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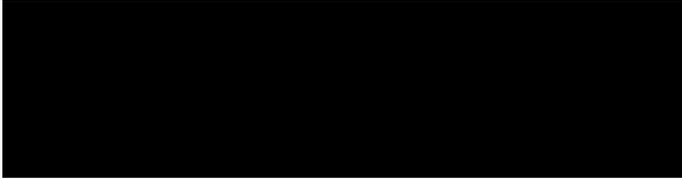
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



FILE: WAC 02 041 56396 Office: CALIFORNIA SERVICE CENTER Date: FEB 12 2004

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 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 is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a building maintenance person. 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.

(2) 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter is based, in part, upon 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. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is January 14, 1997. The beneficiary's salary as stated on the labor certification is \$17.18 per hour for a 40-hour week or \$35,734.40 per year.

Counsel initially submitted partial copies of Form 1120, U.S. Corporation Income Tax Return for 1997, 1998, and 1999. These returns each reflect that it represents the filer's financial data from a fiscal year running from October 1st to September 30th of the following year, beginning with October 1, 1997. The entity named as the filer of each of these returns is Mariner Post-Acute Network, Inc. & Subsidiaries. The address and employer identification numbers were different from the petitioner's. None of the subsidiaries were identified in the tax returns. Mariner Post-Acute Network's taxable income before net operating loss deduction (NOL) and special deductions was shown as:

1997	-\$172,786,449
1998	-\$575,413,120
1999	-\$335,492,248

As noted above, none of the years indicate that this filer could pay the proffered wage out of its taxable income. Further, as shown on the corresponding Schedule L of each tax return the filer's current liabilities exceeded its current assets. Only the 1997 Schedule L reflected that the beneficiary's salary could be paid out of net current assets. Finally, the period covering the priority date of January 14, 1997 is not represented on these returns.

On February 24, 2002, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's proposed salary of \$35,734.40 from the priority date and continuing until the beneficiary obtains lawful permanent residence. The director advised the petitioner that the 1998 and 1999 tax returns already

submitted were insufficient to establish the petitioner's ability to pay the beneficiary's proposed salary. The director requested the petitioner to submit either annual reports, federal tax returns complete with tax schedules and tables, or audited financial statements, consistent with the requirements of 8 C.F.R. § 203.5(g)(2). The director also instructed the petitioner to submit copies of the last four quarters of its state wage reports, copies of the 2001 payroll summary of wages paid to all employees, and evidence that the beneficiary possesses the necessary employment experience as shown on the approved labor certification. The director advised that this verification should convey the dates of employment, duties, and title of the job held by the beneficiary.

In response, counsel submitted copies of corporate tax returns for "American-Cal Medical Services, Inc." for the fiscal years 1996, 1997, 1998, and 1999. Although the financial information set forth on the tax returns of this company shows that it had the ability to pay the beneficiary's salary in each of these years from either its taxable income or net current assets, the record contains no other financial evidence responsive to the director's request. As with Mariner Post-Acute Network, Inc., these tax returns do not bear the name of the petitioner and contain a different employer identification number than either the petitioner or Mariner Post-Acute Network, Inc. The petitioner was not named within the tax return as a subsidiary and the filer's address was not that of the petitioner's. Its address is slightly different than Mariner Post-Acute Network, Inc.'s address.

The director denied the petition, finding that the petitioner had not established its continuing ability to pay the beneficiary's salary as of the priority date because it had not submitted its own tax returns, but rather the tax returns belonging to American-Cal Medical Services, Inc.

On appeal, counsel requests reconsideration of the director's denial and asserts that the director erred by not requesting clarification from the petitioner as to the relationship of the entities involved. Counsel states that the employer was not given an opportunity to explain the relevance of the evidence submitted as it relates to the petitioner's ability to pay the proffered wage. Counsel also submits a copy of a business license issued by the State of California to American Cal-Medical Services, Inc. reflecting that it is licensed to operate and maintain Santa Monica Health Care Center, the petitioner. This license was issued on December 30, 2001 and expired on December 29, 2002.

We agree that the director's February 2002 request for additional evidence could have been articulated better if it had specifically requested clarification as to the relationship between the petitioner and Mariner Post-Acute Network, Inc. prompted by the original submission of those tax returns. It is important to remember, however, that the petitioner bears the burden to prove that the beneficiary is eligible to receive the visa classification sought. In this case, it is difficult to believe that by submitting two completely different groups of tax returns, the petitioner or counsel would not have voluntarily included an explanation and provided sufficient evidence to establish that the petitioner is, in fact, a subsidiary of one of these companies or that one of these companies has a legal obligation to pay the salaries of the petitioner's employees beginning as of the January 1997 priority date. As it is, even on appeal, complete clarification was not offered. One copy of a business license issued with the effective date of December 30, 2001 does not speak to the relationship between the petitioner and either Mariner Post-Acute Network or American-Cal Medical Services prior to that date. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As set forth above, 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered salary beginning on the priority date. This has not been accomplished in this case.

After a review of the federal tax returns, and further argument and evidence presented on appeal, it is concluded that the petitioner has failed to establish 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.

Beyond the decision of the director, it is noted that the employment verification documents contained in the record do not establish that the beneficiary has had two full years experience in building maintenance as

mandated by the terms of the approved labor certification. The record contains a copy of a letter from Berkley East Convalescent Hospital (no address given) stating that the beneficiary has had experience as a dietary/kitchen helper. There is no employer letter in the record, however, that specifically identifies the dates of employment and hours worked that would confirm that the beneficiary has accrued experience in building maintenance pursuant to the requirements of the regulation at 8 C.F.R. § 204.5(1)(3) and the ETA 750-A.

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.