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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-02-174-50850 Office: VERMONT SERVICE CENTER Date: JUN 18 2004

IN RE: Petitioner: [redacted]
Beneficiar

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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. The director also determined that the petitioner failed to establish that the beneficiary was eligible for the visa classification sought.

On appeal, counsel submits a brief and additional evidence.

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 the granting of 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.

The first issue to be discussed in this case is whether the petitioner established its ability to pay the proffered wage.

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 December 11, 1997. The proffered wage as stated on the Form ETA 750 is $17.43 per hour, which amounts to $36,254.40 annually.

With the petition, the petitioner submitted no evidence.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 19, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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 beginning on the priority date. The director specifically requested the petitioner's tax return for 1997 and any evidence of wages paid to the beneficiary in 1997, such as copies of

the beneficiary's Form W-2 Wage and Tax Statement(s). The director also requested evidence that the beneficiary possessed the two years of experience as a landscape gardener as of the December 11, 1997 filing date required by the position. The beneficiary's qualifications will be discussed below after the discussion on the petitioner's ability to pay the proffered wage.

In response to the director's request for evidence, the petitioner submitted Form 1120 Corporate tax return for the petitioner for the year 1997.

The tax return reflects the following information:

| | 1997 |
|---|---|
| Net income[1] | $1,091 |
| Current Assets | $20,376 |
| Current Liabilities | $-3,250 |
| Net current assets | $17,126 |

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 February 7, 2003, denied the petition.

On appeal, counsel asserts that the petitioner has evidence that supports its ability to pay the proffered wage. The petitioner submits the petitioner's Forms 940, Employer's Annual Federal Unemployment Tax Returns for 1997 through 2002, and the petitioner's Forms W-3, Summaries of Wages and Withholding Information, including the beneficiary's Forms W-2 Wage and Tax Statements from 1996 through 2002. The beneficiary's Forms W-2 Wage and Tax Statements from 1996 through 2002 evidence wages received by the beneficiary from the petitioner in the amounts of $22,099.61, $23,574.31, $25,355.42, $25,973.38, $31,566.55, $32,380.38, and $31,880.79, respectively. Neither counsel nor the petitioner explains why this evidence was not submitted earlier in the proceedings, even though specifically requested by the director in his request for evidence.

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary

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[1] Taxable income before net operating loss deduction and special deductions as reported on line 28.

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 the full proffered wage in 1997.

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 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets during the year in question, 1997, were $17,126.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997. In 1997, the petitioner shows a net income of only $1,091, net current assets of only $17,126 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997.

The petitioner failed to submit evidence to demonstrate that it had the ability to pay the proffered wage during 1997 or any subsequent year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether the petitioner established the beneficiary's eligibility for the visa sought.

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[2] 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is December 11, 1997.

The beneficiary's employment history is set forth in the Form ETA 750-B, signed by the beneficiary. It describes past employment experience with Brushill Nursery in Monmouth, New Jersey. The beneficiary was purportedly employed as a landscape gardener from March 1990 to "present," which presumably meant at least until December 11, 1997, thus indicating that he had the requisite two years of experience required by the position certified by the Department of Labor.

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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In response to the director's request for evidence concerning the beneficiary's qualifications, the petitioner submitted a letter stating the following:

> I am the President of [the petitioner]. I offered [the beneficiary] a job as a Landscape Gardener with my company. When I filed the application for alien labor certification on December 11, 1997, [the beneficiary] already had several years of experience as a Landscape Gardener. His duties included: trimming shrubs; cultivating gardens; planting new and repairing established lawns, using seed mixtures and fertilizers recommended for particular soil type and lawn location; preparing and grading terrain; mowing and trimming lawns; seeding and sodding; transplanting shrubs and plants; using manual and power-operated equipment.

The director correctly determined that this letter was insufficient to demonstrate the beneficiary's qualifications under the regulations at 8 C.F.R. § 204.5(l)(3).

On appeal, the petitioner presents additional evidence of the beneficiary's qualifications, including a letter from the Secretary of the Honorable City Counsel of Santiago Maravatio in the state of Guanajuato in Mexico, stating that the beneficiary was employed from 1985 to 1988 as a municipal gardener. The letter is in Spanish with a certified translation. Additionally, the petitioner presents copies of pay stubs from the beneficiary's purported former employer, Brushill Nursery. Counsel's brief states that Brushill Nursey is no longer in business.

As noted above, the application of *Soriano, supra*, precludes the receipt of this evidence at this point in the proceedings. The petitioner provides no explanation of why it was previously unavailable in response to the director's request for evidence. The director specified the evidentiary requirements for proving the beneficiary's qualifications. Thus, the petitioner had ample notice of how to prove its case.

Even if the evidence were accepted now, it is still insufficient to prove the beneficiary's qualifications. The pay stubs from Brushill Nursery are inconclusive. They date from March 12, 1990 through April 22, 1990, evidencing a total of a little over one month of experience, not two years. The pay stubs do not corroborate the type of experience the beneficiary received as an employee at Brushill Nursery. Additionally, counsel states that Brushill Nursery is out of business and that is the reason for the failure to produce a letter as required under the regulations. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No corroborating evidence was provided to establish this factual allegation asserted by counsel.

Additionally, the petitioner now presents evidence of employment experience that is not listed on the beneficiary's Form ETA 750B, Statement of Qualifications of Alien, which the beneficiary signed on December 4, 1997 under a declaration stating that "under penalty of perjury the foregoing is true and correct." The omission of the beneficiary's experience as a municipal gardener with the City of Santiago Maravatio in the state of Guanajuato in Mexico for three years on this form under penalty of perjury is substantial and raises credibility suspicions at this point in the proceedings. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The evidence is precluded by *Soriano, supra*; however, it would also not be accepted as competent evidence since the petitioner and the beneficiary failed to include this employment experience on the forms supporting this visa petition.

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.