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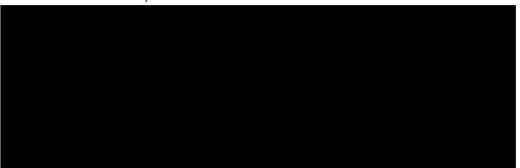
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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



FILE: WAC 02 255 50544 Office: CALIFORNIA SERVICE CENTER Date: **MAR 16 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on November 24, 1998, and approved by the Department of Labor on June 18, 2002. 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.

On appeal, the petitioner indicated that an appeal brief would be submitted in support of the appeal but the record contains no brief.¹ The petitioner has submitted additional documents in support of the appeal that purport to establish the petitioner's ability to pay the proffered wage. Among the documents are copies of business licenses issued by the State of California to the petitioner for five residential care homes. Additional documents include a letter from an accountant dated February 28, 2003, and various tax documents including a copy of Form 1120, U.S. Corporate Tax Return for 2001, and a Form W-2 reflecting wages paid to the beneficiary in 2002 by Mertz Care Home, Inc. These documents are presumably submitted in order to supplement the evidence in the record, but no additional explanation of what they purport to establish has been submitted other than a brief notation on the Form I-290B which states, "Explanation on petitioner's financial status."

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 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.

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 eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on November 24, 1998. The proffered wage as stated on the Form ETA 750 is \$1,724.67 per month, or approximately \$20,696 per year.

¹ The petitioner appears to have retained representation. The petitioner's ostensible representative, Evelyn Sineneg-Smith, has not filed a G-28, Notice of Entry of Appearance in this matter. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's putative representative is authorized to represent the petitioner. In addition, the record contains a memorandum signed by the petitioner indicating that a different individual, Rogaline Jimenez, was authorized to file an appeal on the petitioner's behalf. The Notice of Appeal was signed by Ms. Jimenez. It is also unclear, however, whether Ms. Jimenez is acting in any representative capacity. All representations will be considered, but the decision will be furnished only to the petitioner who will be considered to be self-represented.

With the petition, the petitioner submitted only the Form I-140 and the ETA 750.² Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the director, on October 23, 2002, requested additional evidence pertinent to those issues. Specifically, the Service Center requested proof of the beneficiary's employment history, and evidence demonstrating how the beneficiary satisfied the requirements of the position as set forth in question 15 of the ETA 750.³ On the issue of ability to pay, the Service Center requested copies of the petitioner's payroll summary and W-2's demonstrating wages paid to the beneficiary and any employees. In addition, the Service Center requested that the petitioner provide signed and certified copies of its tax returns for 1998 through 2001, including all related schedules, attachments and tables.⁴ The Service Center also requested evidence to establish the beneficiary's experience as listed on the ETA 750, to include specific information regarding the beneficiary's title, duties and dates of employment. It also requested information addressing the viability of the petitioner's business. In particular, it requested that the petitioner provide copies of any business licenses issued by city, county, state or federal authorities. It also requested that the petitioner provide evidence of the issuance of an occupancy permit for the Mertz Care Home. The Service Center also requested information related to the beneficiary's admission to the United States including a copy of the beneficiary's Form I-94 Arrival/Departure record, a copy of the biographical data page of the beneficiary's passport, and a copy of the U.S. nonimmigrant visa and a copy of the original U.S. immigration admission stamp.

In response, on or about January 15, 2003, the petitioner submitted various records related to each area of inquiry by the Service Center. The petitioner submitted a number of records relating to the beneficiary's experience and training. The primary document submitted was a letter from Mrs. [REDACTED] of the Philippines, who indicated that she had employed the petitioner to care for her child with special needs on a part-time basis from January 1997 to July 1998. Also submitted were a number of documents reflecting various types of health care related training that the beneficiary had completed.

On the issue of ability to pay the proffered wage, the petitioner submitted copies of Form 1120 or Form 1120A U.S. Corporation Income Tax Return for the years 1998, 1999, and 2000. No tax return for 2001 was submitted although the a cover letter indicated that the income tax return for 2001 was also included.

The director, apparently satisfied as to the evidence supporting the beneficiary's experience, addressed only the ability to pay the proffered wage in his decision. 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 January 28, 2002, denied the petition.

On appeal, the petitioner has made no assertions in support of the appeal, but presumably asserts that the wage and tax records related to 2001 establish the petitioner's ability to pay the wage of \$20,696.04 per year. The AAO concludes that the evidence does not support the granting of the petition. Because the petitioner has not offered any reasons why the director's decision is incorrect, the AAO could elect to summarily dismiss the appeal. However, the AAO will address the appeal in greater detail due to the fact that additional

² Although not a factor in this decision, two omissions are noted. Part 4 of the I-140 reflects that a previous immigrant visa petition had been filed by or on behalf of the beneficiary. However, the required explanation was omitted. In addition, the I-140 indicated in Part 3 that no A number exists for the beneficiary. CIS records indicate that the beneficiary has such a number.

³ Specifically, the ETA specified that the position required proficiency in English, knowledge of food nutrition, food preparation and storage, menu planning, First Aid, CPR, a health screening report, background clearance.

⁴ Although the Service Center requested that the copies be signed and certified, the regulations do not contain this requirement.

evidence was submitted on appeal, and to address certain questions raised by the evidence that cast doubt on the petition.

Issues Surrounding the Identity of the Petitioner

A review of the record raises questions regarding the identity of the petitioner. The employer is identified in the ETA 750 as [REDACTED] of Mertz Care Home 2. The ETA 750 identifies the address where the alien will work as [REDACTED]. As noted previously, the petitioner submitted five business licenses in connection with the request for additional information from the California Service Center. Those business licenses, issued by the State of California Department of Social Services, relate to five different locations in San Jose. Each license describes the facility by street address and identifies the number and type of residents to be housed at the facility. Each license also notes the facility number, the issue date of the license, and identifies the individual or entity to which the license was issued. The licenses disclose that they were issued between July 1993 and October 2001 and issued either to [REDACTED] or Mertz Care Home, Inc. Of the five licenses, the three most recently issued were issued to Mertz Care Home, Inc., whereas the earlier licenses, including the license for Mertz Care Home II located at [REDACTED] were issued to [REDACTED] of Mertz Care Home II is the entity identified as the petitioner in the ETA 750. It appears that at some point subsequent to 1993 and the issuance of the first two business licenses, a corporate entity was formed, known as Mertz Care Home, Inc. That entity sought and was issued licenses to operate at least three other facilities, each of which was identified in its particular license. It appears clear from the ETA 750 that it was the petitioner's intention to have the beneficiary work as a nurse assistant at Mertz Care Home II as that facility is identified through question 13 of the ETA 750 and its business license as a facility for developmentally disabled clients aged 2 through 17. By comparison, the business licenses of the other facilities limit them to serving individuals with other characteristics.

Although all of the facilities appear to be involved in residential care services for clients with special needs, the type of business entity submitting the petition on behalf of the beneficiary and the source of that entity's funding is significant. Put another way, while Mertz Home Care Inc. now exists and its tax records have been submitted in support of the petitioner's ability to pay the proffered wage, the evidence in the record indicates that it was not Mertz Care Home, Inc. that filed the petition on behalf of the beneficiary and is the beneficiary's employer, but rather [REDACTED] of Mertz Care Home II. It appears from the tax records that the corporation came into existence on April 30, 1998. It is not clear when Mertz Care Home II became part of the corporate entity or whether it remained as a separate entity. The fact that the petitioner submitted the business license in support of the appeal filed in 2003 with the entity's name still reflected as Mertz Care Home II and not Mertz Care Home, Inc. raises the possibility that it is an entity legally distinct from the corporation. It is possible, of course, that the petitioner has simply not obtained a new business license reflecting that it is now part of Mertz Care Home, Inc. However, without such document, or other evidence of the original petitioner's current status relative to Mertz Care Home Inc., and whether the corporation is a successor in interest to Mertz Home Care II, the AAO will not assume such status.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

Even assuming that the issue of Mertz Care Home II's connection with the corporate entity were satisfactorily explained, the evidence still does not establish that Mertz Care Home, Inc. had the ability to pay the proffered wage as of the priority date of November 24, 1998. The petitioner has submitted tax records and an accountant's letter in support of the ability to pay the proffered wage of \$20,696.04. The AAO finds no error

in the director's evaluation of the tax records. The tax records for 2001, the W-2 wage statement, and the accountant's letter appear to be offered to support the position that the petitioner can now demonstrate the ability to pay the wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, 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. *Supra* at 1084. The court specifically rejected the argument that the INS 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The net income or taxable income figures contained in the 1998 through 2001 Form 1120 Corporate Tax Returns for Mertz Care Home, Inc. do not further the petitioner's case. The tax records reflect the following: for 1998 the taxable income was (\$3,940); for 1999 the taxable income was \$127; for 2000 the taxable income was \$23,845; and for 2001 the taxable income was \$15,175. Only the taxable income for tax year 2000 exceeds the amount of the proffered wage. The petitioner has submitted a copy of a Form W-2 Wage and Tax Statement for 2002 which purports to establish that in tax year 2002 the beneficiary was employed by the petitioner and paid wages of \$36,750, an amount that exceeds the proffered wage. As with the other tax records, this document identifies the employer as Mertz Care Home, Inc., an entity that, as discussed, may or may not encompass the original petitioner, Mertz Care Home II.

Additionally, an examination of the W-2 compared to other documents in the record raises additional questions. The W-2 identifies the employer, Mertz Care Home Inc., as having an address of 2715 McLaughlin Avenue—the same address as the beneficiary. This is not unusual in and of itself as the original ETA 750 noted that the beneficiary would be expected to live on the premises. (See question 15 discussing other special requirements.) However, when the address listed on the W-2 is compared to the business licenses it reflects that it is the address for Mertz Care Home, licensed to [REDACTED] and identified as a facility licensed to serve developmentally disabled individuals ages 60 years and over. This is significant when the ETA 750 is examined. That document identifies the address at which the beneficiary will be employed as [REDACTED] San Jose, California—an address that does not correspond to any of the facility addresses identified in the business licenses--though it is identified as relating to the address of the employer Elvira Mertz of Mertz Care Home 2.⁵ (See ETA 750 questions 4-7.) Consequently, this raises the issue of whether the ETA 750 accurately identifies where the petitioner has worked and is presently working. Although there may be logical explanations for these discrepancies, there is nothing in the record that clarifies

⁵ Curiously, the ETA 750 lists the beneficiary's address as 2722 McLaughlin Ave., the address corresponding to the Mertz Care Home II identified in the business licenses as the small family home for developmentally disabled children. This would correspond to the type of employment identified in the ETA 750, but does not correspond to the employment address located in the ETA 750 as the location where the petitioner would be employed, contradicting the information supplied by the petitioner in question 13 of the ETA 750.

them even though the discrepancies are apparent from the face of the documents themselves. Nonetheless, even if the discrepancies were clarified and the W-2 was found to relate to the beneficiary's work for same employer identified in the original petition, the wages reflected for 2001, while greater than the proffered wage, can not cure the deficiencies of wages in the previous years.

To attempt to establish the petitioner's ability to pay, the petitioner offers the letter dated February 28, 2003, from the accountant Van Pham identified as CPA, Agent Mertz Care Home, Inc. The letter asserts, "the operational results for 1997 through 1999 may not be as useful in the historical analysis of the company's current cash flow ability in meeting its employee salary obligations." The letter notes that the company had experienced "significant operational growth" from 1997 through 2002 and listed a variety of reasons such as demand for care services, the addition of four additional care home facilities, and several intangibles in concluding that the projections for the future were for continued growth. While the letter projects an optimistic future for Mertz Care Home Inc., its conclusions are not backed up by any definitive financial statements such as an audited financial records. While the accountant's letter relies upon increased revenues in 2002, a copy of the 2002 tax return was not included among the materials submitted in connection with the appeal. In addition, despite the optimistic projections for increased revenues, such revenues would need to be examined in the context of the entire financial picture, including any corresponding increases in expenses.

The petitioner failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2001. 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 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.