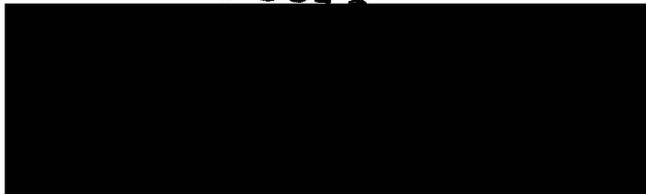




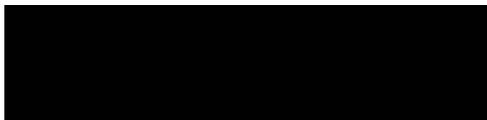
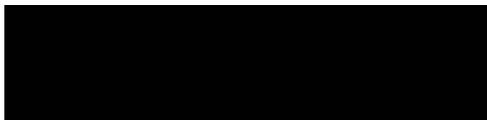
U.S. Citizenship
and Immigration
Services

56

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

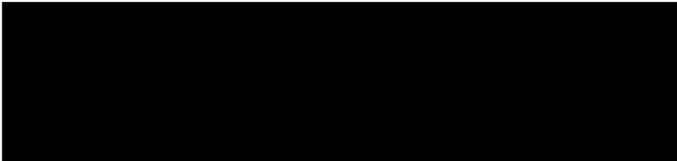


FILE: WAC 03 106 50170 Office: CALIFORNIA SERVICE CENTER Date: **MAR 21 2006**

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for the submission of a complete record of proceedings prior to a final decision by the AAO.

The petitioner is a tennis club. It seeks to employ the beneficiary permanently in the United States as a tennis professional instructor. 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 states that the petitioner has the ability to pay the proffered wage based on its total income. Counsel submits additional documentation.

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) 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 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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$30, or an annual salary of \$62,400. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June of 1996.

On the petition, the petitioner claimed to have been established on May 29, 1996, to have 25 employees, a gross annual income of \$197,390 and a net annual income of \$31,000. In support of the petition, the petitioner submitted letters of work verification from the beneficiary's former employers in Burma. The petitioner also submitted two IRS Forms 1120S, corporate income tax returns for tax years 2000 and 2001. The tax returns were for a business named [REDACTED], located in San Rafael, California. According to these documents, [REDACTED] had ordinary income of \$28,056 in 2000 and \$31,000 in 2001. This entity has the same FEIN as the entity listed on the ETA 750.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 12, 2003, the director requested additional evidence pertinent to that ability. The director also specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements for tax year 2002. The director stated that the record indicated that the beneficiary had worked for the petitioner from June 1996 to the present. The director requested that the petitioner submit a copy of the beneficiary's W-2 Form for years 2001 and 2002, as well as Form DE-6, Quarterly Wage Report for all employees for the last four quarters, along with names, social security numbers and number of weeks worked for all employees.

The director noted that the petitioner had submitted tax documents for a different company than the petitioner, and asked for a thorough explanation regarding the difference in names. With regard to establishing a qualifying relationship between [REDACTED] with [REDACTED] the director requested an annual report of [REDACTED], that listed all affiliates, subsidiaries, branch offices, and percentage of ownership, as well as the petitioner's articles of incorporation and current state business license.

It is noted that although the record contains the director's request for further evidence dated May 12, 2003, the record does not contain any letter from Mr. [REDACTED] with regard to the successor in interest issue. Nor does the record indicate the receipt of the petitioner's tax return for 2002 in response to the director's request for further evidence.

On October 12, 2004, the director referenced his request for further evidence and stated that on August 4, 2003, the petitioner submitted tax returns for the years 2000 and 2001 along with a request for an automatic extension to file its 2002 tax return. The director also noted that the petitioner did not provide W-2 Forms for the beneficiary, or Forms DE-6 with regard to all its employees. In addition, the director stated the petitioner's chief executive officer, [REDACTED] submitted a letter stating that [REDACTED] Management is a successor-in-interest to [REDACTED]. The director also noted that the petitioner failed to submit any evidence, such as a state business license or articles of incorporation. In his examination of the petitioner's 2000 and 2001 tax returns, previously submitted with the initial petition, the director stated that in 2000, the petitioner's taxable gross income was \$28,056, and its net current assets were \$26,066. With regard to tax year 2001, the director stated that the petitioner's taxable gross income in 2001 was \$31,000, while its net current assets were \$1,002. The director determined that as of the March 19, 2001 priority date, the petitioner had not established that it had the ability to continuously pay the beneficiary's proffered wage from March 2001 to the present.

On appeal, counsel submits a fictitious business name statement that states [REDACTED] Novato, and California, was doing business as [REDACTED] located at 5750 Wilshire Boulevard, Suite 160, Los Angeles, California.¹ The document states that [REDACTED] began to transact business under the name [REDACTED] in November 3, 1997. The form is date stamped as received on January 15, 2003.

¹ Although in his brief, counsel asserts that the fictitious business name statement is issued by [REDACTED], the document does not reflect this dual name.

Counsel also submits tax returns for [REDACTED] located at [REDACTED] San Rafael, California, for tax year 2001. Two other Forms 1120S for tax years 2002 and 2003 are submitted for [REDACTED] c. These documents indicate that the petitioner doing business as [REDACTED] Clubs, had ordinary income of \$31,000 in 2001, of \$421,664 in 2002, and \$252,927 in 2003. Counsel then submits a definition for the word "net income" from MSN Money website on the Internet. Counsel also submits a statement from [REDACTED] C.P.A., who identifies herself as a CPA and Chief Financial Officer of [REDACTED] doing business as [REDACTED]. Ms. [REDACTED] states that the petitioner has the ability to pay a wage of \$62,400 based on the petitioner's annual net operating income which is four to six times greater than the proffered wage. Counsel also submits a balance sheet for [REDACTED] Club, Inc, as of September 30, 2004, along with a profit and loss statement for [REDACTED] from January through September 2004. Finally counsel submits a profit and loss statement for January through September 2004 for [REDACTED] as well as profit and loss statements for the same entity for the periods of January through December 2001, 2002, and 2003.²

Counsel asserts that even if ordinary income is negative, CIS will generally assume that the petitioner can handle the additional salary, if according to its tax return, it has a favorable enough ration of total current assets to total current liabilities. Counsel asserts that the petitioner's gym equipment alone is worth nearly \$300,000, and its liabilities are minimal. Counsel also asserts that if the evidence submitted is not self-explanatory, CIS should turn to expert opinion letters such as the letter submitted by Ms. [REDACTED], the petitioner's financial officer. Counsel then states that case law further establishes the petitioner's ability to pay the proffered wage and cites to several unpublished AAO decision as well as to *Matter of Ranchito Coletero*, 02-INA-105 a Bureau of Alien Labor Certification Appeal (BALCA) decision.

As previously stated, the record does not reflect any materials submitted by the petitioner in response to the director's request for further evidence, with regard to whether the petitioner is a successor in interest to the present petitioner. Furthermore, the materials submitted by the petitioner on appeal suggest that the current petitioner may be doing business as [REDACTED], although this relationship is not clearly established in the record. Thus, the record is confused. While the AAO will examine the materials submitted on appeal, the petition shall be remanded to the director for submission of the complete record. The AAO will comment on the materials found in the record as presently constituted, while acknowledging that the petition will be remanded for the submission of the complete record.

Counsel's reliance on the profit and loss statements from the [REDACTED] which it appears to suggest is the same business as the petitioner, is misplaced. First, the record does not reflect the relationship between [REDACTED] and the petitioner, other than they are located at the same address. Second, 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the

² Based on Ms. [REDACTED] letterhead, the [REDACTED] is located at the same address as the petitioner, namely, [REDACTED]. Ms. [REDACTED] does not list [REDACTED] LA in her letterhead.

representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel refers to unpublished AAO decisions and to *Ranchito Coletero*, a BALCA decision and states that these decision lend credence to the petitioner's ability to pay the proffered wage. With regard to the AAO decisions, counsel does not provide published citations for these cases. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, with regard to BALCA decisions, Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Again, precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

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 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. Although the beneficiary indicated on the Form ETA 750 that he had worked for the petitioner since May 1996, the petitioner provided no evidentiary documentation to further establish this assertion. 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)). In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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. 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). 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 the Service should have considered income before expenses were paid rather than net income. It is noted that the priority date for the instant petition is March 19, 2001. Therefore the income tax return for 2000, submitted with the initial petition, is not dispositive.

In addition, the 2001 tax returns submitted with the initial petition and on appeal are for a business with an employer identification number of 68-0383986 and an incorporation date of May 29, 1996. This employer identification number and incorporation date is the same as that listed on the Form ETA 750. The tax returns submitted on appeal for tax year 2002 and 2003 are for a business with an employer identification number of 68-0304990, and with an incorporation date of June 8, 1993. As noted previously, the record is confused. As suggested by the director in his decision, there is insufficient evidence in the record to establish the relationship between [REDACTED] and its mother company, [REDACTED]. Furthermore as previously stated, the fictitious name statement submitted by the petitioner establishes no relationship between the petitioner, identified as [REDACTED] and either [REDACTED] or [REDACTED] Clubs, the two businesses named on the statement. If the petitioner is only one of several facilities owned by [REDACTED] the record is not clear as to what extent the resources of the mother company are available to pay the beneficiary's proffered wage.

The evidence indicates that the business identified as [REDACTED], or [REDACTED] Inc. is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. [REDACTED]'s tax returns for 2001, 2002, and 2003 show the following amounts of ordinary income: \$31,000 in 2001, \$421,664 in 2002, and \$252,927 in 2003. [REDACTED] net income for 2002 and 2003 are sufficient to establish its ability to pay the proffered wage of the petitioner to pay the proffered wage of \$62,400. A petitioner must establish the elements for the approval of the petition at the time of filing. However, a petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). [REDACTED]'s net income in 2001, the year in which the priority date is established, is not sufficient to establish the petitioner's ability to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 a corporation's end-of-year net current assets are equal to or

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

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 submitted the following information for tax year 2001:

	2001
Ordinary Income	\$ 31,000
Current Assets	\$ 1,002
Current Liabilities	\$ 0
Net current assets	\$ 1,002

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of \$31,000, and net current assets of \$1,002, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. Although [REDACTED] established its ability to pay the beneficiary's wage in 2002 and 2003, it has not shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As previously stated, the record of proceedings is incomplete with regard to any materials submitted by the petitioner in response to the director's request for further evidence. Therefore the matter is remanded to the director for the submission of a complete record of proceedings prior to the issuance of a final decision by the AAO. Based on the record as presently constituted, the petitioner has not established its ability to pay the proffered wage. Also, as stated previously, the relationship between [REDACTED] and [REDACTED] remains unclear.

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 petition is remanded to the director for submission of a complete record of proceedings prior to the issuance of a final decision by AAO.