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U.S. Citizenship
and Immigration
Services

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APR 27 2005

FILE: WAC 03 123 52809 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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: 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 Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The appeal will be dismissed.

The petitioner is a private duty nursing services company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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 appeal in this matter was summarily dismissed pursuant to 8 C.F.R. § 103.3(a)(1)(v), because the appeal failed to specifically identify any erroneous conclusion of law or statement of fact. On the motion the petitioner states that it submitted a brief and supporting materials by mail on June 18, 2004. Counsel submits a copy of that brief and those supporting materials and evidence of delivery. This office concurs with counsel's assertion that the brief and supporting materials must have been misplaced by CIS. Further, as the brief and supporting materials contain specific assignments of error the appeal in this matter should not have been subject to summary dismissal. Those materials shall be considered to have been timely submitted on appeal. CIS shall reopen the matter *sua sponte* and a decision on the merits of the appeal shall be issued.

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.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on March 19, 2003. The proffered wage as stated on the Form ETA 750 is \$26 per hour, which equals \$54,080 per year.

On the petition, the petitioner stated that it was established during 1984 and that it employs 100 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated February 28, 2003, from its immigration specialist. That letter states that the petitioner is able to pay the proffered wage. The petitioner provided its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows ordinary income of \$58,234 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner also submitted its compiled 2001 financial statements, which show net income from operations of \$399,739 during that year.

On March 1, 2004, the California Service Center issued a request for, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested copies of the petitioner's California Form DE-6 Wage Reports for the first and last quarters of 2003.

The petitioner responded with a letter, dated March 5, 2004, which stated that it had not yet filed its 2003 tax return. The petitioner provided the requested DE-6 forms and a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The 2002 tax return also shows ordinary income of \$345,538. The Schedule L attached to the 2002 return shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The DE-6 forms show that the petitioner employed 70 workers during the first quarter of 2003 and 46 workers during the last quarter of 2003, but did not employ the beneficiary during either quarter.

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 April 19, 2004, denied the petition. The director noted that the petitioner's 2002 net income of \$345,548 would be sufficient to pay the proffered wage to six new employees, but that the petitioner has recently had petitions for eight alien workers approved.

On appeal, the petitioner submits a fee schedule from California's Department of Health Services stating that \$40.57 is the hourly rate that department authorizes for registered nurses. The petitioner also submits a letter dated June 16, 2004 and labeled Exhibit B, from its Administrator. That letter states the income derived and expenses allegedly incurred by one of its nurses working 40 hours in a given week. By the Administrator's calculations, the petitioner derives \$56.24 in gross profit per week from each nurse it is able to employ. In a brief, the petitioner argues that the petitioner will, therefore, reap a profit by employing the beneficiary. The petitioner also argues that its current assets should be included in the calculation of its ability to pay the proffered wage.

In addition, counsel submits information to demonstrate that a shortage of nurses exists in the United States. That information is not relevant to any material issue in this case. The Department of Labor has placed

registered nurses on its Schedule A list of shortage occupations. The issue of whether registered nurses are a shortage occupation is thereby settled. That does not, however, release the petitioner of the burden of demonstrating the continuing ability to pay the proffered wage beginning on the priority date.

The petition, which was submitted during the first quarter of 2003, states that the petitioner employs 100 workers. That threshold number refers to the clause in 8 C.F.R. § 204.5(g)(2) stating that, in such a case, the statement of a financial officer may suffice to show the ability to pay the proffered wage. The Form DE-6 Wage Report for the first quarter of 2003, however, fails to support the assertion that the petitioner employed 100 or more workers during that entire quarter, let alone at any given time during it. 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. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001). This office declines to find the petitioner's assertion that it employs 100 workers to be credible. The petitioner will be obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

Further, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). The evidence exposes that some information provided on the petition was not entirely truthful. The credibility of the remaining information and evidence provided necessarily suffers.

The petitioner's reliance on the compiled financial statements submitted 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's has asserted that it earns a profit on each nurse it employs. The petitioner implicitly argues, therefore, that it should not be required to demonstrate its ability to pay the beneficiary's proffered wage out of previous years' net incomes, as hiring the beneficiary and selling her labor to facilities or individuals will necessarily yield a profit. In support of that assertion counsel submits what purport to be the weekly income to be derived and the weekly expenses to be incurred by hiring the beneficiary. The petitioner's argument has, in the abstract, considerable merit.

However, this office questions the accuracy of the petitioner's figures. The petition states that the beneficiary is currently in the Philippines. The figures provided do not include an allowance for the initial expenses of hiring the beneficiary, which include, for instance, transporting her from her home country. The petitioner may be omitting from its calculations other expenses involved in hiring the beneficiary. This office does not, therefore, find the petitioner's assertion that it will necessarily reap a profit from hiring the beneficiary to be convincing.

Typically, 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, ordinarily 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).

The proffered wage is \$54,080 per year. The priority date is March 19, 2003.

The director stated that eight petitions submitted by the instant petitioner have recently been approved. Those petitions are not currently available to this office. This office, however, has recently had ten other appeals from denials of Form I-140 petitions filed by the instant petitioner before it, each at the same proffered wage as that in the instant case. The proffered wages in the approved cases are likely the same.¹ In order to win approval, the petitioner must show the ability to pay the proffered wages of the eight recently approved petitions and that of the instant petition. Those proffered wages, in the aggregate, equal \$486,720.²

The petitioner has provided tax returns for 2001 and 2002. Those documents, of course, contain no information directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The appeal in this matter, however, was submitted during 2003. Having not yet closed out the year, the petitioner's 2003 tax returns and other end-of-year data were clearly unavailable. Information from the 2001 and 2002 returns will be accorded some evidentiary value in this case, as it is the only evidence from which this office may extrapolate.

The petitioner's tax return shows that during 2001 it declared \$58,234 in ordinary income. If the petitioner had been obliged to demonstrate the ability to pay the wages proffered to the beneficiaries of the eight approved petitions and the proffered wage in the instant case, it would have been unable to show that ability with its ordinary income. At the end of that year, the petitioner had negative net current assets. The petitioner would have been unable, therefore, to show the ability to pay any portion of those wages out of its net current assets. The petitioner has not submitted reliable evidence of any other funds available to it with which it might have paid the proffered wage during that year. The evidence submitted does not indicate that the petitioner was able, had it been obliged, to pay the proffered wage during 2001.

¹ In the event that this inductive conclusion is incorrect and results in denial of an otherwise approvable petition, that error may be redressed on a motion.

² \$54,080 x 9.

The petitioner's 2002 tax return shows that it declared \$345,538 in ordinary income. If the petitioner had been obliged to demonstrate the ability to pay the wages proffered to the beneficiaries of the six approved petitions and the proffered wage in the instant case, it would have been unable to show that ability with its ordinary income. At the end of that year, the petitioner had negative net current assets. The petitioner would have been unable, therefore, to show the ability to pay any portion of those wages out of its net current assets. The petitioner has not submitted reliable evidence of any other income available to it with which it might have paid the proffered wage during that year. The evidence submitted does not indicate that the petitioner was able, had it been obliged, to pay the proffered wage during 2002.

The petitioner has not demonstrated that it was able to pay the proffered wage during 2001 and 2002. Extrapolating from that evidence, the only reliable evidence in the record pertinent to ability to pay the proffered wage, this office must find that the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petition may not be approved.

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 matter is reopened. The decision of the director is affirmed. The petition is denied.