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**U.S. Citizenship  
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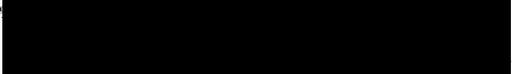


B6

FILE:   
WAC 02 217 51320

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 29 2004**

IN RE: Petitioner:   
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: 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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that she is an attorney but states that she is the petitioner's "bonded immigration consultant." That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a residential care facility for developmentally disabled clients. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 and denied the petition accordingly.

On appeal, the petitioner submits additional evidence.

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 granting 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 unavailable.

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 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 the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on July 27, 1998. The proffered wage as stated on the Form ETA 750 is \$1,724.67 per month, which equals \$20,696.04 per year.

On the petition, the petitioner stated that it was established on June 17, 1996 and that it employs one worker. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Gilroy, California.

With the petition, the petitioner submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on August 28, 2002, the California Service Center issued a request for evidence of that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence must consist of copies of annual reports, federal returns, or audited financial statements.

In response, the petitioner submitted copies of the petitioner's 1998, 2000, 2001 Form 990, Return of Organization Exempt from Income Tax. Those returns show that the petitioner ended those years with net assets or fund balances of \$149, \$464, -\$14,785, and \$18,512, respectively. Submission of Form 990 to the Internal Revenue Service indicates that the petitioner is chartered as a not-for-profit organization.

The director determined that the petitioner's returns did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 19, 2002, denied the petition.

On appeal, the petitioner submits (1) a copy of a letter, dated January 15, 2003, from the petitioner's accountant, (2) a history of the income of Virginio C. Pardo and Aniceta C. Pardo from 1993 through 2001, (3) a projected 2002 monthly profit and loss statement for Virginio C. Pardo and Aniceta C. Pardo, (4) the 1998, 1999, 2000, and 2001 Form 1040 joint personal income tax returns of Virginio C. Pardo and Aniceta C. Pardo, (5) a letter, dated November 14, 2002, from Aniceta C. Pardo, (6) the Form 1998, 1999, 2000, and 2001 Form 1040EZ of the beneficiary, and (7) a letter, dated January 15, 2003, from the president of a skilled nursing facility.

In the letter of January 15, 2003, the petitioner's accountant observes that the petitioner is a non-profit entity and that low year-end net assets or fund balances are normal and customary for such entities, rather than a sign of poor fiscal health.

In the letter of November 14, 2003, Aniceta Pardo emphasizes the income of another group home she and her husband operate as an index of the petitioner's ability to pay the proffered wage. She also appears to imply, though she does not explicitly state, that she and her husband would contribute to the petitioner as necessary to pay the proffered wage.

Such a promise, even if explicitly given, might be rescinded at will. The income and assets of the petitioner's owners, and of other entities they operate, will not be considered in the determination of the petitioner's ability to pay the proffered wage. The petitioner must demonstrate the ability to pay the proffered wage out of its own funds and any other funds available to it as a matter of right.

This office does not contest that non-profit entities ordinarily report low year-end net assets or fund balances. However, that fact does not relieve the petitioner of the obligation, pursuant to 8 C.F.R. § 204.5(g)(2), of demonstrating its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner also alleges, but provides no evidence to demonstrate, that it could have obviated or delayed some of its expenses as necessary to pay the proffered wage. If the petitioner had been able to demonstrate that ability, rather than merely asserting it, the additional amounts that the petitioner would have had available

to pay the proffered wage might have been considered. Merely asserting that some of its expenses were discretionary is insufficient.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net assets or fund balances figure reflected on the petitioner's federal return, without consideration of depreciation or other expenses. CIS may rely on federal returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's total revenue exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The amount of the petitioner's year-end net assets or fund balances, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner is able to show the existence of any other funds that are available to it, as a matter of right, CIS will consider those additional funds in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage is \$20,696.04. The priority date is July 27, 1998.

During 1998 the petitioner declared net assets or fund balances of \$149. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared net assets or fund balances of \$464. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared net assets or fund balances of -\$14,785. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net assets or fund balances during

that year. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared net assets or fund balances of \$18,512. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.