



U.S. Citizenship
and Immigration
Services

36

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE: WAC 04 024 50364 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



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 residential care home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/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 submit evidence establishing the beneficiary's qualifying work experience as of the visa priority date and denied the petition accordingly.

On appeal, the petitioner¹ submits additional evidence "to show that [the beneficiary] has experience in caregiving."

Although the director failed to make a determination relevant to the petitioner's continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, for the reasons explained below, the AAO finds that the evidence not only fails to demonstrate that the beneficiary had obtained the qualifying employment experience as of the priority date, but also fails to demonstrate that the petitioner has had the continuing ability to pay the proffered wage as of the priority date. Each issue will be considered as an independent and alternative basis for the denial of the petition.

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.

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(l)(3) provides:

(ii) *Other documentation*—

(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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also 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); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). **Here, Form ETA 750 was accepted for processing on October 23, 2000. The proffered wage as stated on Form ETA 750 is \$1,471.58 per month, which amounts to \$17,658.96 per year. On Form ETA 750B, signed by the beneficiary on October 16, 2000, the beneficiary does not claim to have worked for the petitioner.**

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 provides that the applicant for the position of a household domestic worker/caregiver in a residential care home must have three months in the job offered. The described duties for the certified position include cooking as well as monitoring and assisting developmentally disabled residents with their needs.

Part 5 of the petition, filed on November 3, 2003, states that the petitioner was established in August 1989, has a gross annual income of \$410,764, a net annual income of \$16,345, and currently employs three 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 relevant to the beneficiary's qualifying work experience as a household domestic worker and caregiver. The request for evidence stipulated that the petitioner would have until July 21, 2004, to submit the required documentation.

He specifically instructed the petitioner provide additional evidence to support the beneficiary's accrual of the required three months of experience as specified on the ETA 750, as well as the required CPR and health screening documentation. The director informed the petitioner that a letter describing the beneficiary's past qualifying employment should include a description of the beneficiary's title, job duties, dates of employment, and number of hours worked per week. The director further requested pertinent information regarding the beneficiary's commencement of employment with the petitioner including copies of Wage and Tax Statements (W-2) issued to the beneficiary.

Relevant to the ability to pay the beneficiary's proposed wage offer of \$17,658.96, 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 2000 through 2003. The director also requested various documentation related to the financial status of the beneficiary and the owner of the petitioning business.

The petitioner's response included a letter from [REDACTED] one of the petitioner's corporate officers. He states that the beneficiary has worked for the petitioner since October 2, 2000. He does not state the position, duties or salary of the beneficiary. An undated letter from the beneficiary confirms the starting date of employment with the petitioner as a "caregiver." Three letters from past Filipino employers were also provided with the petitioner's response, but none documented any experience as a household domestic worker and caregiver. They collectively indicate that the beneficiary worked as a banquet waiter for the [REDACTED] from February 1997 to November 1998; that he was employed as a mechanic's helper for the [REDACTED] Corporation from April 1992 until December 1996, and that he worked as a television assembler and part-time repairer at an electronics factory and for the [REDACTED]

Regarding the ability to pay the proposed wage offer of \$17,658.96, the petitioner supplied copies of the beneficiary's W-2s for 2001 through 2003. They contain the following information:

	Wage
2001	\$5,505.10
2002	\$13,212.24
2003	\$14,675.64

Copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2000 through 2003 were also provided with the petitioner's response. 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	2002	2003

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

Taxable Income before NOL				
Deduction	\$4,401	-\$ 276	-\$10,827	\$ 5,311
Current Assets (Sched. L)	(not provided)	\$18,906	-\$ 981	\$ 2,256
Current Liabilities (Sched. L)	(not provided)	\$22,983	\$31,827	\$29,897
Net Current Assets	(not provided)	-\$4,077	-\$32,808	-\$27,641

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's July 29, 2004, denial of the petition was solely based on his conclusion that the petitioner had failed to provide any evidence establishing that the beneficiary had obtained three months of employment experience as a household domestic worker and caregiver as of the priority date of October 23, 2000. As indicated above, the director concluded that the petitioner's letter only established some kind of employment beginning on October 2, 2000, and the other employer's letters failed to document any experience as a household domestic worker and caregiver.

On appeal, the petitioner merely asserts that its purpose is to show that the beneficiary has experience in caregiving. With the appeal, the petitioner submits a copy of a January 1993 discharge summary from the "Dr. [REDACTED]" Bacolod City, Philippines. It relates to "[REDACTED]" A 1993 list of medicines relating to this individual is also provided. A letter, dated August 19, 2004, from "Ms. [REDACTED]" states that the beneficiary "worked as a volunteer caregiver for his uncle Mr. [REDACTED] Tilano from February 1993 to December 1993 during his free time including Saturdays and Sundays." She lists his duties as including assistance in eating, giving medication, monitoring blood pressure and housekeeping.

This letter and accompanying documents do not meet the requirements of the approved labor certification calling for three months of experience in the certified position of household domestic worker/ caregiver. CIS jurisdiction encompasses a review of the qualifications of a beneficiary for the designated position. 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 unquantified volunteer services provided to the beneficiary's uncle in 1993 cannot be found to meet the requirements of the ETA 750. The petitioner has not demonstrated that the beneficiary obtained three full months of qualifying experience as of the priority date of October 23, 2000. As noted in *Matter of Phelps*, 88-INA-214 (BALCA 1989), experience gained by an alien in a parent or relative's home cannot be considered as a *bona fide* employer-employee relationship even if the alien received a salary. Although *Matter of Phelps*, decided by the Board of Alien Labor Certification Appeals, is not binding, it provides guidance in this case. In interpreting the requirements of 20 C.F.R. § 656.21(a)(3)(iii) requiring paid experience as a household domestic to satisfy the terms of a labor certification, the Board noted that the familial relationship was controlling and that this experience could not be considered as qualifying employment experience similar to that performed for a non-

family employer “where market standards of performance and conduct, not family bonds, determine satisfactory performance.” The Board concluded that paid experience meant an arms-length domestic experience with a non-family employer-employee relationship.

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.

In this case, as noted above, the beneficiary’s W-2s for 2001-2003 indicate that the petitioner paid him less than the certified wage. In 2001, he was paid \$12,153.86 less than the proffered salary. In 2002, his earnings were \$4,446.72 less than the proffered wage, and in 2003, he was paid \$2,983.32 less than the proposed wage offer.

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 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 set forth above, although the petitioner established its ability to pay the proffered wage in 2003 because the petitioner’s net taxable income of \$5,311 could cover the \$2,983.32 shortfall resulting from the comparison of wages paid to the proffered wage, none of the other three relevant years provided a similar profile.

In 2000, the petitioner’s net taxable income of \$4,401 was insufficient to pay the proffered salary of \$17,658.96. No information is contained in the record indicating the level of the petitioner’s net current assets (Schedule L) on its 2000 federal tax return.

In 2001, neither the petitioner’s net taxable income of -\$276, nor its net current assets of -\$4,077 was enough to pay the \$12,153.86 difference between the wages paid to the beneficiary and the proffered salary.

The petitioner’s net taxable income of -\$10,827 was insufficient to cover the proposed wage offer of \$17,658.96 in 2002. Similarly, its net current assets of -\$27,641 was also inadequate to pay the proffered salary. The petitioner has not demonstrated its *continuing* financial ability to pay the proffered salary as required by 8 C.F.R. § 204.5(g)(2).

It is noted that the individual tax returns and financial data contained in the record and relating to one of the petitioner's officers is not determinative 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 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."

In view of the foregoing, the AAO cannot conclude that the petitioner established that the beneficiary obtained the requisite work experience as of the priority date or demonstrated its continuing ability to pay the proffered wage. As explained above, these findings constitute alternative and independent reasons for the petition's 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.