



U.S. Citizenship
and Immigration
Services



B6

FILE: WAC-02-198-53855 Office: CALIFORNIA SERVICE CENTER

Date: MAY 21 2004

IN RE: Petitioner:
Beneficiary:



PETITION: 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:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convalescent home. It seeks to employ the beneficiary permanently in the United States as a dietetic technician. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 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 [CIS].

Eligibility in this matter turns, in part, on 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. The petition's priority date in this instance is June 6, 1997. The beneficiary's salary as stated on the labor certification is \$11.49 per hour or \$23,899.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The petitioner's initial evidence included copies of Form 1120 U.S. corporate tax returns for the corporate parent of the petitioner for 1997, 1998 and 1999. In a request for evidence (RFE) dated September 10, 2002, the director required additional evidence on the petitioner's ability to pay the proffered wage for the years 1997 to 2001, and additional evidence on the beneficiary's experience.

Counsel responded to the RFE with additional evidence consisting of copies of Form 1120 U.S. corporate tax returns for the corporate parent of the petitioner for 1998, 1999, and 2001, a copy of a letter dated January 28, 2002 from the petitioner stating the name of its owner as Mariner Post Acute Network and the number of the petitioner's employees as 117, and a letter dated January 28, 1997 from the petitioner attesting to the beneficiary's experience.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present, and denied the petition.

On appeal, counsel submits a brief and additional evidence. All of the evidence consists of additional copies of documents previously submitted, except for copies of W-2 forms for the beneficiary for the years 1997 to 2001, which are submitted for the first time on appeal and a copy of an undated letter from the Chief Executive Officer of the corporate owner of the petitioner, which is also submitted for the first time on appeal.

Counsel states on appeal that the evidence showing a high amount of gross income and a high amount of assets of the petitioner was sufficient to establish the petitioner's ability to pay the proffered wage. Counsel also asserts that the financial figures stated in the director's decision were incorrect.

The AAO will first consider the evidence submitted prior to the decision of the director. The evidence submitted for the first time on appeal will then be considered.

The director's decision acknowledges receipt of the copy of a tax return for 1997, yet then in the succeeding two paragraphs the decision states that the 1997 return had not been received. In fact, as noted above, a copy of the 1997 return had been submitted with the I-140 petition. The director's decision correctly states that no copy of a return for the year 2000 was submitted. The director's decision analyzes the returns for 1998, 1999 and 2001 and correctly states the taxable income figures for each of those years as -\$575,413,120 for 1998, -\$335,492,248 for 1999, and -\$16,870,033 for 2001. The director also states figures for "assets" for each of those years in the amounts of \$53,593,531 for 1998, \$11,748,332 for 1999 and \$2,828,557 for 2001. However, those figures appear nowhere on the tax returns for those years, nor do they correspond to the results of calculations of current assets, net current assets, total assets, or net total assets for any of those years. It is therefore unclear how the director arrived at the figures which he cites as "assets" for 1998, 1999 and 2001.

The director concluded that the evidence submitted did not establish the ability of the petitioner to pay the proffered wage from the June 6, 1997 priority date until the present. The precise reason for the director's conclusion is not stated. Although the director cited figures for the petitioner's "assets" which ranged from more than \$53 million in 1998 to more than \$2 million in 2001 the director made no analysis of whether those assets indicated the ability of the petitioner to pay the proffered wage of \$23,899.20. The director appeared to find the supposed absence of a tax return for 1997 and the absence of a tax return for 2000 as gaps in the evidence which rendered unnecessary any further analysis of the petitioner's assets for the years 1998, 1999 and 2001.

Because of the errors in analysis in the director's decision, the AAO will make its own analysis of the evidence which was in the record prior to the decision of the director.

The letter dated January 28, 2002 from the petitioner states that the petitioner has one hundred and seventeen employees. Where a prospective U.S. employer has 100 or more employees the regulation at 8 C.F.R. § 204.5(g)(2) quoted above allows the director to accept a statement from a financial officer of the petitioner which establishes the ability of the petitioner to pay the proffered wage. Nonetheless, in the instant case no such statement was submitted, and the petitioner has chosen instead to rely on the tax returns for the corporate owner of the petitioner.

The Form 1120 U.S. corporate tax returns for the corporate parent of the petitioner show the following amounts on line 28, for taxable income before net operating loss deduction and special deductions: -\$172,786,449 for 1997, -\$575,412,120 for 1998, -\$335,492,248 for 1999, and -\$16,870,033 for 2001. No copy of a tax return for 2000 was submitted in evidence.

Calculations based on current assets and current liabilities shown on the Schedule L's attached to the above returns yield the following amounts for net current assets: \$40,280,483 for the beginning of 1997, \$429,801,038 for the end of 1997, -\$1,990,526,908 for the end of 1998, -\$1,137,219,428 for the end of 1999, and -\$1,088,813,658 for the end of 2001.

Although the above evidence establishes that the corporate parent of the petitioner is a very large enterprise, the tax returns indicate financial losses by the corporate parent on a very large scale, and a decline in net total assets from approximately \$397 million at the end of 1997 to approximately a negative \$1.4 billion at the end of 2001. Moreover, no information was submitted for the year 2000.

Counsel asserts that the corporate parent's high amount of income and high amount of assets are sufficient to establish the petitioner's ability to pay the proffered wage. However, from 1997 onward the expenses of the corporate parent were higher than its income and from 1998 onward the liabilities of the corporate parent were even higher than its assets.

It is true that the amount of the proffered wage in relation to the income and expenses of the corporate parent is negligible. But the continuing large financial losses of the corporate parent put in doubt the ability of the corporate parent to sustain its current level of operations. Corporations which suffer continual large financial losses often are forced to restructure their operations, which may include the sale or closing of subsidiaries and the termination of substantial numbers of employees. In the instant case, the tax returns of the corporate parent show a large reduction in the amounts spent on salaries and wages, from about \$1.2 billion in 1998 to about \$302 million in 2001. Those figures indicate a significant reduction in the number of persons employed by the corporate parent and its subsidiaries during that time period.

Based on the foregoing analysis, the evidence establishes that the resources of the corporate parent, if available to the petitioner, were sufficient to pay the proffered wage as of the June 6, 1997 priority date. However the evidence fails to show that the resources of the corporate parent were sufficient to pay the proffered wage from that date until the beneficiary obtains permanent residence.

Aside from the deficiencies in the financial evidence, the record also fails to establish the relationship of the petitioner to its corporate owner or the more fundamental question of the legal identity of the petitioner.

The letter dated January 28, 2002 from the petitioner states the name of the petitioner's owner as Mariner Post Acute Network. The letter gives no information about the nature of the entity of the petitioner itself, nor does it state what type of ownership interest is held by Mariner Post Acute Network. The letter fails to give the full legal name of the owner, by omitting the abbreviation "Inc.," an abbreviation which does appear on the tax returns submitted in evidence.

The tax returns submitted in evidence state the name of the taxpayer as "Mariner Post-Acute Network, Inc. & Subsidiaries" (1997) or as "Mariner Post-Acute Network, Inc. & Subs." (1998, 1999 and 2001). Each of the returns is checked as a consolidated return. An instruction on the Form 1120 beside the check block for a consolidated return states "(attach Form 851)." Nonetheless, no copy of Form 851 was attached to any of the tax returns submitted in evidence by the petitioner.

Internal Revenue Service Form 851 is titled Affiliations Schedule and is a schedule for information on affiliated corporations. In the current version of that form, for tax year 2003, Part I has items for the name of the parent corporation and for the names of each subsidiary corporation. Part II has items for the principal business activity of the parent corporation and each subsidiary corporation, and for stockholding information for each subsidiary. Part III has items for changes in stock holding throughout the year and Part IV has items for additional stock information. See Internal Revenue Service Form 851 (rev. Dec. 2003), available on the Internet at www.irs.gov.

The RFE dated September 10, 2002 contained the statement, "The tax return information should be accompanied by all supporting documents such as related tables, schedules and notes." The failure of the petitioner to include copies of Form 851 with any of the tax returns submitted in evidence leaves uncertain the corporate identity of the petitioner as well as the relationship of the petitioner to the parent corporation. The petition was filed in the name of Inglewood Health Care. The fact that the corporate returns of the parent are consolidated returns of the parent and its subsidiaries indicates that the petitioner is one of those subsidiary corporations. Moreover, the Internal Revenue Service employer identification number of the petitioner as shown on the I-140 petition is the same number which appears on the tax returns of Mariner Post-Acute Network, Inc. and Subs. According to information on the Internet web site of the Internal Revenue Service, parent and subsidiary corporations may use

the same employer identification numbers. Also, the Internet web site of Mariner Post-Acute Network, Inc. contains a link to the petitioner. The evidence submitted prior to the decision of the director does not state the legal name of the corporation doing business as Inglewood Health Care, the name stated as the petitioner on the I-140 petition.

In addition to the evidentiary deficiencies concerning the legal name of the petitioner, the evidence on the name of the corporate owner of the petitioner is inconsistent. In an amendment to the ETA 750 dated May 23, 2001 filed by the petitioner the petitioner states, "We conduct Business as "Inglewood Health Care Center." The petitioner then states, "We are Owned by Amerra Health Services (Paragon)." This information appears to be inconsistent with the information in the January 28, 2002 letter from the petitioner stating the name of the owner of the petitioner as "Mariner Post Acute Network." The record contains no evidence to indicate what relationship exists, if any, between Amerra Health Services (Paragon) and Mariner Post Acute Network.

The ETA 750B states that as of March 30, 1998 the beneficiary was presently employed by the petitioner, having begun working for the petitioner in June 1996. Nonetheless, no copies of W-2 forms for the beneficiary were submitted in evidence prior to the decision of the director.

The AAO in certain instances has approved petitions where a petitioner which is a subsidiary corporation has offered evidence of financial resources of its corporate parent to show the petitioner's ability to pay the proffered wage. See, e.g., In Re: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY], EAC 97 197 52397 (AAO 1998), available on the Westlaw database at 1998 WL 34022162 (INS). Nonetheless the AAO is aware of no petition which has been approved where the legal name of the petitioning subsidiary and the subsidiary's relationship to the parent did not appear in the evidence.

For the foregoing reasons, even if the tax return information for the corporate owner of the petitioner showed sufficient resources to pay the proffered wage for the relevant period, the evidence in the record prior to the decision of the director would still not support an approval of the petition because the record lacks evidence on the legal name of the petitioner and of the relationship of the petitioner to its corporate owner.

On appeal the petitioner submits new evidence, consisting of copies of W-2 forms for the beneficiary for the years 1997 to 2001 and a copy of an undated letter from the chief executive officer of the corporate owner of the petitioner. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on that issue by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated September 10, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. With regard to the petitioner's ability to pay, the RFE mentioned that evidence on certain years was required, namely evidence on the years 1997 to 2001.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on those issues for the first time on appeal will not be considered.

Nonetheless, even assuming that the evidence newly submitted on appeal was properly before the AAO on appeal, that evidence would fail to establish the petitioner's ability to pay the proffered wage during the relevant time period. The undated letter from the CEO of the corporate owner of the petitioner states that the corporate parent of the petitioner was in Chapter 11 bankruptcy protection for 27 months, beginning in January 2000. This information implies that the corporate parent did not emerge from bankruptcy protection until approximately April 2002.

Counsel states in his brief that the petitioner was in Chapter 11 bankruptcy proceedings in the year 2000, and therefore has no tax filing for that year. Counsel cites no legal authority which relieves a corporation from filing income tax returns while in bankruptcy proceedings. The fact that a copy of a tax return for the year 2001 was submitted in evidence, a year when the corporate owner was still in bankruptcy proceedings, appears to indicate that bankruptcy proceedings do not necessarily relieve a corporation from the obligation to file tax returns. The assertion of counsel that bankruptcy proceedings were the reason for the absence of a tax return for the year 2000 is unsupported by any evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaiqbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The W-2 forms for the beneficiary submitted on appeal fail to establish the corporate identity of the petitioner. The W-2 form for 1997 shows the employer as "Grancare, Inc. Inglewood Health Care Center." The W-2 form for 1998 shows the employer as "New Grancare, Inc." The W-2 forms for 1999 and 2000 show the employer as "Grancare, Inc." The W-2 form for 2001 shows the employer as "GC Services, Inc." The W-2 forms therefore show three different corporate names for the employer of the beneficiary. Grancare, Inc. and New Grancare, Inc. have the same EIN, and GC Services, Inc. has a different EIN. But neither of those numbers is the EIN given for the petitioner on the I-140 petition and given for the petitioner's corporate parent on its consolidated tax return. Therefore the evidence in the record contains references to a total of three different EINs.

Counsel's brief asserts that the W-2 forms show that the petitioner has paid the beneficiary's wages since 1997. But the brief offers no explanation for the different corporate names on the W-2 forms, nor for the different EINs. No evidence is found in the record which would indicate whether the three different corporations named on the beneficiary's W-2 forms are successors in interest of one another. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

For the foregoing reasons, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence.

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.