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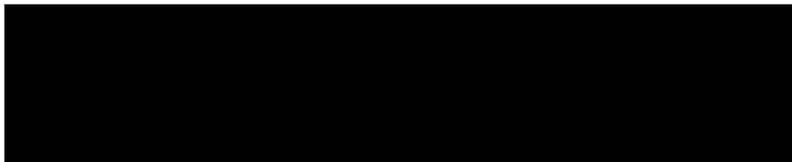
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington DC 20529



U.S. Citizenship
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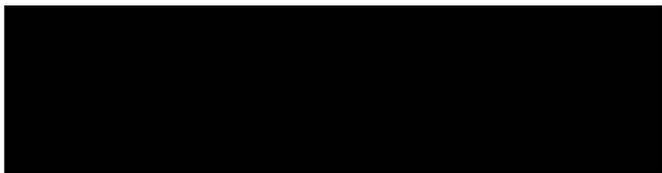
Petitioner:

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 visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a freight forwarding firm. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on October 27, 2006. The proffered wage as stated on Part F of the ETA Form 9089 is \$38,168 per year. On Part K of the ETA Form 9089, signed by the beneficiary on November 21, 2006, the beneficiary claims to have worked for the petitioner beginning on January 3, 2001 and ending on December 8, 2006.²

On Part 5 of the I-140, which was filed on November 22, 2006, the petitioner states that it was established on January 18, 2002, and currently employs three workers.

With the petition and in response to the director's December 1, 2006, request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2005.

	2005
Net Income ³	-\$27,511
Current Assets	\$56,819
Current Liabilities	\$255,524
Net Current Assets	-\$198,715

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period

² The dates of employment were expressed in numbers. Unless the month and day are reversed, it is unclear what the beneficiary is attesting to as his ending date in December is subsequent to the signature date on the ETA Form 9089.

³ 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 IRS 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* (1997-2003) line 17e* (2004-2005) line 18* (2006) 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 2005, the petitioner's net income is found on Schedule K of its tax return for 2005 and also for its subsequently filed tax return for 2006.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also supplied a copy of the Wage and Tax Statement (W-2) that it issued to the beneficiary for the year 2005 and copies of 2006 earnings statements reflecting that as of November 30, 2006, the petitioner had paid the beneficiary \$25,482.70.

The petitioner additionally provided other documentation including a copy of its federal quarterly tax return (Form 941) for the first quarter of 2006 and copies of its 2006 California and New York state quarterly wage and withholding reports for the first and second quarters, respectively.⁵ The petitioner also provided copies of its bank statements for two accounts for the period from January 1, 2006 to October 31, 2006.

Following a review of the evidence submitted, the director denied the petition on December 19, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. The director noted that the documentation failed to establish that the petitioner had the ability to pay the full proffered wage of \$38,168 per year. He declined to rely on the petitioner's bank statements or other documentation to demonstrate that the petitioner had the ability to pay the difference between the actual wages paid to the beneficiary and the proffered wage in 2006, and noted that in lieu of the submission of an audited financial statement covering 2006 which had been requested in the director's request for evidence and which the petitioner had stated it could not submit, the director also reviewed the petitioner's 2005 federal income tax return.

The petitioner, through counsel, submits a copy of the petitioner's 2006 federal corporate income tax return, which had been recently filed.

	2006
Net Income	\$21,203
Current Assets	\$89,632
Current Liabilities	\$263,434
Net Current Assets	-\$173,802

Counsel also provides a copy of the beneficiary's W-2 for 2006, indicating that the petitioner paid \$28,572 in compensation to him.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ These reports show two employees in California and two in New York.

Counsel contends that the director was unreasonable in requesting audited financial statements for 2006 as the 2006 calendar year had not expired. Counsel contends that the petitioner's bank statements could have been utilized as the priority date did not occur until October 27, 2006 and that this was an appropriate case within the context of 8 C.F.R. § 204.5(g)(2) because neither audited financial statements nor a tax return were available. Counsel also asserts that the ability to pay and the wage offer should have been prorated for the months of November and December 2006 and that bank statement balances could have been utilized in assessing the ability to pay.

We do not find counsel's remaining assertions to be persuasive. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is October 27, 2006.

That said, we do not find that the director erred in declining to treat this as an appropriate case to rely on the submitted 2006 bank statements or that the proffered wage should have been prorated in combination with the bank statements. 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. They provide an incomplete profile of a petitioner's financial status as they do not reflect other encumbrances or liabilities that may affect the review. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial picture of the petitioner. The regulation permits audited financial statements to be submitted if a federal tax return is not available. Counsel cites no legal authority that an audited financial statement may not be submitted unless it covers the full calendar year. The petitioner was allowed three months to provide such documentation by the director's request for evidence. The period did not expire until February 23, 2007. Although the 2005 federal tax return did not cover the priority date and would generally be of lesser probative value, in view of the petitioner's negative figures indicated for its net income and net current assets, we do not find that the director erred in declining to rely on the 2006 bank statements when the petitioner elected not to submit a 2006 federal tax return or an audited financial statement. It is additionally noted, that while CIS will prorate the proffered wage if the record contains evidence of net income (not just bank statements) 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 pay stubs, in this matter, it would not have resulted in a favorable outcome as the underlying record did not support that petitioner was paying the proffered wage on a monthly basis.

That said, counsel's evidence of the 2006 federal tax return and the beneficiary's 2006 W-2 is determinative of the petitioner's ability to pay during the relevant period.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will review both the petitioner's net income as set forth on a federal tax return, audited financial statement or annual report as well as whether the petitioner may have employed and paid the beneficiary during the relevant period. 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. "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*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *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 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 also 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 any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the petitioner submitted evidence of \$28,572 in compensation paid to the beneficiary in 2006. The shortfall between the 2006 wages paid to the beneficiary and the proffered wage of \$38,168 was \$9,596. As the petitioner's net income of \$21,203 could cover this amount, then the petitioner demonstrated its ability to pay the full proffered wage.

In this matter, the documentation submitted satisfies the requirements set forth in 8 C.F.R. § 204.5(g)(2) and establishes the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.