

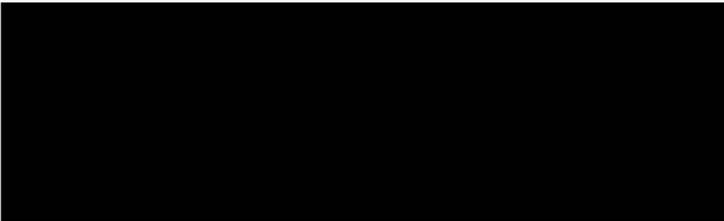


U.S. Citizenship  
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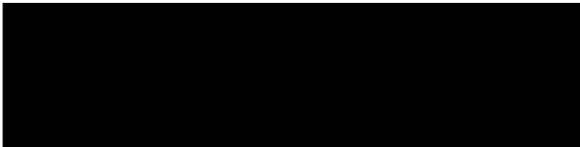
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FILE: LIN 03 241 50529 Office: NEBRASKA SERVICE CENTER Date: **MAR 07 2006**

IN RE: Petitioner:



Beneficiary:

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not provided documentation for establishing its ability to pay the proffered wage as of the priority date.

On appeal, counsel submits:

- The petitioner's internal financial statement of income and expenses dated August 31, 2004.

The regulation 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. 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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d).

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is August 11, 2003.

The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, which amounts to \$41,600 annually. On the Form ETA 750B, signed by the beneficiary on May 21, 2003, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28; and,
- The original ETA 750 with attachments.

On April 5, 2004, the director issued to the petitioner a Request for Evidence (RFE) seeking:

- Evidence missing from part 5 of the petition; and,
- Documentation pertinent to the petitioner's ability to pay the proffered wage.

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.

In response, the petitioner on June 21, 2004, submitted:

- The requested information concerning part 5 of the petition.

The director denied the petition on August 19, 2004, finding that the petition the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director found that counsel, in response to the RFE, had stated that the petitioner has a net annual income of over \$6 million, and that it has 100 employees, but had not documented these assertions.

On appeal, counsel asserts that the petitioner and counsel had failed to submit the requested documents by mistake.

Citizenship and Immigration Services (CIS) will first examine 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 the 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. (Emphasis in original.) *Chi-Feng* at 537.

Because counsel did not submit tax returns to demonstrate the requested financial information concerning the petitioner's ability to pay the proffered wage of \$41,600 per year from the priority date, this office cannot examine the petitioner's federal income tax returns for the year 2003 to determine the petitioner's net income for the pertinent period.

Therefore, for the year 2003, this office cannot determine if the petitioner had sufficient net income to pay the proffered wage.

CIS will generally consider an employer's 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.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the instant case, however, the petitioner's federal income tax return for that year is unavailable to determine the amount of the petitioner's net current assets.

On appeal counsel has submitted the petitioner's unaudited financial statement dated August 31, 2004.<sup>2</sup> While on their face the numbers might confirm the petitioner's ability to pay the proffered wage, counsel's reliance on unaudited financial records 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. 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.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) enables the petitioner to demonstrate its ability to pay the proffered wage, beginning with the priority date, with a statement from the company's financial officer that the company employs 100 or more people. While counsel's response to the RFE indicates the petitioner might have availed itself of this provision, the record of proceedings contains no such statement.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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 not met that burden.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>2</sup>It is unclear from the financial statement whether it covers a period that begins with the priority date.

LIN 03 241 50529

Page 5

**ORDER:** The appeal is dismissed.