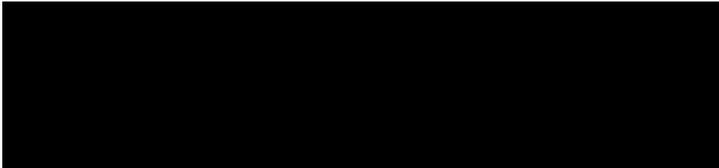


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



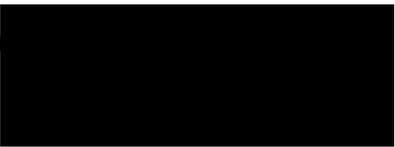
FILE: WAC 01 293 57240 Office: CALIFORNIA SERVICE CENTER Date:

NOV 1 0 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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 an elder care facility. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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)(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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 turns, in part, on the petitioner's ability to pay the wage offered from 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$9.81 per hour or \$20,404.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 6, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date, continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's original, signed federal income tax return, as received and stamped by the Internal Revenue Service (IRS) and State, annual report, or audited financial statement. Also, it requested the employer's quarterly wage reports to California (DE-6) with each employee's name, social security number, and number of weeks worked.

Counsel, in response to the RFE, included the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, as received and stamped by the IRS. Schedule L of the 2000 Form 1120S, the balance sheet, reported a deficit, (\$193), of net current assets.¹ The 2000 Form 1120S reported an ordinary loss from trade or business activities of (\$458), less than the proffered wage.

¹ The difference of current assets minus current liabilities equals net current assets. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

The petitioner provided its copy of the 2001 Form 1120S. It reported taxable income of \$18,855, less than the proffered wage. Schedule L stated current assets of \$8,272 minus current liabilities of \$8,410, or a deficit of net current assets of (\$138), less than the proffered wage. The record did not include, as the director requested, the hours that employees worked, either in Form 940 or any other account. Evidently, the petitioner did not employ the beneficiary.

In responding to the RFE, the petitioner offered the 2001 Arizona Wage and Tax Reports for all four (4) quarters (AZ reports) with the wages paid to current employees. The petitioner's manager, responding to the RFE in a letter dated April 29, 2002 (2002 RFE letter), stated that:

The beneficiary will replace one of the employees, [REDACTED] who will retire at the end of this year. [REDACTED] was paid \$20,535 in wages in 2001. Therefore, the petitioner has sufficient income to pay the beneficiary's salary, \$20,404.80 annually.

No statement of [REDACTED] (the retiree), or other documentary evidence, supported the assertion that she would, or did, retire at any time. The 2001 AZ reports reflected wages paid to the beneficiary, namely, \$8,774 for the second quarter, \$2,154 for the third, and none for the fourth. Counsel states that the entry for the first quarter was \$9,607, though an overprint blurs it, and the record contains no legible version. If it was \$9,607, the petitioner, in 2001, paid [REDACTED] \$20,535, equal to, or greater than, the proffered wage.

The director determined that the 2001 net income of \$18,555 was less than the proffered wage, that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits a brief and a new letter of the petitioner's manager dated June 6, 2002 (appeal letter). The brief and appeal letter merely state that, for 2001, the addition of net income, \$18,855, plus the deduction for depreciation, \$1,553 equal \$20,408, a sum equal to, or greater than the proffered wage, \$20,404.80.

As to the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence, the petitioner and counsel initiated the hypothesis of the retirement of the specified person in response to the RFE. They did not state the hours that the retiree worked in 2001, as requested in the RFE, give information on duties that the retiree performed, or present other credible evidence to document the retirement. If the duties were not full-time, or not the same as described on the Form ETA 750, the beneficiary could not replace the retiree. The petitioner merely asserted, but did not document, the fact of retirement in response to the RFE.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The retirement and replacement depend wholly on hearsay assertions of counsel and the petitioner about the retiree's future actions. Consequently, wages already paid to the retiree are not available to satisfy the proffered wage for the beneficiary.

The RFE provided the opportunity to include the evidence of the retirement and replacement. In fact, the petitioner proposed it, but did not provide the requested or pertinent evidence for it. The RFE serves the purpose to elicit further information to clarify whether the petitioner has established eligibility for the benefit at the priority date. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Counsel and the petitioner offered only the hearsay in favor of retirement and replacement in response to the RFE and analyzed other points on appeal. The petitioner, however, did not document any in support of the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

After a review of the federal tax returns, Forms 940, AZ reports, RFE letter, appeal letter, and brief, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

This decision turns, in part, on another issue, as to whether the Form ETA 750 supports the I-140 that the petitioner filed as of the priority date. The petitioner filed the I-140 for a skilled worker, requiring at least two (2) years of specialized training or experience. The Form ETA 750, however, indicated that the position of assistant manager required one (1) year of training in studies in health, and no other education, training, or experience. *See Matter of Katigbak, supra*.

The Form ETA 750, in Part A, block 14, allowed merely one (1) year of training, so it could never support this I-140 for a skilled worker, requiring two (2) years. Once the director has entered the service center's decision, the AAO has jurisdiction to consider the unfavorable decision, but none for amendments to the I-140 and speculative, lesser classifications. *See* 8 C.F.R. 103.3(a)(1)(ii). Consequently, the petition may not be approved, even if the petitioner demonstrated the ability to pay the proffered wage both at the priority date and continuing until the beneficiary obtains lawful permanent residence.

The Form ETA 750 did not support the I-140 for a skilled worker, and the I-140 must be denied. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the Form ETA 750 to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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.