

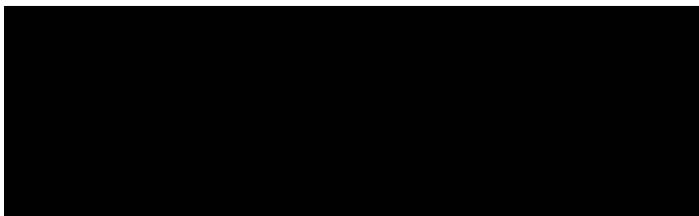
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 03 138 51089

Office: TEXAS SERVICE CENTER

Date: OCT 02 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 immigrant visa petition was denied by the Director (director), Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care services firm. It seeks to employ the beneficiary permanently in the United States as a licensed practical nurse. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner established its continuing financial ability to pay the proffered salary.

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

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

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)].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$18.63 per hour, which amounts to \$38,750.40 per year. On the ETA 750B, signed by the beneficiary on May 15, 2002, the beneficiary does not claim to have worked for the petitioner.¹

On Part 5 of the visa petition, filed on April 14, 2003, the petitioner claims to have been established in 1994,

¹ In contrast, the beneficiary claims employment with the petitioner from 2000 to the present on her biographic questionnaire (Form G-325A), signed by her on March 7, 2003, and submitted in connection with her application for permanent resident status (I-485).

have a gross annual income of \$2,171,405, a net annual income of \$110,500, and to employ 116 workers.² The petitioner did not initially submit any documentation of its ability to pay the proffered salary of \$38,750.40.

On October 27, 2004, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage. The director requested the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements. She further instructed the petitioner federal income tax returns and copies of the beneficiary's Wage and Tax Statements (W-2) or evidence of payment of wages if employed by the petitioner. The director also requested that the petitioner provide copies of its federal quarterly tax return (Form 941) filed during 2003.

In response to the director's request for additional evidence related to the petitioner's ability to pay the proffered wage, the petitioner, through counsel, provided copies of the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Return for an S Corporation. They indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information:

	2001	2002	2003
Ordinary Income	-\$ 27,672	\$110,548	-\$293,051
Current Assets (Schedule L)	\$160,999	\$146,491	\$300,248
Current Liabilities (Sched. L)	\$299,856	\$253,690	\$582,263
Net Current Assets	-\$138,857	-\$107,199	-\$282,015

The petitioner did not provide copies of any Form 941(s) or copies of any payroll or W-2 records showing wages paid to the beneficiary.

The director denied the petition, determining that the petitioner had failed to establish its continuing ability to pay the proffered salary beginning on the visa priority date. The director noted that although its net income of \$110,548 was sufficient to pay the proposed wage offer in 2002 and, thus, establish the petitioner's ability to pay in that year, the director concluded that neither the net income or net current assets in 2001 and 2003, demonstrated the petitioner's ability to pay the proffered wage in each of those years.³

On appeal, counsel asserts that the director's decision was not based on precedent decisions or regulations relating to the ability to pay the proffered salary. Counsel subsequently submits a copy of the petitioner's bank statement dated December 31, 2001 and a copy of the petitioner's bank statement as of December 31,

² The regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer which establishes the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). This alternative recognizes that large employers in some years may have net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to reject an employer's assurances and seek corroborative evidence. 8 C.F.R. § 103.2(b)(8). In this case, the director elected to seek additional evidence.

³ The director's decision indicates that while she calculated losses of net income and net current assets for 2001 and 2003, the numbers stated in the decision are not correct.

2003. In both cases the ending balance was approximately \$17,000 and \$15,000, respectively. Counsel also provides a letter, dated April 19, 2000,⁴ signed by the petitioner's chief financial officer, [REDACTED]. Ms. [REDACTED] states that the petitioner employs over 150 workers and that the petitioner has been satisfied with the beneficiary's work over the years. She adds that the beneficiary was unable to work during the entire year in 2003 due to illness, so "payments to her only totaled \$27,822." Ms. [REDACTED] also mentions the funds in the bank statement that could have been applied to the remaining proffered wage. She adds that the beneficiary received \$45,000 in 2004 but does not mention 2001.

Regarding the 2001 tax return, Ms. [REDACTED] references accounts receivable balance of \$34,342 and other assets of \$4,754, as well as the bank account ending balance shown on the December 2001 bank statement. She also notes that the \$77,195 (sic) listed as other current liabilities represents payroll, taxes and an overdraft which the petitioner usually pays gradually.

These assertions are not persuasive in this case. It is noted that the petitioner was requested in the underlying proceedings to provide evidence of payment of wages to the beneficiary and declined to comply. On appeal, the actual dates of the beneficiary's employment remain vague and no actual corroboration of payment of wages has been forthcoming. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. 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 be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during that period. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this case, as the net income and net current assets figures shown above indicate, no shortfall could be covered because each of the figures for 2001 and 2003 represent losses.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will next examine the net taxable income as reflected on the petitioner's federal income tax return, audited financial statements or annual reports, 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, supra*, and *Ubeda v. Palmer, supra*; 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 (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

⁴ The year appears to be a mistake and should be "2005."

rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The reliance on the petitioner's bank statements is misplaced. 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. While this regulation allows additional material "in appropriate cases," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial picture. Moreover, bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for 2001 and 2003, which correlate to the periods covered by the submitted tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Similarly, the \$34,342 referred to by M as receivables on the 2001 Schedule L of the petitioner's tax return, have already had been included in the calculation of the petitioner's net current assets for that year. The additional \$4,754 mentioned by Ms. is shown as part of the petitioner's longer-term total assets on line 14 and is not considered as cash or cash equivalent funds represented by the figures included as current assets. It remains that in order to calculate net current assets, current assets must be balanced by consideration of current liabilities regardless of how a petitioner elects to pay such liabilities. In this case, it cannot be concluded that either the -\$27,672 in net income or the -\$138,857 in net current assets could provide sufficient funds to pay the proffered wage in 2001. Similarly, in 2003, neither the petitioner's -\$293,051 in net income, nor its -\$282,015 in net current assets was sufficient to pay the proffered salary in 2003.

The regulation at 8 C.F.R. § 204.5(g) (2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage. The evidence in this case fails to establish that the petitioner had the continuing ability to pay the proposed wage offer of \$38,750.40 in 2001 or 2003. Based on the evidence contained in the underlying record and after consideration of the information submitted on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the April 30, 2001, priority date of the petition.

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.