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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

File [REDACTED]
SRC 06 216 51934

Office: TEXAS SERVICE CENTER

Date: FEB 13 2009

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grisson
John F. Grisson, Acting Chief
Administrative Appeals Office

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

The petitioner is a clinical information research facility. It seeks to employ the beneficiary permanently in the United States as a research pharmacist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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 a brief and additional evidence. For the reasons discussed below, the director failed to consider the financial information pertaining to the petitioner in the consolidated returns submitted and the evidence of wages paid to the beneficiary in 2006. As this information sufficiently establishes the petitioner's ability to pay the proffered wage as of the priority date, we must withdraw the director's adverse findings.

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 either 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 ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on April 10, 2006. The proffered wage as stated on the ETA Form 9089 is \$91,000 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 1, 2001.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$362,624, a net income of \$68,547 and three employees. In support of the petition, the petitioner submitted unaudited financial statements and the 2004 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return filed by the petitioner's parent company RHC USA Corporation. IRS Form 851 Affiliation Schedule, filed as an attachment to the tax return, lists the petitioner as an affiliated company.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 15, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. As this documentation would not be available for 2006, the director requested this evidence for 2005. The director also requested evidence of wages paid to the beneficiary.

In response, the petitioner submitted RHC USA Corporation's 2005 IRS Form 1120 tax return, IRS Forms W-2 issued to the beneficiary and payroll documents for 2006. The 2005 tax return, while filed by RHC USA Corporation, is a consolidated return. While the IRS Form 1120 and Schedule L contain the combined figures, the returns also include a Schedule of Combined Income and Deductions and a Schedule of Combined Ending Balance Sheet. These schedules provide the financial information for the petitioner alone, separate from its parent company.

The combined schedules submitted with the 2005 tax return reflect the following information:

Net income ¹	\$64,213
Current Assets	\$215,615
Current Liabilities	\$10,685
Net current assets	\$204,930

The beneficiary's 2005 IRS Form W-2 indicates wages of \$74,418.78. The 2006 payroll statements reflect biweekly payments to the beneficiary of \$3,791.67, which annualizes to \$98,583.42. Finally, the petitioner submitted its bank statements covering several months.

The director concluded that RHC USA Corporation's financial information could not establish the petitioner's ability to pay the proffered wage because they were two separate legal entities. The director then concluded that the petitioner paid the beneficiary less than the proffered wage in 2005. The director did not consider the 2006 payroll statements. Thus, the director denied the petition.

On appeal, counsel notes that the petitioner has been paying the beneficiary the proffered wage as of the priority date and that the 2005 tax return includes data specific to the petitioner. The petitioner submits the beneficiary's 2006 IRS Form W-2 reflecting wages of \$91,000.08.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. While the 2006 IRS Form W-2 would not have been available in response

¹ Before net operating loss deduction.

to the director's request for additional evidence, the payroll statements submitted at that time clearly demonstrated that the petitioner had begun paying the beneficiary \$3,791.67 on April 14, 2006, the pay period that covered the priority date. The 2006 IRS Form W-2 submitted on appeal confirms that the petitioner paid the full proffered wage in 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 that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Even in 2005, while prior to the priority date, the record demonstrates the petitioner's ability to pay the difference between the proffered wage and wages paid, which amounts to \$16,581.22.

Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *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, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is 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 USCIS, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets 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, the 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. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

² 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

current liabilities are shown on lines 16(d) through 18(d). 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.

The petitioner has demonstrated that it paid \$74,418.78 in wages to the beneficiary during 2005, \$16,581.22 less than the proffered wage of \$91,000. In that year, according to the consolidated tax return, the petitioner shows a net income of \$64,213 and net current assets over \$200,000. The petitioner has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of either its net income or net current assets.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2006 and even in 2005. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

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.