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U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536*

[REDACTED]

File: WAC 00 263 54069 Office: CALIFORNIA SERVICE CENTER

Date: **APR 15 2004**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The Associate Commissioner for Examinations (now the Administrative Appeals Office) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted. The previous decisions of the director and Associate Commissioner will be affirmed. The petition will be denied.

The petitioner is a wilderness outfitter. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and seeks to employ the beneficiary permanently in the United States as a packer/wrangler. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition. The director also found that the petitioner had failed to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the labor certification application. The Associate Commissioner affirmed the decision of denial, dismissing the appeal.

In support of the motion, counsel submits a statement 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 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the beneficiary qualifying for the proffered position on the priority date. The petitioner must also demonstrate its continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was filed on September 15, 1995. The beneficiary's salary as stated on the labor certification is \$10.19 per hour, which equals \$21,195.20 annually.

The petition in this matter indicates that it is a petition for a skilled worker or a professional pursuant to section 203(b)(3)(A)(i) or section 203(b)(3)(A)(ii) of the Act. Classification as a position requiring a skilled worker is only available for positions requiring a minimum of two years experience. Classification as a position requiring a professional is only available for positions requiring a minimum of a bachelor's degree. The Form ETA 750 filed in this matter, however, does not indicate that a bachelor's degree is a prerequisite of the proffered position. The petition, therefore, will be analyzed pursuant to the regulations applicable to skilled worker positions.

With the petition, the petitioner submitted no evidence pertinent to its ability to pay the proffered wage. The petitioner submitted a statement from its owners that declared that the beneficiary had worked for the petitioner as an independent contractor. Part B of the Form ETA 750 states that the beneficiary worked for the petitioner from January 1992 to December 1992, from January to December 1993, and from January to December 1994. An addendum to that form also states that the beneficiary worked as a horse trainer/appraiser and riding instructor.

The director found that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage and insufficient evidence that the beneficiary possesses the requisite experience. On October 26, 2000, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage and the beneficiary's work experience.

As to the petitioner's ability to pay the proffered wage, the Service Center requested, in accordance with 8 C.F.R. § 204.5(g)(2) that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements showing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's work experience, the Service Center requested that the petitioner provide letters on the letterhead of the beneficiary's previous employers stating the beneficiary's position title, duties, dates of employment, and number of hours worked per week.

The petitioner did not respond to that notice. The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage or that the beneficiary has the experience required by the proffered position. The director denied the petition on January 6, 2001.

The appeal in this matter was filed on October 23, 2001. On appeal, the petitioner stated that it had never received the Request for Evidence and had not received the Notice of Decision until September 25, 2001. The petitioner requested an extension of time to supplement the appeal. No further information, argument, or documentation was received. The Associate Commissioner dismissed the appeal on August 22, 2002.

On the motion, counsel states that no additional evidence was submitted to supplement the appeal because the Associate Commissioner did not respond to the petitioner's request for additional time to supplement the appeal. This office notes that the petitioner requested additional time within which to supplement the appeal on October 23, 2001. The decision dismissing the appeal was issued on August 22, 2002, ten months later, which allowed sufficient time to supplement the appeal. Counsel asserts that this procedure conflicts with 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii), but submits no argument in support of that assertion.

Counsel reasserts that the petitioner did not receive the Request for Evidence issued on October 26, 2000. In support of that assertion, counsel provided an affidavit from [REDACTED] a representative of the petitioner. In addition to stating that the Request for Evidence was not received, the petitioner's representative states that she previously submitted "relevant portions" of the petitioner's 1998 and 1999 income tax returns. The record does not support the contention that portions of tax

returns were submitted prior to the submission of the motion.

Copies of portions of the 1995, 1996, and 1997 Form 1040 joint income tax return of [REDACTED] and [REDACTED] are appended to the motion. Those portions include Schedule C, Profit or Loss from Business (Sole Proprietorship), which indicates that [REDACTED] owned the petitioner during those years, and that Mr. and Mrs. [REDACTED] had one dependent. Also appended are copies of the 1998 and 1999 Schedule C, Profit or Loss from Business (Sole Proprietorship), from the Form 1040 return of [REDACTED] showing that he owned the petitioner during those years. Taken together, those returns appear to indicate that Louis Roeser owned the petitioner until 1998, when [REDACTED] acquired it.

Schedule C of the 1995 tax return shows that the petitioner suffered a loss of \$1,258 during that year. Line 31 of the Form 1040 shows that the Roesers' adjusted gross income during that year, including the petitioner's loss, was \$11,174.

Schedule C of the 1996 tax return shows that the petitioner returned a profit of \$18,248 during that year. Line 31 of the Form 1040 shows that the Roesers' adjusted gross income during that year, including the petitioner's profit, was \$21,276.

Schedule C of the 1997 tax return shows that the petitioner suffered a loss of \$22,268 during that year. Line 31 of the Form 1040 shows that the Roesers' adjusted gross income during that year, including the petitioner's loss, was \$22,217.

The 1998 Schedule C, Profit or Loss from Business (Sole Proprietorship), shows that, during that year, the petitioner returned a profit of \$32,566. The petitioner's owner's Form 1040 was not provided.

The 1999 Schedule C, Profit or Loss from Business (Sole Proprietorship), shows that, during that year, the petitioner declared a loss of \$7,126. The petitioner's owner's Form 1040 was not provided.

Counsel also submitted an affidavit from the beneficiary. In that affidavit, the beneficiary notes that he submitted Part B of the Form ETA 750 as evidence that he has the experience required by the proffered position, and that he subsequently provided more detail. The beneficiary reasserted the veracity of the statements contained on Part B of the Form ETA 750. Counsel argues that this affidavit establishes the beneficiary's qualifying experience.

Finally, counsel submitted a letter, dated April 21, 1994, on letterhead of a travel agency in Brussels, signed by the Chairman/General Manager of that company. That letter states that the beneficiary worked for the company as an independent travel consultant creating, organizing, and guiding trail rides, pack trips, and other equestrian activities in the American West since 1986.

In the brief, counsel notes that the petitioner's Gross Receipts, Labor Costs, and Gross Income have consistently exceeded the amount of the proffered wage, and argues that those figures show the ability to pay the proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's Gross Income exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year². The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's Schedule C, Line 31, Net profit.

The owner of a sole proprietorship is obliged to use his own funds, if necessary, to pay the debts and obligations of the company. Therefore, if a petitioner is a sole proprietorship, the income and assets of the petitioner's owner may be considered in determining the petitioner's ability to pay the proffered wage. In such an instance, however, the petitioner must demonstrate not only that its net profit combined with its owner's income and assets was sufficient to pay the proffered wage, but that the owner would retain the ability to support his family after payment of the proffered wage.

The priority date of the petition is September 15, 1995. The

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² Similarly, the petitioner might have provided evidence of wages it paid to the beneficiary during each of the years since the priority date, but did not. If those amounts were in evidence, they might be considered in the determination of the petitioner's ability to pay the proffered wage.

proffered wage is \$21,195.20. During 1995, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only the ability to pay that portion which would have been due had the petitioner hired the beneficiary on the priority date. On the priority date, 257 days of that 365-day year had already elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 108 days. The proffered wage times $108/365^{\text{th}}$ equals \$6,271.46, which is the amount the petitioner must show the ability to pay during 1995.

During 1995 the petitioner suffered a loss of \$1,258. During that year, the petitioner's owner declared adjusted gross income of \$11,174. The \$6,271.46 portion of the proffered wage, subtracted from the petitioner's owner's and the owner's spouse's adjusted gross income of \$11,174 leaves a difference of \$4,902.54. The petitioner has submitted no evidence that any other funds were available during that year with which the petitioner's owner could have supported his family. The inference that the petitioner's owner could not have supported his family during 1995 on \$4,912.54 is clear. The petitioner has not demonstrated the ability to pay the proffered wage during 1995.

The petitioner is obliged to show the ability to pay the entire proffered wage during 1996 and each ensuing year. During 1996 the petitioner returned a profit of \$18,248. The petitioner's owner and owner's spouse declared an adjusted gross income of \$21,276 during that year, including the petitioner's profit. The petitioner's adjusted gross income, minus the proffered wage, leaves a difference of \$80.80. The petitioner has submitted no evidence that any other funds were available during that year with which the petitioner's owner could have supported his family. The inference that the petitioner's owner could not have supported his family during 1996 on \$80.80 is clear. The petitioner has not demonstrated the ability to pay the proffered wage during 1996.

During 1997 the petitioner suffered a loss. The petitioner's owner and owner's spouse declared an adjusted gross income of \$22,217, including the petitioner's profit. The petitioner's adjusted gross income, minus the proffered wage, leaves a difference of \$1,021.80. The petitioner has submitted no evidence that any other funds were available during that year with which the petitioner's owner could have supported his family. The inference that the petitioner's owner could not have supported his family during 1997 on \$1,021.80 is clear. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998, the petitioner returned a profit of \$32,566. The petitioner's owner's 1998 personal income tax return was not provided. This office is unable to determine whether the owner could have paid the proffered wage out of the petitioner's profits and yet retained enough to support himself and any dependents. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner returned a profit of \$7,126, an amount less than the proffered wage. The petitioner's owner's 1999 personal income tax return was not provided. This office is unable to determine whether the owner had any additional funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the proffered wage during 1995, 1996, 1997, 1998, or 1999.

As to the beneficiary's employment history, this office finds that the statements of the petitioner and the beneficiary's own statements, even given under oath, are insufficient to establish the petitioner's qualifying experience. The other evidence pertinent to the petitioner's employment experience is the April 21, 1994 letter from a travel agency. That letter does not clearly state the number of hours the beneficiary worked per week. Whether the petitioner worked the equivalent of one full-time year during his years of experience with that company is unknown. That letter does not establish that the petitioner has the requisite year of experience in the proffered position.

The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date and has not demonstrated that the beneficiary has the employment experience required by the proffered position. Therefore, the objections of the Associate Commissioner (now AAO) have not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of August 22, 2002 is affirmed. The petition is denied.