U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FILE: WAC 05 041 54119 Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2007

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]

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dairy and feedlot. It seeks to employ the beneficiary permanently in the United States as a veterinary technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (D)L), accompanied the petition. The director determined that the petitioner had not established that the beneficiary had acquired the necessary qualifying employment experience as of the priority date of the visa petition. The director also determined that the petitioner had not established its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the beneficiary obtained the qualifying work experience and that the petitioner had the continuing financial ability to pay the proffered wage.

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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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 that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. 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 DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.[1] The proffered wage is stated as $8.50 per hour, which amounts to $17,680 per year.

The visa preference petition was filed on November 15, 2004. Part 5 of the petition indicates that the petitioner was established on April 27, 1995, claims gross annual income of $16,652,000, net annual income of $1,331,000, and currently employs 135 workers.

An addendum to the ETA 750B, signed by the beneficiary on June 27, 2003, indicates that she worked for the petitioner from May 2000 to August 2000.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. It is also stamped as having a correction approved by DOL. In this matter, item 14 states that the alien must have a minimum of two years of college and two years of training or two years of experience in the job offered of veterinary technician. Further, Item 15 "Other Special Requirements" states that graduation from a 2-year curriculum in veterinary technology or employment for at least two years as a veterinary assistant under the supervision of a veterinarian is required.

The director issued a request for evidence on May 5, 2005, instructing the petitioner to provide evidence showing that the beneficiary had obtained the requisite education, training, and experience required by the labor certification. The director also requested that the petitioner submit documentation establishing its continuing ability to pay the proffered wage. He advised the petitioner that this evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements, or, if the company employs one hundred or more workers, a statement from the financial officer of the organization that establishes the employer's ability to pay the proffered salary.

In support of the beneficiary's qualifying past work experience, the petitioner provided a letter from the "[redacted] in Guadalajara, Mexico, signed by [redacted], the general director. He affirms that the beneficiary was employed by the packing house between 1994 ad 1999 as an "internal organs quality control processing inspector and detector of problems and illnesses."

---

[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The petitioner also submitted copies of the beneficiary's educational credentials including her college transcript from the University of Guadalajara showing that she completed five years of academic study in Veterinary and Animal Husbandry Medicine from 1984 to 1989.

In support of the petitioner's financial ability to pay the proposed wage offer of $17,680 per year, the petitioner provided copies of a state unemployment tax and wage report for the second quarter of 2005 including a list of the workers and wages paid.

The director denied the petition on August 23, 2005. The director noted that the payroll tax reports do not establish the petitioner's ability to pay the proffered wage as they do not contain sufficient information relevant to the petitioner's financial position with which to determine its ability to pay the proposed wage offer of $17,680 per annum. The director also determined that the employment verification letter from the packing house in Mexico was too vague in describing the beneficiary's duties so as to confirm that she had two years of qualifying experience in the job offered of veterinary technician.

On appeal, in support of the petitioner's ability to pay the proffered wage, counsel submits copies of the petitioner's combined balance sheets along with the combined statements of income, equity, and cash flows for the years 2004 and 2005. They are accompanied by a transmittal letter from [redacted] P.C., indicating that the financial statements were reviewed but not audited. Counsel asserts on appeal that the petitioner employs approximately 150 people and pays quarterly wages of $976,610 per year.

Counsel also states that further evidence of the beneficiary's education and experience will be provided. He also contends that the beneficiary has satisfied the terms of the labor certification as she has completed five years at the University of Guadalajara while the certified position only requires completion of two years of college.

The regulation at 8 C.F.R. § 204.5(l)(2) referring to skilled workers, provides that "relevant post-secondary education may be considered as training for the purposes of this provision." In this case, we find that item 14 of the labor certification, including the stamped DOL correction approval stamp, allows two years of training or two years of experience in the job offered. Here, as shown by the record and as noted by counsel, the beneficiary has completed five years of university veterinary study. Therefore, her educational credentials satisfy the two years of college and two years of training as set forth in item 14, in lieu of demonstrating two years of work experience. Item 15 also seems to be consistent with this interpretation as it permits either education or employment as a veterinary assistant. The AAO finds that the petitioner has established that the beneficiary's educational credentials satisfy the provisions of item 14 and 15 of the labor certification.

Counsel's assertions relevant to the petitioner's continuing ability to pay the proffered wage are not persuasive. 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. 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. In this case, the record contains no indication that the petitioner employed the beneficiary after 2000.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* and *Ubeda v. Palmer, supra; see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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.

As set forth in 8 C.F.R. § 204.5(g)(2), a petitioner's demonstration of its continuing ability to pay the proffered salary must include either copies of annual reports, federal tax returns or audited financial statements. Neither the petitioner's unemployment wage and tax reports supplied to the underlying record, nor the material provided on appeal, can be considered probative to the petitioner's continuing financial ability to pay the certified wage of $17,860. The financial statements submitted on appeal represent a review of the petitioner's financial information. 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. As noted in the accompanying letter from the petitioner's accountant, the review is restricted to information based upon the representations of management. As such, the unaudited financial statements provided on appeal cannot be considered as determinative of the petitioner's ability to pay a proffered salary during 2004 or 2005.

As the petitioner has not demonstrated its continuing ability to pay the proffered wage to the beneficiary, the petition may not be approved.

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.