

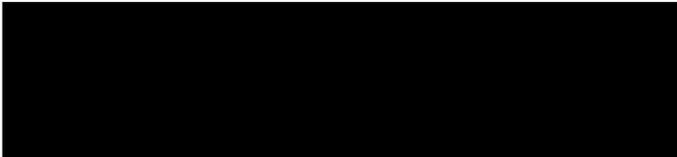
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] SRC 06 160 52126

Office: TEXAS SERVICE CENTER Date: DEC 19 2007

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

The petitioner is a newspaper publisher. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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 demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has had the continuing ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 are members of the professions.

The regulation at 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.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 15, 1999. The proffered wage is set forth as \$36,000 per year. The ETA 750B, signed by the beneficiary on December 10, 1999, indicates that he has worked for the petitioner since February 1998.

¹ 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).

On part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on April 24, 2006, the petitioner claims that it has five employees.

The director requested additional evidence on May 23, 2006. In addition to instructing the petitioner to complete sections 5 and 6 of the I-140 and provide evidence supporting the beneficiary's prior qualifying employment experience, the director instructed the petitioner to provide evidence of its ability to pay the proffered wage beginning in December 1999 to the present. She requested the petitioner to submit copies of its federal tax returns, annual reports or audited financial statements pursuant to 8 C.F.R. 204.5(g)(2), as well as copies of the beneficiary's Wage and Tax Statements (W-2s) from 1999 to 2005. She advised the petitioner that it may provide additional evidence in addition to that requested.

In response, the petitioner submitted partial copies of its Form 1120, U.S. Corporation Income Tax Return for 1999 through 2004. It did not submit any financial data in the form of an income tax return, audited financial statement or annual report covering 2005. It did provide copies of the beneficiary's (W-2s) for 2001 through 2005. They indicate that the petitioner paid the following wages to him:

2001	\$10,998
2002	\$17,690
2003	\$19,200
2004	\$19,200
2005	\$19,200

Although the petitioner provided a copy of the beneficiary's 2000 individual federal income tax return, it did not provide a copy of a W-2, which would have reflected the source of the beneficiary's wages in that year. Further, it did not provide a W-2 for 1999.

The petitioner's corporate income tax returns contain the following information:

	1999	2000	2001
Net Income ²	-\$ 29,487	-\$27,429	\$24,085
Current Assets (Sched.L)	\$ 51,693	\$ 6,349	\$32,493
Current Liabilities (Sched.L)	-\$110,200	\$56,119	\$63,994
Net Current Assets	-\$ 58,507	-\$49,770	-\$31,501
Year	2002	2003	2004
Net Income	\$ 2,099	-\$ 4,564	-\$261,107
Current Assets (Sched. L)	\$21,481	\$70,339	\$ 1,154

² For the purpose of this review, taxable income before net operating loss deduction and special deductions found on line 28 of Form 1120 will be treated as net income.

Current Liabilities (Sched. L)	\$36,571	\$68,266	\$248,269
Net Current Assets	-\$15,090	\$ 2,073	-\$247,115

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its corporate tax return. If the petitioner's end-of-year 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 a copy of a 2004 audited consolidated balance sheet of a Turkish company identified as "[REDACTED]". The figures are expressed in Turkish Lira and neither the petitioner's name, nor any U.S. entity is identified within the document on page 73 where the subsidiaries and associates of the Turkish company are listed, although a letter, dated July 31, 2006, from [REDACTED] the petitioner's vice-president, claims that the petitioner is a US-based branch entity of this company and that the petitioner's general financial wherewithal is more accurately reflected when this is taken into consideration.

The director denied the petition on August 29, 2006. The director concluded that neither the petitioner's net income nor net current assets as shown on its 1999-2004 federal tax returns, including consideration of the wages paid to the beneficiary, were sufficient to cover the proffered wage of \$36,000. The director also noted that the petitioner failed to provide any financial information relevant to 2005 and had not established the ability to pay in that year also. The director additionally declined to consider the financial statement offered on behalf of the Turkish company as the petitioner is a distinct corporate entity with its own obligation to establish its financial ability to pay the proffered wage. Finally, the director noted that the petitioner had failed to complete section(s) 5 and 6 of the I-140 as requested.

On appeal, counsel submits a partial copy of the petitioner's 2005 tax return, consisting of the first two pages of the 2005 return and two other pages related to the 2004 return. Counsel also provides copies of the beneficiary's individual tax returns for 1999 and 2000. Counsel contends that the petitioner's ability to pay the proffered wage is established in 2005 based on the funds available within the petitioner's net income to cover the difference between the actual wages paid to the beneficiary and the proffered wage.

Counsel also provides copies of two of the petitioner's bank statements covering the period from July 22, 2006 and September 21, 2006. Two funds transfers which appear on each statement designate the sender as [REDACTED]. Counsel asserts that the Turkish parent entity's wires to the petitioner cover all

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

monthly office expenses incurred by the petitioner and that the petitioner's salaries have never failed to be covered.

We do not find counsel's contentions persuasive. Two selected bank statements indicating receipt of funds from a Turkish company do not define what kind of relationship exists between these entities and does not establish the petitioner's continuing financial ability to pay the proffered wage as of the December 15, 1999, priority date through the regulatory-prescribed evidence of federal tax returns, audited financial statements or annual reports. 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). As noted by the director, the financial status of the Turkish company will not be considered in this matter. 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."⁴

It is further noted that Schedule K of the petitioner's tax returns indicates that the petitioner is not a subsidiary in an affiliated group or a parent-subsidary controlled group; that at the end of the tax year did any individual, partnership, corporation, estate or trust directly or indirectly own 50% or more of the petitioner's voting stock; and that no one foreign person owns, directly or indirectly, at least 25% of the petitioner's stock.

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 that period. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In this case, as mentioned above, the petitioner paid the beneficiary \$10,998 in 2001; \$17,690 in 2002; and \$19,200 in 2003, 2004, and 2005. The difference between what the petitioner paid to the beneficiary in each year and the proffered wage of \$36,000 was as follows:

2001	(\$25,002)
2002	(\$18,310)
2003	(\$16,800)
2004	(\$16,800)
2005	(\$16,800)

⁴ In *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997), the court noted that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage.

As noted above, copies of the beneficiary's individual tax returns from 1999 and 2000, without the accompanying W-2s do not establish the origin of the beneficiary's compensation and may not be considered. 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 a given period, CIS will also 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *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 taxable 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.

In this case, even if the petitioner's net income figure of \$20,464 reported on 2005 is sufficient to cover the \$16,800 difference between the proffered wage and the actual wages paid to the beneficiary, the petitioner's ability to pay the certified salary of \$36,000 has not been demonstrated in any other year.

In 1999, neither the petitioner's net income of -\$29,487, nor its net current assets of -\$58,507 could pay the annual proffered wage of \$36,000.

In 2000, neither the petitioner's net income of -\$27,429, nor its net current assets of -\$49,770 could pay the annual proffered wage of \$36,000.

In 2001, neither the petitioner's net income of \$24,085, nor its net current assets of -\$31,501 could cover the shortfall of \$25,002 between the actual wages paid and the annual proffered wage of \$36,000.

In 2002, neither the petitioner's net income of \$2,099, nor its net current assets of -\$15,090 could cover the difference of \$18,310 between the actual wages paid and the annual proffered wage of \$36,000.

In 2003, neither the petitioner's net income of -\$4,564, nor its net current assets of \$2,073 could pay the shortfall of \$16,800 between the actual wages paid and the annual proffered wage of \$36,000.

Finally, in 2004, neither the petitioner's net income of -\$261,107, nor its net current assets of -\$247,115 could pay the shortfall of \$16,800 between the actual wages paid and the annual proffered wage of \$36,000.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish that it has had a *continuing* ability to pay the proffered wage as of the priority date. Based on a review of the underlying record and the evidence

and argument submitted on appeal, the AAO finds that the petitioner has not demonstrated a continuing financial ability to pay the certified wage.

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.