



U.S. Citizenship
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Services

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FILE: [REDACTED]
WAC 03 055 53347

Office: CALIFORNIA SERVICE CENTER

Date: JAN 25 2005

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

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:



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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a general maintenance coordinator. 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, counsel submits a statement.

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 January 17, 2001. The proffered wage as stated on the Form ETA 750 is \$17.74 per hour, which equals \$36,899.20 per year. The Form ETA 750 states that the position requires two years and six months of training and two years and six months of experience in the proffered position.

The Form ETA 750 B requests that the beneficiary list all jobs held during the past three years and any other jobs held which are related to the proffered position.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked as a senior equipment operator in the Philippines from January 1979 to September 1984, as a power plant senior boiler operator in the Philippines from April 1987 to August 1990, and as a "desk operator" for PIC International, Inc. from November 1995 to June 1996. On that form the beneficiary did not claim to have ever worked for the petitioner.

With the petition counsel submitted a statement from the beneficiary. On that statement the beneficiary claimed to have worked as a self-employed electrician in the Philippines from January 1998 to August 1998, as a driver and maintenance worker for a taxi company in the Philippines from September 1998 to March 2000, as a part-time recruiter in the Philippines from April 2000 to August 2000, and as the petitioner's general maintenance coordinator from October 2000 until at least March 12, 2001, the date of that statement.

With the petition, counsel submitted no documentation verifying either of the beneficiary's claimed employment histories and no evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on February 19, 2003, the California Service Center, on requested evidence pertinent to both of those issues.

Consistent with 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.

Consistent with the requirements of 8 C.F.R. 204.5 § (1)(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 (1) copies of the petitioner's 12 most recent California Form DE-6 Quarterly Wage Reports, (2) a copy of the petitioner's owner's¹ 2001 Form 1040 U.S. Individual Income Tax

¹ Actually, whether the Service Center intended to request the petitioner's tax return or the beneficiary's tax return is

Return with all schedules and attachments including Form W-2 Wage and Tax Statements, and (3) the beneficiary's pay stubs for the previous six months.

In response, counsel submitted the 2001 and 2002 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and her spouse. The 2001 return shows that the petitioner's owner operates the petitioning company and other care homes as sole proprietorships. During 2001 the petitioner returned a net profit before depreciation of \$34,078. The petitioner's owner and owner's spouse declared adjusted gross income of \$4,951 during that year, including all of the profit received from the petitioner and the other care homes.

The 2002 return shows that the petitioner's owner and owner's spouse declared a loss of \$44,166 as their adjusted gross income during that year. That amount included a \$43,770 loss from their sole proprietorships.

Counsel also submitted the beneficiary's résumé. That résumé states that the beneficiary received a bachelor's degree in mechanical engineering from Quezon University in the Philippines during 1973 and attended seminars in fire fighting and prevention and safety on land and seas.

The résumé further stated that the petitioner worked as a senior boiler operator in the Philippines from January 1979 to September 1984, as a boiler operator for Resource Science Arabia Ltd. in Saudi Arabia from August 1984 to March 1987, as a senior boiler operator in the Philippines from April 1987 to August 1990, as a housing contractor in the Philippines from September 1990 to September 1995, as a senior boiler operator for PIC International in the United Arab Emirates from November 1995 to June 1996, as a taxi operator/driver in the Philippines from August 1996 to November 1998, as a self-employed electrician in the Philippines from January 2000 to July 2000, and as the petitioner's general maintenance coordinator in Union City, California from October 2000 through May 2001.

Counsel submitted an employment verification letter, dated February 20, 1989, from Manila Electric Company. That letter states that the company employed the beneficiary in various capacities related to equipment operator and boiler operator from May 21, 1974 to December 31, 1978.

Counsel submitted an employment verification letter, dated February 24, 1992, from the national power company of the Philippines. That letter states that the company employed the beneficiary from January 1, 1979 to September 30, 1984 as a senior equipment operator.

Counsel submitted an employment verification letter, in both English and Arabic, from Resource Sciences Arabia, Ltd. of Saudi Arabia, dated June 24, 1985. That letter verifies that Resource Sciences hired the beneficiary on August 30, 1984 and continued to employ him on June 24, 1985.

Counsel submitted an employment verification letter, dated September 13, 1990, from Meralco Industrial Engineering Services Corporation. That letter states that the company employed the beneficiary at the Rockwell Thermal Plant as a Power Plant Senior Boiler Operator from April 13, 1987 to August 1990.

Counsel submitted an employment verification letter, dated July 8, 1997, from PIC International, Inc., of [REDACTED]. That letter states that the company employed the beneficiary at a location near [REDACTED] the United Arab Emirates from November 11, 1995 to June 11, 1996.

Counsel submitted an employment verification letter, dated October 3, 2002, from Digicell International, Inc. of Los Angeles, California stating that it had employed the beneficiary in an unstated capacity from June 20, 2001 and continued to employ him on the date of that letter.

Counsel did not submit the requested California Form DE-6 Wage Reports.

On May 29, 2002, the Director, California Service Center issued a Notice of Intent to Deny in this matter. The director noted that the evidence presented did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The notice stated that the Service Center had requested the petitioner's 12 most recent Form DE-6 Wage Reports and the W-2 forms showing wages the petitioner paid to the beneficiary, but had not received them. The Service Center stated that it was therefore unable to confirm that the petitioner had paid any wages to the beneficiary.

The notice accorded the petitioner 30 days to respond. The notice stated that, if the petitioner chose to respond, it should submit the petitioner's last 12 California Form DE-6 Quarterly Wage Reports, a statement of the petitioner's owner's monthly expenses, and the beneficiary's 2001 and 2002 tax returns with all schedules and attachments including Form W-2 Wage and Tax Statements.

In response, counsel submitted the petitioner's Form DE-6 reports for all four quarters of 2001 and the first two quarters of 2002. During those quarters the petitioner employed between five and seven workers, but did not employ the beneficiary.

Counsel also submitted a letter, dated June 24, 2003, from the beneficiary, stating that he began working for Digicell International on June 20, 2001 and was fired on May 30, 2003, and that during the interim he never received a W-2 form from them.

Counsel did not explain why only six reports were submitted, rather than the 12 reports requested. Counsel did not explain why he did not submit a statement of the petitioner's owner's family's monthly expenses. Counsel did not submit the beneficiary's tax returns and did not explain the failure to do so.

On July 18, 2003 the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, (1) evidence, in conformity with the requirements of 8 C.F.R. § 204.5(g)(2), to show the petitioner's ability to pay the proffered wage during 2002, (2) a statement of the monthly expenses of the petitioner's owner's family, and (3) copies of the W-2 forms the petitioner issued to the beneficiary during 2000 and 2001. The Service Center also requested that the petitioner state whether it currently employs the beneficiary.

In response, counsel submitted an additional copy of the 2002 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and the owner's spouse. Counsel submitted a letter, dated September 30, 2003, from the petitioner's administrator. That letter states that the petitioner employed the beneficiary from

October 2000 to April 2001 but did not issue him a W-2 form. Finally, counsel submitted year-to-date computer printouts of wages the petitioner paid to its employees during the third and fourth quarters of 2002.

Counsel still did not submit a statement of the petitioner's owner's family's monthly expenses or explain why it was not submitted.

The director denied the petition on October 14, 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.

On appeal, in response to the finding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, counsel asserts that the petitioner was able to pay the proffered wage even though it did not declare a profit during some years. Counsel states that the petitioner's ability to pay the proffered wage stems from other funds, including substantial savings, credit lines, and loans. Counsel submitted no evidence of those other funds.

In response to the finding that the petitioner has failed to demonstrate that the beneficiary is qualified for the proffered position, counsel submitted another copy of the beneficiary's résumé. Counsel did not, however, indicate which prior position or positions gave the beneficiary the requisite experience for the proffered position as stated on the Form ETA 750.

Counsel's allusion to additional funds is insufficient to demonstrate that the petitioner is able to pay the proffered wage. If counsel wishes to rely on savings, for instance, to show the petitioner's ability to pay the proffered wage, counsel must demonstrate the existence of those savings, rather than merely postulate them.

Evidence of credit lines or other credit available to the petitioner, even if counsel had submitted it, would be insufficient to demonstrate that the petitioner is able to pay the proffered wage. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

This office notes that one of the beneficiary's employment histories has an internal inconsistency and that two of those histories conflict with each other.

The beneficiary's résumé states that he worked as a senior boiler operator in the Philippines from January 1979 to September 1984 and as a boiler operator for Resource Science Arabia Ltd. in Saudi Arabia from August 1984 to March 1987. According to that history the beneficiary was working both in the Philippines and in Saudi Arabia during both August and September of 1984. That is manifestly unlikely.

That résumé further states that the beneficiary worked as a taxi operator/driver in the Philippines from August 1996 to November 1998. The beneficiary's statement of March 12, 2001, however, states that the beneficiary held that position from September 1998 through March 2000. Those statements conflict. The beneficiary's

March 12, 2001 statement asserts that the beneficiary worked as an electrician from January 1998 through August 1998, which apparently conflicts with the beneficiary's statement, on his résumé, that he worked as a taxi operator/driver during some of that period.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

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, the petitioner stated that it employed the beneficiary during part of the period since the priority date, but provided no documentary evidence of that assertion. Under the circumstances, this office shall not take as proven that the petitioner employed and paid the beneficiary.

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 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that she could have paid the proffered wage out of his adjusted gross income and supported herself and her family on the amount remaining.

The proffered wage is \$36,899.20 per year. The priority date is January 17, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$4,951, inclusive of the petitioner's profit. That amount is less than the proffered wage. The petitioner has not demonstrated that any other funds were

available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared a loss of \$44,166 as her adjusted gross income. That amount is inclusive of the profit or loss from the petitioner's operations. The petitioner could not have paid any portion of the proffered wage out of that loss. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The remaining issue cited in the decision of denial is whether the petitioner has demonstrated that the beneficiary has the requisite employment experience as stated on the Form ETA 750. The petitioner has submitted evidence that the beneficiary has held various positions. Only the position the beneficiary allegedly held with the petitioner from October 2000 to May 2001, however, was a general maintenance coordinator position. None of the other positions appear to be related to the proffered position.

The Form ETA 750 states that the proffered position requires two years and six months of experience in the proffered position. Even if credited, the beneficiary's claim of employment for the petitioner was less than a year. Further, as was noted above, the beneficiary's claimed employment history has been called into question, and the petitioner has provided insufficient evidence to demonstrate that it actually employed the beneficiary as it claims. For all of those reasons, the petitioner has failed to demonstrate that the beneficiary has the requisite two years and six months of experience in the proffered position.

Another issue exists in this case beyond those cited in the decision of denial. The Form ETA 750 states that the position requires two years and six months of training. Although the beneficiary's résumé indicates that the beneficiary has a bachelor's degree in mechanical engineering and has attended seminars, the record contains no evidence to support that assertion and no evidence that the alleged training was pertinent to the proffered position, that of general maintenance coordinator.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the beneficiary has the requisite experience. The evidence submitted does not demonstrate that the beneficiary has the requisite training. For all three reasons, 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.