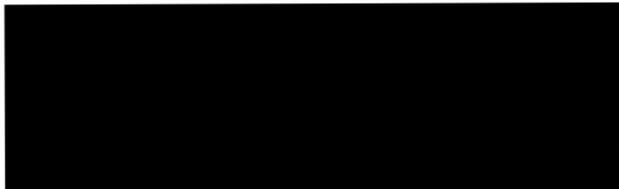


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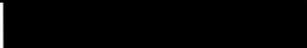
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 05 2007

SRC 06 179 50736

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, 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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is a realty company. It seeks to employ the beneficiary permanently in the United States as a clerical assistant. As required by statute, a ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), 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. The director also concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying educational credentials as of the visa priority date.

On appeal, the petitioner, through counsel provides additional evidence and maintains that the petitioner has established its continuing financial ability to pay the proffered wage and demonstrated that the beneficiary's educational credentials meet the requirements of the approved labor certification.

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:

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 regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation—*

(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 petitioner, must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of 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, the ETA Form 9089 was accepted for processing on December 15, 2005.¹** The

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa

proffered wage as stated on the approved labor certification is \$8.90 per hour or \$18,512 per year. The ETA Form 9089, signed by the beneficiary on September 1, 2006, does not indicate that she has worked for the petitioner.

Item 4 of Part H of the Form ETA 9089 describes the education, training and experience that an applicant for the certified position must have. In this matter, the only specific requirement for the job is an Associate's degree in general studies.

Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on May 30, 2006, indicates that the petitioner was established on December 11, 2004, has an annual gross income of \$76,820, an annual net income of \$72,560.99, and currently employs no workers.

In support of its ability to pay the proposed wage offer of \$18,512, the petitioner initially submitted a copy of its two principal shareholders' individual joint tax return for 2005.

The director issued a request for additional evidence on August 18, 2006. She advised the petitioner that as the petitioner was a corporation, it should provide a copy of the federal corporate tax return for 2005, as well as copies of evidence of any wage and/or salary paid to the beneficiary, such as Wage and Tax Statements (W-2s). The director also requested evidence of the beneficiary's qualifying education.

In response the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005. This return indicates that the petitioner uses a standard calendar year to file its taxes. It shows that the petitioner reported ordinary income of \$3,363.² Schedule L of the tax return reflects that the petitioner had \$2,092 in current assets, which combined with \$3,423 in current liabilities, results in -\$1,331 in net current assets.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted copies of its bank statements for the first three months of 2006 showing ending balances of approximately \$483, \$3,388, and \$440, respectively. Copies of the petitioner's articles of

abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

² For the purpose of this review, ordinary income will be treated as net income.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

incorporation executed on December 21, 2004, and a copy of its corporate North Carolina real estate license issued on January 26, 2005, were also included.

In support of the beneficiary's qualifying education, the petitioner provided a copy of the beneficiary's December 1974 diploma from the Binondo Maternity Hospital School of Midwifery in the Philippines, awarded to the beneficiary when she was eighteen.

The director denied the petition on September 25, 2006. She found that the petitioner had not established its financial ability to pay the proffered wage as its 2005 corporate tax return failed to indicate that either its net income or net current assets could pay the certified salary in that year. The director further noted that of the three ending balances shown on the petitioner's bank statements, only the February 2006 statement demonstrated an ending balance sufficient to cover one month of the certified wage.

The director also determined that evidence submitted in support of the beneficiary's qualifying education was not sufficient, in that the beneficiary's diploma from the School of Midwifery did not establish that she possessed the foreign degree equivalent of an Associate's degree in general studies in the U.S. The director noted that no independent evaluation of the diploma's equivalence, if any, to a U.S. degree was included in the record.

On appeal, counsel asserts that the beneficiary's midwifery diploma qualifies as the foreign equivalent of a U.S. associate's degree. He provides a copy of a transcript from the Filipino Professional Regulation Commission showing the numerical ratings that the beneficiary received upon taking the "midwife" examination in nine subjects on February 8, 1975. Counsel also submits a credential evaluation report from the "World Education Services," (WES), dated December 1, 2006. The report states the "U.S. Equivalency Summary" of the beneficiary's diploma in midwifery is that of a "completion of a certificate-level program in midwifery from a regionally accredited institution."

Counsel's assertions are not persuasive. At the outset, it is noted that CIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989).

We do not find that the WES evaluation is probative of the beneficiary's credentials as required by the terms of the labor certification. **The author's identity and credentials are not disclosed. The documents reviewed are not revealed.** Moreover, it fails to explicitly find that the beneficiary's midwifery diploma is the equivalent of a U.S. Associate's degree, but rather a certificate level- program in midwifery from a regionally accredited institution. It is noted that the credential report's basis for determining that the midwifery program was a two-year program is not contained in the record, other than a copy of a portion of a request for release of transcripts completed by the beneficiary. The WES report also fails to indicate what documents it reviewed in order to determine that the Binondo midwifery program's admission requirements were based on a high school education. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

As the record stands, we cannot conclude that the beneficiary possesses the foreign equivalent of a U.S. Associate's degree in general studies as required by 8 C.F.R. § 204.5(l)(3)(ii)(D). The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor. Since that was not done, we must concur with the director's finding on this issue.

Relevant to the petitioner's continuing ability to pay the proffered wage, on appeal, counsel provides a letter from the petitioner's bank, dated October 18, 2006, confirming that the petitioner has a current balance of \$20,042.16.

Counsel's assertion that the petitioner has established its continuing ability to pay the proposed wage offer of \$18,512 is not persuasive. The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner sponsoring an alien worker for an immigrant visa must establish its continuing ability to pay the certified wage at the time the priority date is established. As the I-140 petitioner is a corporation, it must establish its own ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, 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 determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, the record does not indicate that the petitioner has employed 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, CIS will next examine the net income figure (or net current assets) as 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*, 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). 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.

The regulation at 8 C.F.R. § 204.5(g)(2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. In this matter, for 2005, neither the petitioner's net income of \$3,363, nor its net current assets of -\$1,331 could cover the proposed wage offer.

Counsel's reliance on selected 2006 bank statements or the petitioner's bank balance on October 18, 2006, as reflected by the bank's letter submitted on appeal, is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," it is noted that the petitioner failed to submit an audited financial statement for the period under consideration, if the 2006 federal tax return was not yet available. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Additionally, in this respect, the three bank statements from January-March 2006, with only the February statement demonstrating a sufficient balance to pay the monthly proffered wage, and the bank letter giving the petitioner's balance on October 18, 2006, do not represent a sustainable ability to pay the proffered wage.

Based on a review of the record and the additional evidence and argument provided on appeal, it cannot be concluded that the petitioner has demonstrated its continuing financial ability to pay the proffered wage as of the priority date or established that the beneficiary possesses the requisite educational credentials as set forth on the ETA Form 9089.

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.