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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE:

SRC 07 083 51781

Office: TEXAS SERVICE CENTER Date:

APR 03 2009

IN RE:

Petitioner:

Beneficiary:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a healthcare service company. It seeks to employ the beneficiary permanently in the United States as a rehab coordinator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 professionals or 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 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 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 DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 19, 2004. The proffered wage as stated on the Form ETA 750 is \$24.00 per hour (\$49,920.00 per year). The Form ETA 750 states that the position requires one year of experience in the job offered or in a related occupation.

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 On appeal, the petitioner has submitted a brief, bank statements and a document from the American Physical Therapy Association summarizing the 2003 proposed Medicare physician fee schedule. Other relevant evidence in the record includes copies of the petitioner's corporate income tax returns for the years 2004, 2005 and 2006; copies of the W-2 Wage and Tax Statements issued to the beneficiary by the petitioner for the years 2004, 2005 and 2006; and copies of the petitioner's checking account statements from 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-140 petition the petitioner claimed to have been established in 1996 and to currently have 10 employees. The petitioner listed its gross annual income as \$571,000.00 and its net annual income as \$56,000.00. On the Form ETA 750B, signed by the beneficiary on April 13, 2004, the beneficiary claimed to have worked for the petitioner since September 2003.

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, U.S. Citizenship and Immigration Services (USCIS) 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 during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by 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. In the instant case, the petitioner has provided copies of W-2 Wage and Tax Statements issued to the beneficiary for the years 2004, 2005 and 2006. The wages paid to the beneficiary during these years is represented in the table below.

<u>Years</u>	<u>Wages Paid</u>
2004	\$5,812.80
2005	\$22,196.00
2006	\$41,392.00

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).

The petitioner did not pay the full proffered wage in 2004, 2005 or 2006. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary: \$44,107.20² in 2004; \$27,724.00 in 2005; and \$8,528.00 in 2006.

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, USCIS will next 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 USCIS, 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 USCIS 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. [USCIS] 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 Chang* at 537.

The record shows that the petitioner was structured as a C corporation in 2004 and an S corporation in 2005 and 2006. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. For an S corporation, where, as here,

² Because the priority date is April 19, 2004, the director prorated the proffered wage for 2004 and determined that the petitioner was only required to establish its ability to pay \$33,820.00 for 2004. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Therefore, the AAO will not prorate the proffered wage for 2004.

the corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S.³

The petitioner's tax returns demonstrate its net income for the years 2004 through 2006, as shown in the table below.

- In 2004, the Form 1120 stated net income of \$2,662.00.
- In 2005, the Form 1120S stated net income of \$55,766.00.
- In 2006, the Form 1120S stated net income of \$5,654.00.

The petitioner had sufficient net income to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2005. The petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2004 or 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2004 and 2006 as shown in the table below.

In 2004, the Form 1120 stated net current assets of \$24,850.00.

In 2006, the Form 1120S stated net current assets of \$78,826.00.

The petitioner had sufficient net current assets to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2006. The petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2004.

³ Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (for 2005) or line 18 (for 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 12, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner had no entries for additional income, credits, deductions or other adjustments. Therefore, as noted, the petitioner's net income is the figure for ordinary income as shown on line 21 of page one of the petitioner's tax returns for 2005 and 2006.

⁴According 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.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2004 through wages paid to the beneficiary, net income or net current assets.

On appeal, counsel states that the determination regarding the petitioner's ability to pay must be made with reference to the "totality of the circumstances." Specifically, counsel asserts that the petitioner's sole shareholder has the ability to adjust his own compensation. Counsel notes that the sole shareholder's compensation was \$121,000.00 in 2004. However, there is no evidence in the record, such as a written statement from the sole shareholder, to establish that the sole shareholder was willing and able to forego some or all of his compensation to pay the proffered wage. Simply put, the sole shareholder did not "adjust" his salary in 2004, and this argument is not persuasive. 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)).

Counsel also states that a drop in the petitioner's revenues in 2004 was due to a change in Medicare/Medicaid payment policies. Counsel submitted two articles regarding the Medicare fee schedule. The first article is a summary of the 2003 proposed Medicare physician fee schedule. The article explains that the proposed fee schedule would reduce Medicare spending for physical therapy services in 2003. As the reduction in spending was to occur in 2003, it is not clear what effect, if any, such reduction would have on the petitioner's income in 2004. The second article discusses the proposed fee schedule for 2004, and explains that the proposed fee schedule included an estimated 4.2 percent cut for all Medicare services as of January 1, 2004. However, it appears that this proposed schedule did not go into effect and, in fact, the final rule *increased* payments for Medicare services.⁵ Further, counsel has failed to provide any evidence of how any changes in the Medicare physician fee schedule impacted the petitioner's revenues. In fact, it is noted that the petitioner's gross receipts were greater in 2004 (\$540,346.00) than they were in 2006 (\$445,401.00). 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)).

Counsel also states that the petitioner's bank statements from 2004 show that the petitioner had sufficient resources to pay the proffered wage in that year. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that

⁵ "Medicare Program; Changes to Medicare Payment for Drugs and Physician Fee Schedule Payments for Calendar Year 2004," 69 Fed. Reg. 1084, 1095(01/07/2004)(stating "we will increase the physician fee schedule CF by 1.5 percent for 2004"). See also "CMS Announces Payment Increases for Physicians in 2004 in Accord with Historic Medicare Reform Law," Society for Vascular Ultrasound, December 31, 2003, (available online at http://www.svunet.org/advocacy/12.31.03.fee_schedule.htm).

the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Moreover, counsel states that there may have been an error in the petitioner's 2004 tax return. Counsel further states that, absent this error, the petitioner's tax return would have shown \$31,469.00 in net current assets. First, it is noted that this amount would still be insufficient to establish the petitioner's ability to pay the proffered wage in 2004. Further, the counsel has not provided evidence to substantiate this claim, such as an amended return or a statement from the petitioner's accountant. As noted above, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).⁶

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.

ORDER: The appeal is dismissed.

⁶ It is noted that, even if the AAO used the prorated proffered wage for 2004 of \$33,820.00, and combined 2004 W-2 wages, net income, and net current assets from 2004 in calculating the petitioner's ability to pay, as counsel implies is appropriate on appeal, the record still does not establish an ability to pay the proffered wage. In any event, it is noted that, in examining a petitioner's ability to pay the proffered wage, USCIS will not combine the petitioner's net income and net current assets. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways or methods of demonstrating the petitioner's ability to pay the wage – one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.