identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2004
WAC 03 117 54584

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Michael Valdez

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 facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a live-in residential care aide. 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 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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is $8.43 per hour, which equals $17,534.40 per year.

On the petition, the petitioner did not state the year during which it was established. The petitioner stated that it employs four workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to

have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Garden Grove, California.

In support of the petition, counsel submitted the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return and the corresponding Schedule C showing the results of the petitioner's operations during that same year. The Schedule C shows that during that the petitioner returned a loss of $583 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of $950 during that year, including the petitioner's loss.

Counsel submitted a bank account statement showing that the petitioner had a balance of $4,087 in a checking account on June 25, 2002 and statements from the same firm showing the petitioner's 2001 securities transactions.

Counsel submitted two statements of the petitioner's owner's personal accounts showing that she had a balance in one of $118.97 on December 31, 2001 and a balance in the other of $2,037.26 on January 11, 2002. Counsel submitted a statement from an investment firm showing that the petitioner realized a gain of $542.67 on the sale of $1,903.12 of securities on June 21, 2001. Counsel submitted statements from that same firm showing the petitioner's owner's 2001 securities transactions.

Finally, counsel submitted an unaudited balance sheet and profit and loss statement for the 2001 calendar year.

On May 2, 2003, the Director, California Service Center issued a Notice of Intent to Deny in this matter. That notice observed that the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date but that the evidence then in the file did not demonstrate that the petitioner had that ability. The petitioner was accorded an opportunity to submit additional evidence.

In response, the counsel submitted additional evidence pertinent to the petitioner's owner's investment accounts and evidence pertinent to three real properties owned by the petitioner's owner. Counsel argued that all of the assets of the petitioner and the petitioner's owner demonstrated that the petitioner is able to pay the proffered wage.

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 June 9, 2003, denied the petition.

On appeal, counsel again argues that the assets of the petitioner and the petitioner's owner, in addition to the petitioner's income, show the ability to pay the proffered wage.

The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 did not establish that it 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 corporate 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's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The real property owned by the petitioner's owner is not the kind of liquid asset that can be used to pay wages. Further, any of those properties that are used as the petitioner's business premises cannot be sold without diminishing the petitioner's ability to continue in business. Further still, the information provided pertinent to those properties included the purchase price and original mortgage amount, but did not include the market value of the properties and the balances of the mortgages now encumbering those properties. As such, this office has no evidence from which it might estimate the petitioner's owner's equity in those properties. The petitioner's owner's three real properties will not, therefore, be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the bank and investment account statements in this case is misplaced. 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 owner's account statements somehow reflect additional available funds that were not reflected on its tax returns.

The proffered wage is $17,534.40 per year. The priority date is March 19, 2001. .

During 2001 the petitioner suffered a loss of $583. The petitioner's owner's adjusted gross income, including that loss, was $950. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Although the petitioner was advised of its obligation to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, it submitted no evidence of its ability to pay the proffered wage during 2002. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

An additional issue exists in this case that was not noted in the decision of denial. The Form I-140 petition clearly states that it is a petition for a skilled worker or a professional. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), states that a position for a skilled worker is one which requires at least two years of experience. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), states that positions qualify as positions from professionals only if they require a minimum of a bachelor's degree. The labor certification in the instant case states that the position requires one year of experience and no college education. As such, the proffered position does not qualify as a skilled worker position or as a position for a professional. This is an additional reason the petition should have been denied.

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.