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FILE: WAC 03 231 51480 Office: CALIFORNIA SERVICE CENTER Date: **APR 14 2006**

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a school of massage therapy. It seeks to employ the beneficiary permanently in the United States as a secretarial assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 the continuing ability to pay the proffered wage beginning on 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, Form ETA 750 was accepted for processing on January 4, 2000. The proffered wage as stated on Form ETA 750 is \$14.16 per hour, which amounts to \$29,452.80 per year. The ETA 750B, signed by the beneficiary on November 27, 1999, indicates that the beneficiary has worked for the petitioner since December 1990.

Part 5 of the preference petition, filed on August 8, 2003, indicates that the petitioner was established on January 1, 1980, has a gross annual income of \$380,000, a net annual income of \$5,000, and currently employs approximately eight workers.

Because the petition failed to include sufficient evidence establishing the petitioner's ability to pay the proffered wage, on April 19, 2004, the director requested additional evidence pertinent to the director's ability to pay the proffered wage of \$29,452.80 per year. He advised the petitioner that the evidence submitted in support of its ability to pay the proffered salary must include either annual reports, federal tax returns, or audited financial statements. He instructed the petitioner to provide additional evidence of its financial ability to pay the certified wage for 2000 through the year 2003. He requested that the petitioner provide copies of the beneficiary's

Wage and Tax Statements (W-2s) issued to the beneficiary by the petitioner for the year 2000 through 2003, as well as copies of the last four quarters of state quarterly wage reports. The director further requested that the petitioner provide evidence demonstrating that the beneficiary had obtained one year of qualifying work experience as set forth on the approved labor certification.

In response, as well as submitting an employer verification letter, the petitioner provided copies of Form 1099, Miscellaneous Income that it issued to the beneficiary for the years 2000 through 2003. They show nonemployee compensation paid to the beneficiary in the amounts of:

Year	
2000	\$ 2,186
2001	\$ 2,633
2002	\$ 4,028.50
2003	\$10,434

Accompanying state quarterly wage reports indicate that the petitioner carried two to three employees on its regular payroll and paid the rest as independent contractors. The petitioner additionally provided copies of internally generated profit and loss financial statements for 2000 through 2003. According to these documents, the petitioner reported net income as a loss in each of these years except 2002, when it reported net income of \$1,373.44.

The director denied the petition on August 21, 2004, noting that the petitioner's internal profit and loss financial statements were not responsive to his request for either federal tax returns, *audited* financial statements, or annual reports. Reviewing the figures reflected as losses contained in these statements, however, as well as the amounts that the petitioner paid to the beneficiary as shown on the 1099s, the director concluded that the petitioner had failed to establish its ability to pay the proffered wage because neither forms of evidence clearly established that the petitioner could pay the proposed wage offer of \$29,452.80.

On appeal, counsel asserts that the petitioner did not submit audited profit and loss statements because they do not have their books audited every year as it involves a large expense. He adds that these statements do not reflect the petitioner's weekly ability to meet payroll and include the normal seasonal lessening of demand at year's end. As additional evidence of the petitioner's ability to pay the proffered wage, counsel submits copies of compiled financial statements comprised of balance sheets and statements of income for the 2000 through 2003.

Counsel's assertions are not convincing. 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 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 during that time. 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 a given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as set forth above, the

record shows that the petitioner compensated the beneficiary \$27,266.80 less than the proffered wage in 2000; \$26,819.80 less than the proffered salary in 2001; \$25,424.30 less than the proffered wage in 2002; and \$19,018.80 less than the certified wage in 2003.

If the actual wages paid fail to a petitioner's ability to pay the proposed wage offer, CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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.

If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, as stated above, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown 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 regulation at 8 C.F.R. § 204.5(g)(2) requires that the evidence submitted to demonstrate a petitioner's continuing ability to pay the proffered salary must include federal tax returns, audited financial statements, or annual reports. If a petitioner believes that its audited financial statements are too expensive to submit to establish its ability to pay a certified wage, it may elect to provide federal tax returns as set forth in the regulation. But, it must be noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be *audited*. (Emphasis added.) A compilation as submitted on appeal is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). As noted by the director, it is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). As in this matter, this disclaimer is found at the beginning of a compilation where the accountant explains that no form of assurance or opinion can be expressed based on the figures presented, and that the financial statement has not been reviewed or audited. As such, the internally generated profit and loss statements, as well as the compilations submitted on appeal, cannot be considered as probative of the petitioner's ability to pay a proffered salary.

Moreover, it is noted that these compilations reflect consistent net income losses for each of the four years examined. Net current assets as the difference between current assets and current liabilities also appear to be relatively modest, ranging from a high of \$10,811.74 in 2000 to a low of -\$9,078.65. None of these figures suggest that the petitioner demonstrated either sufficient net income or net current assets to cover the respective shortfalls between the actual compensation paid to the beneficiary and the proffered wage in any of the relevant years, as discussed above.

The regulation at 8 C.F.R. § 204.5(g)(2) specifically requires a petitioner to demonstrate its ability to pay a proposed wage offer beginning at the priority date and continuing until the beneficiary obtains lawful permanent resident status.

Based on a review of the evidence contained in the underlying record and the additional evidence provided on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage 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.