



U.S. Citizenship
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Services

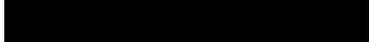
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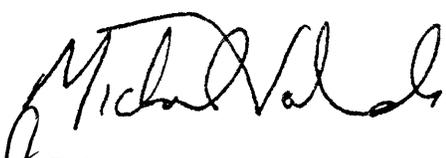
FILE:  Office: CALIFORNIA SERVICE CENTER Date: **MAR 25 2005**
WAC 02 230 53518

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:


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's current counsel submitted a Form G-28, Entry of Appearance in this matter. That Form G-28 states that counsel is a member of the California bar. Previously, counsel had other ostensible representation. The petitioner's prior representative also submitted a Form G-28. On that form, the petitioner's ostensible representative did not indicate that she is an attorney but that she is a bonded immigration consultant and Juris Doctor. That representative's name does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible previous representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner and counsel.

The petitioner is a care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a nurse 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 denied the petition accordingly.

On appeal, counsel submits a brief.

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 granting 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 petitioner must demonstrate the continuing ability to pay the proffered wage 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 1999. The proffered wage as stated on the Form ETA 750 is \$1,757.60 per month, which equals \$21,091.20 per year.

On the petition, the petitioner stated that it was established during October 1987 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Concord, California.

In support of the petition, the petitioner submitted a photocopy of its owner's 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns.

Schedule C of the 1999 return shows that the petitioner declared a loss of \$19,483 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$72,249, including the petitioner's loss.

Schedule C of the 2000 return shows that the petitioner declared a loss of \$28,724 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$56,280, including the petitioner's loss.

Schedule C of the 2001 return shows that the petitioner declared a loss of \$34,544 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$61,198 during that year, including the petitioner's loss. Because the first page of that return was photocopied with a W-2 form covering a portion of it, the number of dependents the petitioner's owner claimed during that year was occluded and illegible.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 9, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested (1) W-2 Wage and Tax Statements showing the wages the petitioner paid to the beneficiary during 1999, 2000, and 2001, (2) California Form DE-6 Quarterly Wage Reports for the previous four quarters, (3) a job title and job description for each of the petitioner's employees, (4) the monthly budget of the petitioner's owner and her family, and (5) evidence pertinent to any assets of the petitioner's owner upon which she intends to rely in paying the proffered wage.

In response, the petitioner submitted evidence, but not evidence of the petitioner's owner's assets, indicating that the petitioner did not intend to rely on its owner's assets in paying the proffered wage.

The W-2 forms show that the petitioner paid the beneficiary wages of \$9,500, \$13,900, and \$13,900 during 1999, 2000, and 2001, respectively. The petitioner is obliged to show the ability to pay the \$11,591.20, \$7,191.20, and \$7,190.20 balances of the proffered wage during those same years.

The petitioner's Form DE-6 Quarterly Wage Reports for the last quarter of 2001 and the first three quarters of 2002 show that the petitioner employed between four and seven employees during those quarters and paid its employees \$13,400, \$14,700, \$12,600, and \$15,400 during those quarters, respectively. The forms also show that the petitioner paid the beneficiary \$4,300, \$4,500, \$4,500, and \$2,000 during those quarters, respectively.

The budget submitted lists a gas and electric bill, telephone bill, water bill, garbage expenses, food, cleaning supplies, newspaper, liability insurance, cable TV bill, and payroll expenses. Based on the type of expenses

and the amount of those expenses, the petitioner appears to have submitted a list of its recurring monthly business expenses, rather than it's owner's monthly budget, as was requested.

The director determined 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, on January 13, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's bank balances are sufficient to cover the amount of the proffered wage, but submits no evidence in support of that assertion. Counsel cites non-precedent decisions of this office in support of the contention that those bank balances may be used to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Even had counsel submitted bank statements in support of his statements pertinent to the petitioner's bank balances, bank balances are generally not able to demonstrate a petitioner's continuing ability to pay the proffered wage beginning on the priority date. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Finally, the petitioner was asked, in the October 9, 2002 Request for Evidence, to provide evidence of any of the petitioner's owner's assets upon which it intended to rely. The petitioner provided no evidence of its bank balances in response to that request. The petitioner was given a reasonable opportunity to provide that evidence for the record before the visa petition was adjudicated. The petitioner failed to submit that evidence. Even had the petitioner submitted that evidence on appeal, rather than merely alluding to it, the AAO would not consider it for any purpose. *Matter of Soriano*, 19 I&N Dec. 762 (BIA 1988).

Should the petitioner wish the service to consider evidence pertinent to its assets and those of its owner, the petitioner may file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws.

In the appeal brief, counsel makes clear that he and the petitioner misinterpreted the request for a budget to be a request for the petitioner's operating expenses, rather than a request for the petitioner's owner's recurring monthly expenses. The Service Center requested that the petitioner provide "a statement of monthly expenses for the petitioner's family," and stipulated that

This statement must indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: housing (rent or mortgage), food, car

payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expense.

The Service Center made clear that it was requesting the budget of the petitioner's owner and the owner's family. The petitioner's response, provision of the petitioner's monthly business expenses, was not responsive to the Service Center's Request for Evidence. The failure of the petitioner to provide evidence pertinent to the petitioner's owner's monthly expenses renders CIS unable to compare the petitioner's owner's income to her expenses and to determine whether the petitioner's owner is able both to support her family and pay the wage proffered to the beneficiary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.