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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



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FILE: [Redacted]
WAC 03 034 50318

Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a physical, occupational, and speech therapy provider. It seeks to employ the beneficiary permanently in the United States as a physical therapist.

As required by statute, a Form ETA 750, Application for Alien Employment Certification 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 submits a brief.

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 granting 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.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on November 5, 2002. The proffered wage as stated on the Form ETA 750 is \$22.57 per hour, which equals \$46,945.60 per year.

On the petition, the petitioner stated that it was established during 2000 and that it employs 115 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the

petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Colton, California.

In support of the petition, counsel submitted a letter from the petitioner's CFO stating that the petitioner has more than 100 employees and is able to meet its payroll obligations.

On January 23, 2003, the California Service Center requested, *inter alia*, additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested that the petitioner prove its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements, and that the evidence cover the period from 2001 to the date of that request. The Service Center also requested that the petitioner provide copies of its Form W-3 transmittals showing wages it paid during 2001 and 2002.

The Service Center observed that 8 C.F.R. § 204.5(g)(2) gives it the option of accepting the statement of a financial officer of a petitioner as evidence of the petitioner's ability to pay the proffered wage, but does not preclude the Service Center from requesting additional evidence of ability to pay the proffered wage in appropriate cases. The Service Center gave no specific reason for disregarding the letter from the CFO or for finding that the instant case is an appropriate case for requesting additional evidence.

In response, counsel submitted an additional copy of the CFO's letter stating that the petitioner has the ability to pay the proffered wage. Counsel also submitted the petitioner's unaudited financial statements for 2001 and 2002 and the petitioner's 2001 and 2002 W-3 transmittals. Those transmittals show that the petitioner paid a total of \$2,366,439.25 during 2001 and \$4,875,355.64 during 2002.

On April 22, 2003, the Service Center issued a second request for evidence in this matter. The Service Center observed that the petitioner has filed additional alien worker petitions, some of which remained pending. The Service Center stated that the petitioner must show the ability to pay the proffered wage of all of its beneficiaries. The Service Center again requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage during 2001¹ and 2002.

Again, the Service Center noted that 8 C.F.R. § 204.5(g)(2) gives it the option of accepting the statement of a financial officer of a petitioner as evidence of the petitioner's ability to pay the proffered wage, but does not preclude it from requesting additional evidence of that ability in appropriate cases. Again, the Service Center gave no specific reason for disregarding the CFO's letter.

In response the petitioner submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$1,371,971 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. As to its 2002 tax return, the petitioner submitted a Form 7004 Application for Automatic Extension of Time to File Corporate Income Tax Return asking that it be allowed to file its return by August 15, 2003.

¹ This office notes that, because the priority date is November 5, 2002, evidence of the petitioner's financial condition during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On July 10, 2003, the Service Center issued a third Request for Evidence. The Service Center requested, again, that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during 2002.

In response counsel submitted a letter, dated September 30, 2003. In that letter counsel stated he was submitting the petitioner's 2002 tax return and audited financial statements. Counsel did, in fact, submit a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. Counsel also submitted a cash basis profit and loss statement covering the period from January 1, 2003 through July 31, 2003. That profit and loss statement, however, is not audited.

The 2002 tax return shows that the petitioner declared a loss of \$1,495,307 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On October 8, 2003 the Service Center issued a fourth Request for Evidence. The Service Center noted that the record indicates that the petitioner has employed the beneficiary since November of 2002. The Service Center requested copies of the beneficiary's 2002 tax return, and of her 2003 tax return if it was then available. The Service Center requested that the Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary for employment during those years accompany those returns.

In response counsel submitted a letter, dated October 30, 2003, stating that the beneficiary began to work for the petitioner on November 22, 2002. With that letter, counsel submitted copies of the beneficiary's 2002 Form 1040 EZ, Income Tax Return for Single and Joint Filers with No Dependents. That return shows that the beneficiary declared adjusted gross income of \$3,600 during that year. The accompanying W-2 form shows that the petitioner paid the beneficiary \$3,600 during that year.

On November 24, 2003, the Service Center sent the petitioner a fifth Request for Evidence. The Service Center requested that the petitioner provide a copy of its 2003 tax return and copies of the 2003 W-2 form it issued to the beneficiary.

In response counsel submitted a letter, dated January 20, 2004, in which he stated that, as the 2003 calendar year had recently ended, the petitioner's 2003 tax return and the W-2 form showing wages paid to the beneficiary during that year were not then available.

The director ruled that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 20, 2004, denied the petition.

On appeal, counsel argues that, although the petitioner declared large losses during 2001 and 2002, its financial statements show that it is now making a profit. Counsel argues that the petitioner has, therefore, demonstrated the ability to pay the proffered wage.

Counsel states that the petitioner paid the beneficiary less than the proffered wage during the period before she received her physical therapist license. Counsel states that the petitioner raised the beneficiary's wage to

\$28 per hour after she received her license. Counsel observes that the lesser amount paid previously is not an indication of the petitioner's inability to pay the proffered wage, but reflects the petitioner's standard practice of paying physical therapist licensed applicants less until they are fully licensed.

This office does not take the lesser wage previously paid to the beneficiary as an index of the petitioner's inability to pay more. Having demonstrated the ability to pay that amount, however, the petitioner must now demonstrate the ability to pay the balance of the proffered wage.

Counsel urges that the financial statements provided should be considered evidence of the petitioner's ability to pay the proffered wage. Counsel mischaracterizes those statements as audited.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Generally, a petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The burden of demonstrating the ability to pay the proffered wage is not lifted from the petitioner by unsupported assertions.

The regulation at 8 C.F.R. § 204.5(g)(2), however, contains an exception to the requirement that a petitioner must demonstrate its ability to pay the proffered wage. If a petitioner employs 100 or more workers, the director may accept a statement from a financial officer of the petitioner that it has the ability to pay the proffered wage.

Such a statement was submitted in this case. The Service Center disregarded it, but declined to give any reason. Absent any reason, disregarding that statement would be an abuse of discretion. The record, however, contains a reason to doubt that the petitioner employs 100 or more workers as it asserts.

In response to the Service Center's request, the petitioner provided its 2001 and 2002 W-3 transmittals, which show that the petitioner paid a total of \$2,366,439.25 during 2001 and \$4,875,355.64 during 2002. On the Form I-140 petition, which was signed on November 4, 2002, the petitioner stated that it employed 115 workers at that time. Dividing that number into the total wages the petitioner paid during 2002 yields an average of more than \$42,000 per worker. That amount is consistent with the petitioner employing 115 workers as it claims, including various therapists, managers and clerical workers. Although the petitioner incurred a large tax loss during that year, it sustained its payroll obligations.

The petitioner's Form 1120 U.S. Corporation Income Tax Return, however, does not confirm that the petitioner paid wages of \$4,875,355.64 during that year. On that return, line 13, Salaries and Wages, does not show any salaries or wages paid by the petitioner. All of the deductions shown on that Form 1120 U.S. Corporation Income Tax Return, added together, are less than the \$4,875,355.64 the petitioner claims, on its W-3 form, to have paid during that same year.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp v. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001). This office does not consider the petitioner's statement that it employs 100 or more workers to be persuasive evidence that establishes the petitioner's ability to pay the proffered wage. The petitioner is obliged, therefore, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

The petitioner submitted no annual reports or audited financial statements. The petitioner must therefore demonstrate its ability to pay the proffered wage, if at all, with the tax returns it submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary and paid her \$3,600 during 2002.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will

consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$46,945.60 per year. The priority date is November 5, 2002.

During 2002, the petitioner paid the beneficiary \$3,600. The petitioner is obliged to show the ability to pay the \$43,345 balance of the proffered wage. During 2002 the petitioner declared a loss. The petitioner cannot show the ability to pay any portion of the proffered wage out of its income. At the end of that year the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which it might have paid the proffered wage during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.