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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 255 50579 Office: CALIFORNIA SERVICE CENTER Date: MAR 31 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker, Professional, or Other Worker 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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 facility for developmentally disabled people. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the petitioner submits a brief and 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 the granting of 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.

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.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the

trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on September 10, 1998. The proffered wage as stated on the Form ETA 750 is $1,227.20 per month, which equals $14,726.40 per year. The Form ETA 750 states that the position requires three months of experience in the job offered.

With the petition, the petitioner submitted copies of its 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns.

The 1998 return shows that the petitioner declared a loss of $15,118 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $3,304 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $66,884 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $92,849 and current liabilities of $7,499, which yields net current assets of $85,350.

The Form ETA 750, Part B states that the beneficiary worked for the petitioner from April 1996 "to present," indicating the priority date. Part B also states that the beneficiary worked from August 1993 to July 1996 as a full-time Caregiver/Household Domestic Worker in a private household in Honolulu, Hawaii. The petitioner submitted no evidence in support of that asserted

employment history. This office notes, initially, that the employment history is apparently contradictory. The beneficiary could not have feasibly worked in both Hawaii and California during April, May, June, and July of 1996.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite three months work experience, the California Service Center, on October 16, 2002, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence of the petitioner's ability to pay the proffered wage should include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from employers giving the name, address, and title of the person verifying the employment history, and a description of the experience of the alien. The Service Center requested that the letters be on company letterhead and state the beneficiary's job title, duties, dates of employment, and the number of hours she worked per week. Finally, the Service Center requested pay statements to corroborate the asserted employment history.

The Service Center also specifically requested copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for the previous four quarters and Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 1998, 1999, 2000, and 2001.

As to the petitioner's ability to pay the proffered wage, the petitioner submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return and additional copies of its 1998, 1999, and 2000 returns. The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $2,841 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $76,982 and no current liabilities, which yields net current assets of $76,982.

The petitioner submitted what purports to be the petitioner's General Ledger as of November 30, 2002. That ledger documents various expenditures and deposits from July 1, 2002 to November 30, 2002.

The petitioner submitted copies of its California Form DE-6

Employer's Quarterly Wage Reports for the third and fourth quarters of 2002. Those reports do not show any wages paid to the beneficiary. The petitioner did not explain why reports for only two quarters were submitted, rather than reports for four quarters, as the Service Center requested on October 16, 2002. The petitioner submitted copies of its Form 941 Employer's Record of Federal Tax Liability for the third quarter of 2002.

As to the beneficiary's employment experience, the petitioner submitted a "certification," dated December 30, 2002 and signed by the petitioner's owner, stating that it employed the beneficiary from "April 1996 to 1999." In support of that assertion, the petitioner provided a copy of a 1999 W-2 form showing that the petitioner paid the beneficiary $5,955.60. The petitioner did not indicate the date in 1999 on which the beneficiary ceased to work for the petitioner. Further, the petitioner did not indicate why it failed to provide a copy of the petitioner's 1998 W-2 form in response to the Service Center's request of October 16, 2002.

Finally, the petitioner submitted another certification. It states that the petitioner worked as a caregiver and domestic worker from August 1993 to July 1996. That certification has a signature line for the signature of [redacted] and a space to enter the date, but is unsigned and undated. A note attached to that certification states, "This was sent to me I don't know this person Elena * [redacted] complete address telephone number (Needs Letterhead)."

On January 16, 2003, the director issued a decision in this matter. The director stated that the unsigned employment verification is not credible. The director found, apparently on the strength of the note attached to that letter, that it is fraudulent. The director further found, citing *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), that the remaining documentation submitted by the petitioner is therefore suspect. The director found, further still, that the petitioner's income tax returns do not demonstrate the ability to pay the proffered wage during 1998. Finally, the director found that the record established that the beneficiary had worked for the petitioner during 1999, but not during any later years. The director found that although the petitioner paid part of the proffered wage to the beneficiary during 1999, its tax return for that year did not demonstrate the ability to pay the balance of the proffered wage.

The director denied the petition, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and did not demonstrate that the beneficiary has the requisite three months of work experience.

The Form I-290B appeal submitted in this matter states, "We

enclosing [sic] documents to show Employer's ability to pay and the alien beneficiary's work experience."

With the appeal, the petitioner submits another copy of its California Form DE-6 for the last quarter of 2002 and additional copies of the first page of its 1999, 2000, and 2001 tax returns. The petitioner also submitted a letter, dated January 28, 2003, from its accountant. In that letter, the accountant notes that a depreciation deduction is a non-cash deduction and states that the petitioner's actual cash position is therefore more accurately indicated by adding its depreciation deduction to its net income.

The petitioner also submitted a list of its current employees, the addresses of the facilities at which they work, and the dates they commenced to work for the petitioner. The beneficiary is not named on that list.

The petitioner submitted an employment verification letter stating that the petitioner worked as a caregiver and household domestic for [redacted] in Ewa Beach, Hawaii from August 1993 to July 1996. That letter, dated January 31, 2003, purports to bear the signature of [redacted] The signatory's identity is not verified by a notary public's attestation and seal.

Finally, the petitioner submitted a letter, dated February 11, 2003, from the petitioner's immigration consultant. The consultant states that she mistakenly submitted the first employment verification letter with the note attached. She further states that attached note was from the petitioner's owner, stating that she does not know [redacted]

The consutant who submitted that letter did not submit a Form G-28, Notice of Entry of Appearance in this matter. The record contains no indication that the petitioner has agreed to be represented by counsel. All representations will be considered, but the decision will be furnished only to the petitioner.

The director found that the first employment verification letter attesting to the beneficiary's employment for [redacted] was fraudulent. The evidence to support that finding was weak. On appeal, the letter from the consultant posits an innocent and plausible explanation of how the note came to be attached to that letter. The conclusion of the director that the remainder of the petitioner's evidence is suspect no longer follows. The remaining deficiency of that employment verification letter is that it did not bear the signature of the alleged former employer. On appeal, the petitioner has submitted a signed version of the letter, overcoming that sole remaining defect. The letter conforms to the content requirements delineated in 8 C.F.R. § 204.5(l)(3(ii)(A).

The beneficiary's employment history still contains the apparent contradiction noted above. The director, however, did not base the decision of denial, even in part, on that contradiction. Therefore, the petitioner did not have an opportunity to reconcile the contradiction on appeal. This office declines to base today's decision, even in part, on that discrepancy.

This office finds that the petitioner has sufficiently demonstrated that the beneficiary has the requisite three months of experience in the job offered. The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's accountant is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In submitting a copy of a portion of its general ledger, the petitioner is apparently seeking to rely on its payment of various other expenses as an indication of its ability to pay the proffered wage. Showing that the petitioner paid other expenses, however, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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, Supra* at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh, Supra; 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 Immigration and Naturalization Service, now CIS, had properly relied upon 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 CIS should have considered income before expenses were paid rather than net income.

The priority date is September 10, 1998. The proffered wage is $14,726.40 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 252 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 113 days. The proffered wage multiplied by 113/365th equals $4,559.13, which is the amount the petitioner must show the ability to pay during 1998.

During 1998, the petitioner declared a loss of $15,118. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during 1998. The petitioner has not demonstrated the ability to pay the salient portion of the proffered wage during 1998.

During 1999 and ensuing years, the petitioner must show the ability to pay the entire proffered wage. During 1999, the petitioner declared taxable income before net operating loss deduction and special deductions of $3,304. That amount is

insufficient to pay the proffered wage. The petitioner paid the beneficiary $5,955.60 during that year, and has, therefore, demonstrated the ability to pay that amount during that year. That amount added to the petitioner's taxable income before net operating loss deduction and special deductions equals $9,299.60. That amount is still insufficient to pay the proffered wage of $14,726.40. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of $66,884. The petitioner has demonstrated the ability to pay the proffered wage out of its income during 2000.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $2,841. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of $76,982. The petitioner has demonstrated the ability to pay the proffered wage during 2001 out of its net current assets.

The evidence submitted does not demonstrate that the petitioner had the ability to pay the proffered wage during 1998 or 1999. Therefore, the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and the petition may not be approved.

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.