Sonegawa,* an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful

operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the two federal tax returns contained in the record do not represent a framework of profitable years analogous to that presented by the *Sonegawa* petitioner. Although the petitioner's gross revenue increased, its net income and net current assets decreased significantly from 2000 to 2001. The principal shareholder's letter submitted to the record is not accompanied by any detailed first-hand evidence to demonstrate why the negative net income and negative net current assets figures reflected on the 2001 tax return are an anomaly representing a unique and unusual occurrence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The AAO cannot conclude that the petitioner has clearly demonstrated that such unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The record reflects that the petitioner's federal tax return for 2001 reflects net income of -$63,247 and net current assets of -$16,249. Neither amount reflects the petitioner's ability to pay the beneficiary's wage offer of $41,600. While we note that the 2002 tax return may not have been available at the time of the director's examination of the record or at the time of the appeal, we also note that the petitioner failed to submit any audited financial statement or annual report from which the petitioner's continuing ability to pay the proffered wage may be clearly established as of the priority date, consistent with the guidelines set forth in 8 C.F.R. § 204.5(g)(2). As such, we cannot conclude that the evidence submitted to the record relating to the year of the priority date, 2002, outweighed the losses reported on the petitioner's most relevant tax return submitted into the record. Based on the above, the AAO does not conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage.

The AAO also concurs with the director's observation that the petitioner is a third-party staffing agency and not a direct provider of medical services. Part 6 of the I-140 and the ETA 750A both indicate that the beneficiary will be employed at [redacted] not at the petitioner's place of business. The petitioner's list of client facilities suggests that this address corresponds with the "Town and Country Manor." The record, however, fails to contain any pre-existing contract for this alien's services between the petitioner and this facility corroborating that a realistic job offer of permanent full-time employment for her services existed as of the priority date of August 2, 2002. The petition is not eligible for approval on this basis.

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis for denial. 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.