



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **OCT 20 2006**
EAC 04 179 52364

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:
[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, Chief
Administrative Appeals Office

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

The petitioner is a nursing care firm. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

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

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) provides:

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$8.59 per hour, which amounts to \$17,867.20 per annum. On the Form ETA 750B, signed by the beneficiary on March 27, 2000, the beneficiary does not claim to have worked for the petitioning employer.

Part 5 of the visa petition, filed on May 27, 2004, indicates that the petitioner was established in 1998, employs twenty workers, has a gross annual income of \$395,795, and a net annual income of \$33,906. In support of its ability to pay the beneficiary's proposed wage offer of \$17,867.20 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002 and 2003. They reflect that the

petitioner files its federal tax returns using a standard calendar year. The tax returns contain the following information:

	2001	2002	2003
Ordinary Income ¹	-\$15,328	-\$ 18,171	\$33,906
Current Assets (Sched. L)	\$ 4	\$ not shown	\$10,210
Current Liabilities (Sched. L)	\$ - 0-	\$ not shown	\$ 8,752
Net current assets	\$ 4	\$ -0-	\$ 1,458

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18 (d). If a corporation's year-end 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 also provided copies of the principal shareholders' 2001, 2002, and 2003 individual tax returns, and various unaudited financial statements covering the petitioner's first eight months of 2004, as well as the year(s) 2001, 2002 and 2003.

The director reviewed the petitioner's financial data submitted to the record and concluded that the evidence failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 19, 2001. Denying the petition on April 1, 2005, the director noted that while the petitioner's net income of \$33,906 was sufficient to establish the petitioner's ability to pay the proposed wage offer of \$17,867.20 in 2003, the financial information for 2001 and 2002 did not represent sufficient funds to demonstrate the petitioner's ability to pay the proffered salary.

On appeal, counsel requests reconsideration of the director's decision and cites the petitioner's increase in income and profit since 2001. Counsel offers additional documents on appeal including a copy of the beneficiary's 2004 Wage and Tax Statement (W-2) and corresponding individual tax return, which indicate that the petitioner employed her in that year and paid her \$5,475 in wages. Counsel also provides a copy of the petitioner's 2004 corporate tax return showing that it declared ordinary income of \$3,163. Schedule L reflects that the petitioner had \$10,852 in current assets and \$8,610 in current liabilities, resulting in \$2,242 in net current assets. Counsel further provided various unaudited financial statements covering the petitioner's operations during 2004.

¹ For the purpose of this review, ordinary income will be treated as net income.

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 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.

Counsel's evidence and contentions presented on appeal are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the beneficiary did not begin to work for the petitioner until 2004 and earned \$5,475, or \$12,392.20 less than the proposed wage offer of \$17,867.20.

It is noted that the individual assets of the petitioner's principal shareholders will not be considered in reviewing the petitioner's financial ability to pay the proposed salary. The petitioner is the named corporate employer on the preference petition. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). As stated by the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. While the petitioner's gross sales and receipts increased substantially in 2004 as noted by counsel on appeal, so did its corresponding expenses. It is not reasonable to consider gross income without also considering the expenses incurred in order to generate that income. 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 rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

In this case, as noted by the director, while the figures for 2003 indicate that the petitioner's net income of \$33,906 could pay the proffered wage and thus demonstrate the petitioner's ability to pay in that year, in 2001 and 2002, neither the petitioner's net income or net current assets were sufficient to cover proffered wage and demonstrate the petitioner's ability to pay. In 2001, the certified wage could not be met by either the petitioner's net income of -\$15,328 or its net current assets of \$4.00. In 2002, the certified wage could not be paid out of the petitioner's net income of -\$18,171. Net current assets could not be calculated because Schedule L was not completed.

Similarly, as noted above, the shortfall of \$12,392.20 resulting from a comparison of the wages actually paid to the beneficiary in 2004 and the proffered wage could not be covered by either the petitioner's net income of \$3,163 or the petitioner's net current assets of \$2,242.

It is noted that documents representing what appear to be internally generated or compiled financial statements, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. 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 ability to pay the proffered wage, those statements must be audited. A compilation is a presentation of financial statement information by an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP) and is based upon the representations of management. As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented and will not be considered in lieu of the federal tax returns provided to the record.

Based on the evidence contained in the record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the 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.