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U.S. Citizenship
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Services

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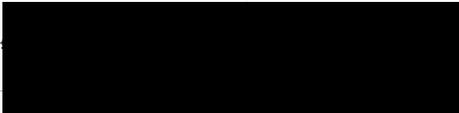
Office: CALIFORNIA SERVICE CENTER

Date: **JAN 13 2005**

IN RE:

Petitioner:

Beneficiary:



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: 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 sustained. The petition will be approved.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that she is an attorney but states that she is the petitioner's "Authorized Representative." That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental assistant. 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 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's ostensible representative submits a brief and additional evidence.

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 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.

8 C.F.R. § 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 February 8, 2001. The proffered wage as stated on the Form ETA 750 is \$17.38 per hour, which equals \$36,150.40 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner stated that it was established on December 1, 1987 and that it employs 30 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The Form ETA 750 indicates that the petitioner will employ the beneficiary in Simi Valley, California.¹

With the petition, the petitioner submitted the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of ██████████ DDS, Inc. Because that return lists the same address as the petitioner, this office believes the two to be identical. That return states that the petitioner declared ordinary income of \$107,503 during that year. At the end of the year the petitioner's current liabilities exceeded its current assets.

The petitioner submitted no evidence of the beneficiary's claimed employment experience with the petition.

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 two years work experience, the California Service Center, on December 27, 2002, requested evidence pertinent to both of those issues.

Consistent with the requirements of 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage 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.

¹ Although the Form I-140 states that the petitioner will employ the beneficiary at an address on Ventura Boulevard in Encino, California, this office notes that the address given is the ostensible representative's address, and believes that information is in error.

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 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.

The Service Center also specifically requested that the petitioner provide California Form DE-6 Quarterly Wage Reports showing the amounts it paid to all of its employees during the previous four quarters. The Request for Evidence stated that, "Pursuant to 8 C.F.R. § 103.2(b)(11) failure to submit **ALL** evidence requested **at one time** may result in denial of [the] petition." [Emphasis in the original.]

In response, the petitioner's Form DE-6 reports for the last quarter of 2001 and the first three quarters of 2002 were submitted. Those reports show that the petitioner employed between 27 and 32 workers during those quarters. The 2001 report shows that the petitioner employed the beneficiary during that quarter and paid her \$3,203.67. The 2002 reports show that the petitioner employed the beneficiary and paid her \$2,705.17, \$2,879.43, and \$2,662.68 during those three quarters, respectively.

The director denied the petition on March 18, 2003, 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

Subsequently, the petitioner's ostensible representative submitted an additional response to the Request for Evidence. Pertinent to the beneficiary's claim of qualifying employment, the petitioner submitted a letter in Spanish and an English translation. The translation states that the beneficiary worked as a full-time dental assistant in the affiant's dental office from September 1996 through May 1999. That employment claim matches the claim the beneficiary made on the Form ETA 750, Part B.

The response also included a Form DE-6 Wage Report for the last quarter of 2002, showing that the petitioner employed the beneficiary during that quarter and paid her \$2,670.24. That report, together with the other three 2002 Form DE-6 reports, shows that the petitioner paid the beneficiary a total of \$10,917.52 during 2002.

On appeal, the petitioner's ostensible representative states that the petitioner's owner contends that he has never failed to pay wages due to his employees. The ostensible representative asserts that the first response to the Request for Evidence was sent by the petitioner's bookkeeper, who was not authorized to send it. The ostensible representative asks that, therefore, the additional evidence sent in the second response be considered.

This office notes that not only was the response to the request for evidence sent in installments, contrary to explicit instructions, but the second installment of evidence was not timely. The Service Center, therefore, was correct in issuing the decision of denial without considering the second response to the request for evidence. This office, however, will exercise its discretion and consider the additional evidence on appeal.

With the appeal the ostensible representative submits the petitioner's Form DE-6 Wage Reports for the last two quarters of 2000 and the first three quarters of 2001, as well as additional copies of the reports previously provided.

The 2000 reports show the petitioner employed 35 during both of those quarters. The petitioner employed the beneficiary during the third quarter of 2000 and paid her \$1,106.97, but did not employ the beneficiary during the fourth quarter of 2000.

The 2001 reports show that the petitioner employed between 33 and 35 workers during those four quarters. The petitioner employed the beneficiary during the second and third quarters of 2001, and paid her \$2,709.50 and \$3,171.73 during those quarters, respectively. The petitioner did not employ the petitioner during the first quarter of 2001. Those reports, plus the report for the last quarter of 2001 which was previously provided, indicate that the petitioner paid the beneficiary a total of \$9,086.90 during 2001.

The ostensible representative also provided a tax summary that purports to compare the figures on the petitioner's 2000 tax return to those on its 2001 return. The 2001 figures are consistent with those on the tax return previously provided. Because the priority date is February 8, 2001, the figures pertinent to the petitioner's finances during 2000 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case beneficiary did not list her employment for the petitioner on the Form ETA 750, Part B. In fact, the beneficiary at one time denied having been employed during that period. The record contains a letter, dated March 8, 2001 that was submitted with the petition. In that letter the beneficiary stated, "I have been unemployed since 5/99 to the present day." The petitioner subsequently submitted California DE-6 forms indicating that it employed the beneficiary and paid her \$9,086.90 during 2001 and \$10,917.52 during 2002.

The beneficiary may have initially denied her employment because that employment was illegal. In view of the beneficiary's contradictory statement, however, this office does not find the evidence on the DE-6 forms to be credible. The amounts that the petitioner now claims to have paid the beneficiary during 2001 and 2002 will not be included in the determination of the ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, 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. The court specifically rejected the argument that CIS 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$36,150.40. The priority date is February 8, 2001. During 2001 the petitioner declared income of \$107,503. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The request for evidence was issued on December 27, 2002. On that date, the petitioner's 2002 tax return was not yet due. The petitioner's 2002 tax return was not subsequently requested. Therefore, the petitioner's failure to provide that return does not prejudice the petitioner's case.

The petitioner responded to the Request for Evidence and provided evidence pertinent to its ability to pay the proffered wage during the only salient year for which evidence was then available. The petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Further, the employment verification letter in the second installment of evidence submitted in response to the Request for Evidence sufficiently documents that the beneficiary has the requisite two years of qualifying experience in the job offered. The petitioner has, therefore, overcome both bases of the decision of denial.

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 met that burden.

ORDER: The appeal is sustained.