

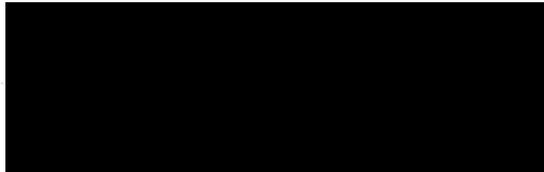
analyzing data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

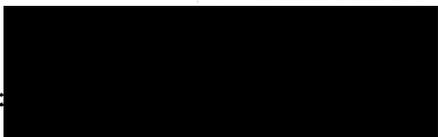


Handwritten initials: RB

APR 28 2004

FILE: WAC-02-226-50118 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: 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: 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.

Handwritten signature of Robert P. Wiemann
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(iii) 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 unskilled labor, 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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is September 9, 1998. The beneficiary's salary as stated on the labor certification is \$1,913.60 per month or \$22,963.20 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage or of the beneficiary's experience. In a request for evidence (RFE) dated August 26, 2002 the director requested evidence on each of those issues.

The petitioner responded to the RFE with a cover letter dated October 8, 2002 from an immigration consultant who is not an attorney, accompanied by additional evidence consisting of a letter and an employment verification form, each dated September 29, 2002, from the petitioner's owner confirming the beneficiary's work experience with the petitioner from August 1997 to the present; a letter and employment verification form, each dated September 29, 2002, from a residential care facility confirming the beneficiary's prior employment with that facility from July 1995 until July 1996; a letter from the beneficiary dated September 29, 2002 explaining her inability to obtain employment verification from the person who employed her in July 1996; a letter dated August 6, 2002 from the bookkeeper of the petitioner; and copies of Form 1040 U.S. individual income tax returns for the owner of the petitioner for 1998, 1999, 2000 and 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present, and denied the petition.

The Form I-290B notice of appeal is signed by the petitioner's owner. With the petitioner's notice of appeal is a Form G-28 notice of entry of appearance as attorney or representative signed by the immigration consultant

mentioned above. The G-28 form makes no claim that the immigration consultant is an attorney or an accredited representative. On the G-28, the first three blocks for representative qualification category are left blank and under category 4 for "Other" the G-28 states, "Bonded Immigration Consultant, Juris Doctor, Bond # WMI1211877."

The name of the immigration consultant does not appear on the most current list of accredited representatives published on the Internet web site of the Executive Office of Immigration Review and dated April 2, 2004. Nor does the statement in category 4 of the G-28 satisfy the requirements in 8 C.F.R. § 292.1 for a person who is neither an attorney nor an accredited representative to serve as a representative. Therefore, a copy of this decision will be furnished only to the petitioner.

On appeal, the petitioner submits additional evidence consisting of a letter dated March 5, 2003 from the petitioner's bookkeeper; a copy of Form 1040 U.S. individual income tax return for the owner of the petitioner for 2002; a letter dated March 3, 2003 from the petitioner's owner explaining certain items on her tax return for 2001; copies of investment reports from Fidelity Investments for accounts of the owner of the petitioner for the entire year 2002 and for the month of May 2002; a copy of a federal depreciation schedule for the owner of the petitioner for the year 2000; a copy of the first page of a bank statement of the World Saving Bank for an account of the owner of the petitioner for January 2002; a copy of a letter dated February 15, 2002 from an insurance broker summarizing the petitioner's workers' compensation premiums; a statement of personal rights for residents of California residential and child day care facilities; a physician's report form for the petitioner; one blank partial admission agreement of the petitioner; and copies of four completed admission agreements for four individual residents at the petitioning facility.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner submitted evidence that the beneficiary had been employed by the petitioner since August 1997. The employment verification form dated September 29, 2002 for the beneficiary by the petitioner states the monthly wages of the beneficiary at \$1,300.00 per month. However that form fails to specify the period for which the beneficiary was paid at that rate, and the context of the information appears to indicate that the figure \$1,300.00 represents the monthly wages of the beneficiary as of the date of the form. It is noteworthy that on the ETA 750, filed on September 9, 1998, the proffered monthly wage was originally \$1,000 per month, a figure which was later amended to \$1,913.60 per month. That amendment suggests that the monthly wage paid to the beneficiary has changed since the September 9, 1998 priority date. The petitioner failed to provide copies of any W-2 wage statements for the beneficiary which would show the actual amounts received by the beneficiary during the relevant time period. The record is therefore insufficient to establish the actual wages paid to the beneficiary by the petitioner from the priority date to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. *K.C.P. Food Co., Inc.*, *supra*, at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In the case of a sole proprietorship, the AAO evaluates the tax returns of the owner of the petitioner, and considers the owner's adjusted gross income as the relevant figure to show net income.

In the instant case, the tax returns for the owner of the petitioner submitted prior to the director's decision show the following amounts on line 33 for adjusted gross income: \$16,398 for 1998; \$27,250 for 1999; \$89,508 for 2000; and \$25,585 for 2001. The owner's adjusted gross income for 1998 is lower than the proffered wage of \$22,963.20 and is therefore insufficient to establish the ability of the petitioner to pay the proffered wage as of the September 9, 1998 priority date. The adjusted gross income in the other years is higher than the proffered wage. For those years, after subtracting the proffered wage the amounts remaining for the owner's household expenses are \$4,827 for 1999, \$66,545 for 2000 and \$2,622 for 2001. The petitioner failed to submit any statement of monthly household expenses for the petitioner's owner, but of the foregoing amounts, only the figure for the year 2000 is considered to be sufficient to pay the reasonable household expenses of the petitioner's owner. Therefore, the petitioner's tax returns fail to establish the ability of the petitioner to pay both the proffered wage and the owner's reasonable household expenses for the years 1998, 1999, and 2001. *See, Ubeda v. Palmer, supra*, at 650.

In his decision, the director analyzed the total income figures shown on the owner's tax returns, shown on line 22, rather than on the adjusted gross income figures shown on line 33. In using the total income figures as the basis for analysis, the director erred. Nonetheless, the director's conclusion that the petitioner had failed to establish its ability to pay the proffered wage from the priority date to the present was correct, since, as noted above, the adjusted gross income of the petitioner's owner was insufficient to pay both the proffered wage and the owner's reasonable household expenses in the years 1998, 1999 and 2001.

The petitioner's evidence also includes a letter dated August 6, 2002 from the petitioner's bookkeeper. The bookkeeper asserts that for the year 2001 the petitioner had \$15,000 in depreciation expenses, which were not out-of-pocket expenses. However, there is no precedent that would allow the petitioner to add back to net income the depreciation expense charged for the year. *See Elatos Restaurant Corp., supra*, at 1054.

For the foregoing reasons, the decision of the director that the evidence failed to establish the ability of the petitioner to pay the proffered wage from the priority date to the present was correct, based on the evidence then in the record.

On appeal the petitioner submits additional evidence. The petitioner makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the petitioner was put on notice by the director in the RFE dated August 26, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage.

The petitioner therefore was given reasonable notice of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The evidence submitted on appeal relates only to the years 2000, 2001 and 2002, and it therefore fails to establish the ability of the petitioner to pay the proffered wage as of the September 9, 1998 priority date or the following year, 1999. Moreover, the evidence submitted on appeal relies heavily on depreciation expenses as evidence of the petitioner's ability to pay the proffered wage. As noted above, no precedent allows the petitioner to add depreciation expenses back to net income in order to establish the petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp.*, *supra*, at 1054.

The evidence submitted on appeal therefore fails to overcome the decision of the director.

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.