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**U.S. Citizenship  
and Immigration  
Services**

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FILE: EAC-04-091-50623 Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**

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: SELF-REPRESENTED

**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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont 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 professional healthcare staffing firm. It seeks to employ the beneficiary permanently in the United States as a 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 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.

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. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 8 C.F.R. § 204.5(d). The I-140 petition was submitted on February 5, 2004, thereby establishing the priority date.

On the I-140 petition, the petitioner claimed to have been established in 2002, to currently have six employees and to have a gross annual income of \$500,000.00. The item on the petition for net annual income was left blank. The proffered wage as stated on the Form ETA 750 is \$50,000.00 per year. On the Form ETA 750B, signed by the beneficiary on January 22, 2004, the beneficiary did not claim to have worked for the petitioner. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 16, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 28, 2004.

In a decision dated September 28, 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.

On appeal, the petitioner submits no brief and submits additional evidence. The petitioner states on appeal that it files its tax returns on the cash basis of accounting, and that therefore its accounts receivable were not reflected in the current assets portion on Schedule L of the petitioner's U.S. Return of Partnership Income. The petitioner states that a statement of accounts receivable which is submitted on appeal shows a \$71,621.03 balance. The petitioner also states that bank statements submitted on appeal for the months of February through September 2004 show the petitioner's consistent financial ability to compensate the beneficiary at the proffered annual salary of \$50,000.00. Finally, the petitioner states that the \$210,321 cash basis loss shown on the petitioner's Form 1065 tax return for 2003 reflected several one-time start-up related costs that are not expected to recur during the petitioner's continuing operations.

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).

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 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 on January 22, 2004, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 partnership. The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2002 and 2003. The record before the director closed on April 28, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal tax return for 2003 was the most recent return available.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. Where a partnership has income from sources other than from a trade or business, that income is reported on Schedule K. Similarly, some deductions appear only on the Schedule K. *See Internal Revenue Service, Instructions for Form 4562 (2003)*, at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business but the Form 1065 for 2003 indicates one additional relevant deduction. For this reason and for consistency in analysis, both for 2002 and for 2003 the petitioner's net income will be considered as the amounts on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. Those amounts are shown on the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	\$0.0	not applicable	not applicable
2003	-\$210,421.00	not applicable	-\$210,421.00
2004	not available	\$50,000.00*	no information

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2004, which is only year at issue in the instant petition. The petitioner's information for 2003 is considered relevant because the tax return for that year was the most recent return available when the record before the director closed.

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 partnership 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 partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership'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 expected to be converted 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 the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	\$10,000.00	not applicable	not applicable
2003	\$49,579.00	not applicable	not applicable
2004	not available	not available	-\$421.00**

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

\*\* Deficit based on 2003 year-end net current assets.

As noted above, the petitioner's information for 2003 is considered relevant because the tax return for that year was the most recent return available when the record before the director closed. The difference between the petitioner's year-end net current assets in 2003 and the proffered wage is only \$421.00. That amount represents only several days pay at the proffered wage of \$50,000.00 per year. Therefore, the above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2004, which is only year at issue in the instant petition.

The record also contains copies of bank statements. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, in the instant petition, the petitioner has submitted copies of its federal tax returns, which satisfy the regulatory provision as to the form of required evidence. The petitioner's bank statements therefore may be considered as supplemental evidence.

On the petitioner's bank statements the ending balances are as follows:

2004:	Ending balances		Ending balances
January	-	July	\$2,146.66
February	\$45,037.92	August	\$18,209.97
March	\$37,889.54	September	\$21,762.56
April	\$36,310.03	October	-
May	\$26,148.90	November	-
June	\$18,825.24	December	-

In the instant case, the ending balances indicate significant monthly ending balances during most of the months of 2004, which is the year of the priority date. The bank statements therefore indicate that the petitioner had available cash on hand to pay the proffered wage during 2004 and the bank statements therefore provide corroboration for the information on the petitioner's tax returns.

The record also contains a document titled Customer Balance Summary, dated October 18, 2004, showing balances at three health care institutions as of October 12, 2004 totaling \$71,621.03. In the notice of appeal the petitioner states that the document is a statement of current accounts receivable. The document therefore appears to be a partial unaudited financial statement prepared by the petitioner. Unaudited financial statements are not persuasive evidence. 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 of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains a copy of a Form 1040 U.S. Individual Income Tax Return for 2003 of one of the petitioner's members and the member's wife, a joint return. The status of the member with regard to the petitioner is found on a Schedule K-1 attached to the petitioner's Form 1065 U.S. Return of Partnership Income for 2003, which identifies him as a "limited liability company member." (Form 1065 for 2003, Schedule K-1). That designation suggests that the member is not personally liable for the financial obligations of the petitioner. For this reason, the Form 1040 individual tax return of the member and his wife will not be considered as further evidence of the petitioner's ability to pay the proffered wage.

The record also contains copies of Form W-2 Wage and Tax Statements of the petitioner's employees for the year 2003 and copies of pay statements of four of those employees for one pay period in April 2004. The Form W-2's contain no significant information beyond that on the petitioner's Form 1065 tax return for 2003 but they appear to be consistent with the information on that tax return. The pay statements for one pay period in April 2004 also provide no further significant information relevant to the petitioner's ability to pay the proffered wage, but they raise no inconsistencies with other evidence in the record.

In the notice of appeal, the petitioner states that the \$210,321 cash basis loss shown on the petitioner's Form 1065 tax return for 2003 reflected several one-time start-up related costs that are not expected to recur during the petitioner's continuing operations. The petitioner's Form 1065 U.S. Return of Partnership Income for 2002 in the record is marked as an initial return. That return therefore indicates that the petitioner was a new partnership in the year 2002.

In summary, the petitioner's year-end net current assets shown on its federal tax return for 2003 are sufficient to establish the petitioner's ability to pay the proffered wage. Other evidence in the record is consistent with the evidence on the petitioner's tax returns.

In her decision, the director correctly stated the petitioner's net income in 2003 and correctly calculated the petitioner's year-end net current assets for 2003. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage. The director erred in finding that the petitioner's year-end net current assets were insufficient to establish the petitioner's ability to pay the proffered wage, since the difference between the year-end net current assets and the proffered wage is an insignificant amount, and since other evidence in the record is consistent with the tax return evidence and provides additional support to help to establish the petitioner's ability to pay the proffered wage.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal overcome the decision of the director.

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.