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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 020 51072 Office: CALIFORNIA SERVICE CENTER

Date: APR 04 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled 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 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

Cc: Evelyn Sineneng-Smith
1022 West Taylor St.
San Jose, CA 95126

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 operates homes for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered wage of the visa priority date and denied the petition accordingly.

On appeal, the petitioner¹ submits additional financial documentation to show that the petitioner has the ability to pay the beneficiary's proffered wage.

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 other 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 not available in the United States.

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

¹ Although "Ms. [REDACTED]" submitted a Form G-28 (Notice of Entry of Appearance as Attorney or Representative), the petitioner filed the appeal. Ms. [REDACTED] is not an authorized representative. The regulation at 8 C.F.R. § 103.2(a)(3), relating to representatives authorized to file appeals, provides in pertinent part:

Representation. An applicant or petitioner may be represented by an attorney in the United States as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

The regulation at 8 C.F.R. § 1.1(f) defines an attorney as a person who is a member of good standing in any state bar. The regulation at 8 C.F.R. § 292.1(a)(4) provides that an accredited representative is a person "representing an organization described in § 292.2 of this chapter who has been accredited by the Board." ((Board means the Board of Immigration Appeals." 8 C.F.R. § 1.1(e)). There is no indication in the record that Ms. [REDACTED] is an attorney or an accredited representative authorized by the Board.

It is further noted that 8 C.F.R. § 292.1(a)(2)(i), (iii), and (iv) provides that a law graduate not yet admitted to the bar may act as a representative if he or she is appearing at the request of the person requiring representation, that he or she has permission from the official "before whom he or she wishes to appear (namely an immigration judge, district director, officer-in-charge, regional director, the Commissioner, or the Board)," and that he or she "has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents..." Ms. [REDACTED] has submitted copies of a state-required surety bond and a G-28 in this case. These documents do not demonstrate that she falls within any of the relevant categories of representatives authorized by federal immigration regulations. Therefore, she is not authorized to act as a representative in immigration proceedings.

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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on March 2, 2001. The proffered wage as stated on Form ETA 750 is \$1,461.20 per month, which amounts to \$17,534.40 per year. On an amendment to Form ETA 750B, signed by the beneficiary on June 15, 2001, the beneficiary claims to have worked for the petitioner since February 2001. By subsequent letter, dated June 15, 2004, the employer claims that the beneficiary's employment began on April 20, 2001.

Part 5 of the petition, filed on October 29, 2003, states that the petitioner was established on June 1, 1988, has a gross annual income of \$631,919, a net annual income of \$11,986, and currently employs ten workers.

In support of its ability to pay the proffered salary, the petitioner did not initially provide any supporting documentation.

On April 28, 2004, the director requested additional evidence in support of the beneficiary's qualifying three months of work experience as required by the ETA 750, as well as additional evidence establishing the petitioner's ability to pay the beneficiary's proposed wage offer of \$17,534.40. The director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage for 2001 through 2003. The director also requested copies of the beneficiary's Wage and Tax Statement(s) (W-2s) from the start of her employment with the petitioner to the present, as well as various documentation related to the financial status of the beneficiary and the "petitioner's family."

Regarding the ability to pay the proposed wage offer of \$17,534.40, the petitioner supplied copies of the beneficiary's W-2s and Form 1099 (Miscellaneous Income) for 2002 and 2003. They were issued by [REDACTED] Inc." and contain the following information:

Wages and Compensation

2002	\$13,300
2001	\$10,579.29

Copies of Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001 were also provided with the petitioner's response. The 2000 return shows the filer's name as [REDACTED] with an incorporation date of June 1, 1998. The 2001 return shows the filer's name as [REDACTED] with an incorporation date of June 14, 1998. Both returns bear the same tax identification number and the same address, however, and for the purpose of this review, they will be considered as the petitioner's corporate returns for these years. They contain the

following information relevant to the petitioner's taxable income before the net operating loss (NOL) deduction² and current assets and liabilities:

	2000	2001
Taxable Income before NOL		
Deduction	\$41,007	\$15,700
Current Assets (Sched. L)	\$6,125	(none listed)
Current Liabilities (Sched. L)	-0-	(none listed)
Net Current Assets	\$6,125	

As set forth above, net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net taxable income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on July 29, 2004. He determined that the petitioner's net taxable income of \$15,700 was insufficient to pay the proffered wage of \$17,534.40. The director noted that no evidence of payment of wages to the beneficiary in 2001 was provided.

Reviewing the payment of compensation to the beneficiary, the director further concluded that the beneficiary's earnings of \$13,300 in 2002 was \$4,234.40 less than the proffered wage of \$17,534.40, and failed to demonstrate the petitioner's ability to pay during this year.

Similarly, the director found that the beneficiary's 2003 compensation of \$10,579.29 was \$6,955.11 less than the proffered wage and failed to establish the petitioner's ability to pay the proffered wage during this year.

On appeal, the petitioner submits various financial documentation relating to the personal holdings of [REDACTED] [REDACTED]. The record contains various references to this individual as an "owner/licensee" on the ETA 750, and as the "employer" on other submitted documents. None of the financial documentation, however, corroborates exactly what relationship Ms. [REDACTED] has to the petitioning corporation or to the beneficiary who bears the same last name.³

Ms. [REDACTED] personal holdings are not relevant to the consideration of the corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders. As such, CIS will not consider the financial resources of individuals or entities that have no legal

² For the purpose of this review, taxable income before the NOL deduction will be treated as net taxable income.

³ Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

obligation to pay the wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

With reference to a petitioner's ability to pay the proffered wage during a given period, CIS will initially review whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during a given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net taxable income figure 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*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*); *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). 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 the Service should have considered income before expenses were paid, rather than net income.

As the priority date of March 2, 2001 is covered by the financial data contained in the 2001 tax return, it is the more relevant than the 2000 return provided to the record. As noted by the director, no evidence of wages paid to the beneficiary by the petitioner in 2001 was provided. The 2001 corporate tax return fails to show any figures on the Schedule L balance sheet and the petitioner's net taxable income of \$15,700 could not cover the proffered wage of \$17,534.40.

The petitioner supplied no federal tax returns, audited financial statements, or annual reports, as required by 8 C.F.R. § 204.5(g)(2), covering any subsequent period. As shown by the evidence submitted, the petitioner did not pay the beneficiary the full proffered wage in 2002 or 2003. Therefore, the petitioner failed to demonstrate its *continuing* financial ability to pay the proffered wage in 2001, 2002 and 2003.

Beyond the decision of the director, it cannot be concluded that the employment verification letters provided to the record establish that the beneficiary accrued three months of qualifying employment as of the priority date of March 2, 2001. Item 14 of the ETA 750 provides that the applicant for the position of a caregiver in a home for the developmentally disabled must have three months in the job offered. The described duties for the certified position include cooking and housekeeping duties, but also include the assistance of six developmentally disabled residents with behavioral problems as well as monitoring their physical and emotional health.

CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). It may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) and (D) provides that the verification of a beneficiary's experience be provide 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. In this case, the petitioner provided three letters from the beneficiary's prior employers in the Philippines. Two letters are duplicates and do not come from an employer, but from ██████████ a person with whom the beneficiary lived on her days off. She claims that the beneficiary was a household domestic helper for '██████████' for about six months in 1999-2000. "Ms. ██████████" affirms that the beneficiary worked for her for about four years (1984-1988) performing housekeeping duties and babysitting a 1 ½ year old child. While these letters confirm that the beneficiary possesses housekeeping and babysitting experience, they do not establish that the beneficiary has had any caregiving or monitoring contact with developmentally disabled persons. It is noted that the beneficiary's employment with the petitioner did not begin until either February or April 2001, as noted above. It cannot be concluded from this evidence that the beneficiary obtained three months of relevant caregiving experience with developmentally disabled persons prior to March 2, 2001.

The petitioner has not established that it has the continuing financial ability to pay the proffered wage beginning on the visa priority date or demonstrated that the beneficiary possesses the requisite qualifying work experience as of the priority date. The petition will be denied for these reasons, with each considered as an independent and alternative basis for 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 not met that burden.

ORDER: The appeal is dismissed.