B6

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 190 50859 Office: CALIFORNIA SERVICE CENTER Date: NOV 29 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 private college. It seeks to employ the beneficiary permanently in the United States as a dancing 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 submits a brief and additional evidence.

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 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 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 April 2, 2001. The proffered wage as stated on the Form ETA 750 is $31 per hour for 40 hours per week, which, assuming year round employment, equals $64,480 per year.

On the petition, the petitioner stated that it was established on August 3, 1992 and that it employs seven 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 Glendale, California.

In support of the petition, counsel submitted the petitioner's 2000 Form 990, Return of Organization Exempt from Income Tax. That return covers the petitioner's 2000 fiscal year, which ran from July 1, 2001 through June 30, 2001. On that return the petitioner reported net assets or fund balances at the end of year of $54,776.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 14, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director

requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted the Form 990 return covering the petitioner's 2001 fiscal year, which ran from July 1, 2001 through June 30, 2002. On that return the petitioner reported net assets or fund balances at the end of year of $63,104.

The director determined 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 10, 2003, denied the petition.

On appeal counsel argues that the term "full-time" as applied to colleges does not imply 12 months per year, but only nine. Counsel argues that the petitioner's net assets or fund balances at the end of each of the salient years was sufficient to pay the proffered wage for nine months.

In support of his assertion counsel submitted an affidavit from the petitioner's president, dated March 7, 2003, and the section of the 2002 DOL Occupation Outlook Handbook. The Occupational Outlook Handbook supports counsel's assertion that college professors ordinarily work only nine months per year. The petitioner's president's affidavit states that the beneficiary will work only during the regular academic year and not be paid during the summer break.

The Form ETA 750 does not indicate, however, that the proffered position is for a college professor, but rather that it is for a "Teacher, Dancing, Middle and Near Eastern Dancing." None of the evidence submitted supports the proposition that dancing teachers ordinarily work only during the collegiate academic year.

Because the Form ETA 750 indicates that no college degree is required for the proffered position it is not a position for a professional pursuant to Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Because the proffered position requires two years of experience, it must qualify, if at all, as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

Further, as was noted above, section 203(b)(3)(A)(i) of 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 or **seasonal nature**, for which qualified workers are unavailable in the United States.

[Emphasis provided.]

If the position is, as counsel argues, a seasonal position, then the petition may not be approved. The petitioner must show the ability, and must intend, to pay the petitioner the proffered wage on a full-time basis throughout the entire year.

Because counsel has demonstrated, with an affidavit from the petitioner's president, that the petitioner has no such intent, and that the position is, in fact, seasonal; this decision need not dwell on the petitioner's ability to

pay that full-time wage throughout the year. According to facts asserted by counsel and attested to by the petitioner's own president, the proffered position does not qualify as a position for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), and the petition must be denied.

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.