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U.S. Citizenship
and Immigration
Services



B6

FILE: EAC 02 001 50685 Office: VERMONT SERVICE CENTER Date: **DEC 30 2004**

IN RE: Petitioner [Redacted]
Beneficial [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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is a veterinary clinic. It seeks to employ the beneficiary permanently in the United States as a marine wildlife rehabilitator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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, counsel submits additional evidence and asserts that the director erred in evaluating the petitioner's evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 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 [Citizenship and Immigration Services (CIS)].

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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2000. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour, which amounts to \$20,800 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner, although the beneficiary states that she has worked for [REDACTED] located at the petitioner's address.

On the petition, the petitioner claims to have been established in 1996 and to have one employee. In support of the ability to pay the proffered wage, the petitioner submitted a copy of an unaudited financial statement, entitled [REDACTED] "Veterinary Clinic," covering the financial status of the petitioner as of

December 31, 2000. The petitioner also submits a letter, dated August 27, 2001, from Dr. Debra P. Moore. It states that the beneficiary's salary "will be provided by the "Caribbean Center for Marine Studies [CCMS] as a result of funding from the National Fish and Wildlife Foundation and private contractual agreements from [REDACTED] also affirms that she will supply supplemental income if necessary. The petitioner also provides a letter from [REDACTED] President of the [REDACTED] Inc. The letter is dated August 31, 2001. The letterhead confirms that the [REDACTED] Inc. operates from the same address as the petitioner's clinic. [REDACTED] states that the Caribbean Center for Marine Studies grants the Clinica Veterinaria [REDACTED] \$16,000 to be used in the wildlife rehabilitation project and to provide part of the salary for a marine wildlife rehabilitator. The petitioner also included a "professional services contract" executed by [REDACTED] and the alien beneficiary on August 29, 2001. It confirms that the beneficiary will provide services as a marine wildlife rehabilitator at the Clinica Veterinaria under funding provided by the clinic and by the [REDACTED]. The beneficiary will be paid \$1,600 per month for her services.¹

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on December 12, 2001, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also instructed the petitioner to provide a copy of its 2000 U.S. federal income tax return and a copy of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed the beneficiary in 2000.

In response, the petitioner, through counsel, submitted a letter, dated February 5, 2002 from an accountant, [REDACTED] as well as copies of other documents relating to the petitioner and to the Caribbean Center for Marine Studies. [REDACTED] explains that the petitioner, [REDACTED] holds a federal tax-exempt status and that under the law of Puerto Rico, her financial statements are not required to be audited. Along with [REDACTED] letter, counsel provides a cash flow report, miscellaneous invoices issued by the petitioner in 1999 and 2000, copies of the petitioner's bank account statements from the [REDACTED] covering the period from November 30, 1999 through January 31, 2000, and copies of the petitioner's bank account statements from the Western Bank covering the period from February 15, 2000 through December 17, 2000. The Santander statements present monthly balances ranging from \$400.46 to \$1,218.28. The Western Bank statements show monthly balances running from \$32.51 to \$2,046.08.

Counsel also submits various copies of checks from CCMS payable to either "cash" or to [REDACTED], copies of various documents relating to CCMS, including a certificate of incorporation showing that [REDACTED] and the alien beneficiary are the three incorporators of CCMS, and a copy of an Internal Revenue Service (IRS) letter regarding CCMS' non-profit status. A copy of a March 2000 letter from the National Fish and Wildlife Federation to CCMS is also provided, which reflects that a grant of \$28,800 had been approved. Two letters, dated January 2002, from CCMS, are also provided. One reflects that in 2000, CCMS awarded the petitioner part of the original grant that was received from the [REDACTED] and the other letter indicates that [REDACTED] was designated as the treasurer of CCMS in 1997.

¹ On an annual basis, this calculates out to \$19,200, slightly less than the certified wage of \$20,800.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered, and on July 22, 2002, denied the petition. The director noted that the petitioner's unaudited financial statements, copies of bank statements, invoices, and documents related to CCMS rather than to the petitioner, were not sufficient to establish the petitioner's financial ability to pay the proffered wage.

On appeal, counsel asserts that the evidence provided by the petitioner's cash flow statement, as well as by the other unaudited financial statements, and the petitioner's bank account statements were sufficient to demonstrate the petitioner's continuing financial ability to pay the beneficiary's proposed wage offer of \$20,800 per annum. Counsel argues that it would cause excessive financial hardship for a small business, such as the petitioner, to obtain audited financial statements and that this is an appropriate case, within the parameters of 8 C.F.R. § 204.5(g)(2), in which other kinds of evidence should be considered. Counsel states that Dr. Moore vouches for the financial information and that the director should have not concluded that such compilations representing management's opinion of a business' financial status suggest a presumption of fraud.

Counsel's assertions are not persuasive. As noted above, and as referenced by counsel, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). This alternative recognizes that large employers may have large net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to reject an employer's assurances and seek corroborative evidence. 8 C.F.R. § 103.2(b)(8). It remains that this simplified procedure allowable to establish a petitioner's ability to pay the proffered wage was not extended to employers with less than 100 employees. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited to be considered as reliable indicators of a petitioner's ability to pay a proffered wage during a given period. The regulation neither states nor implies that unaudited financial statements are acceptable as a substitute for the required evidence. This doesn't mean that CIS considers unaudited financial statements to be submitted with fraudulent intent; it merely means that CIS is obliged to consider only evidence complying with the regulatory requirements. In this case, the unaudited financial statements submitted to support the petitioner's ability to pay the proffered wage cannot be considered to conform to the regulatory requirements.

Counsel cites a 1992 AAO case in support of her assertion that unaudited financial statements may be an acceptable form of evidence to be considered. The facts of that case are not before the AAO in the instant matter. Moreover, the case cited by counsel is not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

While the regulation allows additional material "in appropriate cases," the AAO does not consider a petitioner's financial hardship to obtain the required evidence as an acceptable explanation to demonstrate why one of the forms of documentation specified at 8 C.F.R. § 204.5(g)(2) would be inapplicable or would otherwise paint an inaccurate financial picture of the petitioner. A petitioner's bank statements may constitute additional evidence to be

submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. It is further noted that in reviewing the balances of the bank statements submitted in this case, as set forth above, the AAO cannot conclude that they reflect a sustainable ability to pay the proffered wage.

As the director noted, the petitioner is not CCMS, but [REDACTED]. As such, other than to illustrate how the petitioner may derive part of its income, the documentation relating to CCMS does not directly translate to demonstrating the petitioner's ability to pay the proffered wage, because like bank statements, it represents an incomplete picture of the petitioner's financial status. Although [REDACTED] may be involved in the formation and operation of CCMS, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on a review of the evidence and argument presented in the underlying record and further offered on appeal, the AAO concurs with the director's conclusion that the petitioner failed to submit evidence sufficient to demonstrate that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, as noted in n.1, *supra*, the job offer made to the alien beneficiary appears to be inconsistent and slightly less than the certified wage set forth in the ETA 750.

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.