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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 18 2005
WAC 03 165 50208

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:
[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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home healthcare firm. It seeks to employ the beneficiary permanently in the United States as a general and operational manager. 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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

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 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$46.70 per hour, which amounts to \$97,136¹ annually. On the Form ETA 750B, signed by the beneficiary on February 21, 2001, the beneficiary claimed to have worked for the petitioner beginning in October 2000 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on May 6, 2003. On the petition, the petitioner claimed to have been established in 1997, to currently have 72 employees, to have a gross annual income of \$1.7 million, but declared its net annual income "confidential."

¹ The director incorrectly calculated the yearly proffered wage as \$61,440. Since the miscalculation, if correct, would have reduced the petitioner's burden, however, this office deems it harmless error.

In support of the petition, the petitioner submitted:

- An original Form ETA 750;
- A Form G-28 listing counsel's name; and,
- The petitioner's Form 1120 tax return for fiscal years 1999–2001 ending March 31.

In a request for evidence (RFE) dated December 11, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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. The director also specifically requested financial evidence for 2001 and 2002.

In response to the RFE, the petitioner submitted:

- Signed Form 1120s for 2001 and 2002; and,
- The petitioner's June 4, 2002 application for an extension to file its 2001 tax return; filing extension dated June 4, 2002.

On February 25, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition. The decision refers to the petitioner's "ordinary income of a negative (-) \$28,962, and a negative (-) assets [sic] of \$91,343."

On appeal, counsel submits a brief and additional evidence. He submits:

- Another Form G-28;
- A March 22, 2004 letter from the petitioner's "Chief Financial Officer" asserted that the 2001 loss was "due to a reduction in our Medical referrals," but that the beneficiary "was able to increase our patient census. This resulted in our gross revenue exceeding the two million mark in 2002," and a 2002 company profit of \$33,824. "The negative assets of \$91,343 represent accounts payable invoices that were year-end 2002-2003 expenses, but were not due to be paid in actuality until sometime in April 2003."

On the I-290B, signed by counsel on "August 26, 2003,"² counsel states that the petitioner has employed the beneficiary for five years at the prevailing wage under the terms of an H-1B nonimmigrant visa the petitioner had obtained on her behalf in 1999.

Counsel further states on appeal that the petitioner in 2001 reported a negative \$28,962 "taxable income" rather than "ordinary income," reciting the \$1.9 million in "total income" the petitioner reported that year. The beneficiary's wages are also included in the \$1.25 million the petitioner included as wages in its 2001 return. Counsel further asserts that rather than having negative assets in 2001, the company reported \$142,848 in "total assets."

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). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director specifically requested none of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude any

² The form bears the director's receipt stamp dated March 25, 2004.

documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary claimed to have worked for the petitioner beginning in October 2000 and continuing through the date of the ETA 750B. In addition, the petitioner claims to have paid the beneficiary the proffered wage for at least five years. However, the record of proceedings does not contain any Form W-2 Tax and Wage Statements or other evidence that would confirm this claim. The record, however, contains no copies of Form W-2 Wage and Tax statements the petitioner may have issued to the beneficiary but without explanation failed to submit. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form

1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 25 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax Year	Taxable Income ³	Proffered Wage ⁴	Amount Over (Under) Proffered Wage
2001	-\$28,962	\$97,136	(\$126,098)
2002	\$33,824	\$97,136	(\$63,312)

Since each of the final amounts is negative, taxable income fails to establish the ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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 those a company expects to convert to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on Schedule L of the petitioner's tax returns yield the following amounts for net current assets: negative (-) \$91,343 for 2001; and negative (-) \$85,284 for 2002. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that her reputation would increase the number of customers. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

³ "Taxable Income" as used on the corporate return is comparable to the terms "ordinary income" or "adjusted gross income," as used on partnership, Subchapter S or individual return forms.

⁴ The full proffered wage, since counsel does not establish the petitioner made any wage payments the beneficiary.