

PUBLIC COPY

**identifying 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

b7c



**U.S. Citizenship
and Immigration
Services**



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2004**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 103(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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on September 23, 1998, and approved by the Department of Labor on May 6, 2002. 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.

On appeal, the petitioner has submitted a memorandum and attachments that purport to establish that the petitioner's family expenses were much less than those determined by the director and thus the new totals support a finding that the petitioner had the ability to pay the proffered wage. Among the documents submitted are a copy of a high school diploma issued in 2002 relating to the son of Ines Otbo, the owner of Saint Agnes Home for the Elderly (hereinafter Saint Agnes Home or petitioner), and a printout of college related expenses for the latter part of 2002 relating to the owner's son.

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 the granting of preference classification to 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.

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 eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 23, 1998. The proffered wage as stated on the Form ETA 750 is \$1,506.27 per month, or approximately \$18,075 per year.

With the petition, the petitioner submitted the Form I-140, the ETA 750 and Form 1040 U.S. Individual Income Tax Returns for 1999-2001. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the Service Center, on October 10, 2002, requested additional evidence pertinent to those issues. Specifically, the Service Center requested proof of the beneficiary's employment history, to include letters from previous employers, evidence of wages paid in those positions, and evidence demonstrating how the beneficiary satisfied the requirements for the position as set forth in question 15 of the ETA 750.¹ The

¹ Specifically, the ETA specified that the position required proficiency in English, knowledge of food nutrition, food preparation and storage, menu planning, First Aid, CPR, a health screening report, background clearance.

Service Center also requested information relating to the beneficiary's admission to the United States including a copy of the beneficiary's Form I-94 Arrival/Departure record, a copy of all pages of the beneficiary's passport, including the biographical data page, a copy of the U.S. nonimmigrant visa, and a copy of the original U.S. immigration admission stamp. Also requested were copies of all I-797 approval notices issued to the beneficiary for all nonimmigrant classifications received, as well as copies of the beneficiary's social security card and proof of the beneficiary's California residence.

On the issue of ability to pay, the Service Center requested copies of the petitioner's quarterly wage reports for all employees for the previously year, along with a summary of the duties of each employee listed on the DE-6 forms. It also requested IRS computer printouts of the Forms W-2 demonstrating wages paid to the beneficiary, and signed and certified copies of its tax returns for 1998 through 2001, including all related schedules, attachments and tables.² Also requested was information addressing the viability of the petitioner's business, including copies of business licenses issued by city, county, state or federal authorities, evidence of Doing Business As (DBA), filings with the state and county government, evidence of occupancy permits for the petitioner and copies of current telephone directory listings, and copies of recent contracts or business plans demonstrating the viability of the business. Finally, because the Service Center determined that the petitioner was a sole proprietorship, it also requested a Statement of Monthly Expenses for the owner's family.

Evidence Submitted in Response to Request for Evidence

On or about December 24, 2002, the petitioner submitted various records related to each area of inquiry by the Service Center. On the issue of the beneficiary's experience and training the petitioner submitted a letter from [REDACTED] an individual from the Philippines who indicated that she had employed the petitioner to care for her mother from December 1996 to February 1997. Also submitted were a number of documents reflecting various types of health care related training that the beneficiary had completed, a copy of a transmittal letter from the Internal Revenue Service assigning a taxpayer identification number to the beneficiary, and a copy of a bank statement relating to the beneficiary. The petitioner also submitted copies of the beneficiary's passport

On the issue of ability to pay the proffered wage, the petitioner submitted copies of various tax records including Form 1040 U.S. Individual Tax for the years 1998, 1999, and 2000, and Form DE-6s for a one year period beginning with the last quarter of 2001, and W-2s related to the beneficiary for 1999-2001. The petitioner also submitted business licenses issued by the State of California Department of Social Services to Ines Otbo for Saint Agnes Home for the Elderly and Saint Agnes Home for the Elderly II issued in 1995 and 1996, respectively, as well as a business license issued to [REDACTED] and [REDACTED] for St. Jude's Home for the Elderly issued in 2000³. The petitioner also submitted six Admission Agreements for residents at Saint Agnes and Saint Agnes II. Additionally, the petitioner submitted a listing of monthly household expenses for Ines Otbo indicating that the household expenses were estimated to be \$3,179 per month.

The director, apparently satisfied as to the evidence supporting the beneficiary's training and experience, addressed only the ability to pay the proffered wage in his decision. The director determined that the

² Although the Service Center requested that the copies be signed and certified, the regulations do not contain this requirement.

³ While the petitioner submitted information related to St. Jude's Home for the Elderly, that appears to be a separate business entity and the information will not be considered by the AAO.

evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on January 30, 2003, denied the petition finding that, as a sole proprietor, the petitioner's household expenses must be considered in determining the ability to pay. The director concluded that the monthly household expenses prevented the petitioner from demonstrating ability to pay the proffered wage.

Petitioner's Ability to Pay the Proffered Wage

On appeal, the petitioner asserts that the director erred in determining that the petitioner did not demonstrate the ability to pay the wage and should not have considered the monthly household expenses in its review of the evidence. According to the petitioner, during the years 1999-2001, the owner and her family lived at Saint Agnes Home for the Elderly and "we therefore had no household expenses." The petitioner additionally asserts that during those same years the owner's son was in high school, so no college related expenses—calculated at approximately \$1,065—were incurred.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now 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. *Supra* at 1084. The court specifically rejected the argument that the INS 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The AAO concludes that the evidence does not support the granting of the petition. The petitioner asserts that during 1999-2001 the owner and her family lived at the Saint Agnes Home and thus incurred no household expenses. The AAO does not agree with this conclusion based on the evidence in the record. First, other than the petitioner's assertions, there is no evidence in support of this contention. Second, although the record reflects that the facilities were located on Flamingo Way in La Habra, the Form 1040 tax returns submitted for tax years 2000 and 2001 by the owner reflect a home address of 1081 Concord Way in La Habra. Third, even though the 1999 tax return does reflect the address of Saint Agnes Home as the one as the one at which the owner and her family resided, it would be an overstatement to say that the family incurred no household expenses at all during that period. It is also not clear how long during that year the petitioner resided at the Saint Agnes facility since the next year's tax return shows the Concord Way address.

The net income or taxable income figures contained in the 1999 through 2001 Form 1040 U.S. Individual Tax Return for the petitioner do not further the petitioner's case. The tax records reflect the following: for 1998 the adjusted gross income was \$28,803; for 1999 the adjusted gross income was \$25,607; for 2000 the adjusted gross income was \$32,318; for 2001 the adjusted gross income was \$51,084. Even reducing the amount of the household expenses by the amount attributed to the college expenses for the owner's son, we

find that the annual household expenses for each of those three years equal \$25,368⁴, and consequently each year's adjusted gross income would need to be reduced by that amount prior to considering the remainder as amounts available to pay the proffered wage. Only the remaining income for tax year 2000 exceeds the amount of the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 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 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.

⁴ This amount results from reducing the original amount of monthly household expenses of \$3,179 by \$1,065.