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U.S. Citizenship
and Immigration
Services

B6

[Redacted]

FILE: EAC 03 104 51051 Office: VERMONT SERVICE CENTER Date: **AUG 30 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an animal grooming company. It seeks to employ the beneficiary permanently in the United States as a cat and dog groomer. 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 also pay the monthly expenses for a family of three, and denied the petition accordingly.

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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 2, 2000. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually.

On the I-140 petition, the petitioner claims that it was established in 1999, has three employees, a gross annual income of \$121,653, and a net annual income of \$3,844. The petitioner also noted on Part Six of the I-140 petition that the beneficiary's proffered wage would be paid out of salaries identified on line 9 of the attached Form 1065. With the petition, the petitioner submitted the first two pages of IRS Form 1120, federal corporate income tax returns, for the years 2000 and 2001, as well as documentation with regard to the beneficiary's training and apprenticeships as a canine groomer in Argentina.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 5, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2000 federal tax return, with all accompanying schedules, statements and attachments. The director stated that if the petitioner was a

corporation, that the petitioner should submit the corporate tax return, and if the business was organized as a sole proprietorship, to submit the owner's Form 1040, with accompanying Schedule C. The director further stated that if the petitioner employed the beneficiary in 2000, that the petitioner should submit copies of the beneficiary's Form W-2.

In response, the petitioner submitted the first page of a Form 1065 for 2000 that lists ordinary income of \$62. The petitioner also submitted a copy of Schedule K, Partnerships worksheet, for its Form 1065 for tax year 2000. In addition, the petitioner submitted a Form 1040 for 2000, with copies of Schedule A, Schedule E, and Schedule SE. This tax return indicated an adjusted gross income of \$25,541. The petitioner also noted on the front of the director's request for further evidence that the beneficiary would be paid out of the petitioner's salaries and wages, and that the beneficiary had never worked for the petitioner. The petitioner submitted one W-2 Form to the record for Marta Anselmi, who earned \$5,065.50 in 2000.

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 10, 2004, denied the petition. The director stated that according to the petitioner's Form 1065, its net annual income in 2000 was \$62, and that the petitioner's Form 1040 indicated a net annual income of \$33,899. The director determined that the petitioner, based on these incomes, would have \$33,961 to pay the proffered wage. The director also stated that the petitioner, after paying the proffered wage of \$26,000, would have \$7,961 to pay the yearly expenses for a family of three. The director stated that he was not convinced that the petitioner could support his family on such a sum and pointed out that the petitioner's real estate taxes and home mortgage interest payments as indicated on the tax return, equaled \$6,557. Finally, the director stated that the petitioner had not established that it had the financial wherewithal to pay the proffered wage.

On appeal, counsel states that \$26,000 in salary has been available for the beneficiary as of the date of filing the labor certification. Counsel submits the first page of the petitioner's Form 1065 tax returns for the years 2000, 2001, and 2002. Counsel states that the I-140 petition stated that the proffered wage was to be paid out of the salaries line indicated at line 9 of the Form 1065. With regard to tax year 2000, line nine shows salaries and wages paid of \$54,795, and line ten of the same return shows guaranteed payment of partners of \$26,022. For the year 2001, counsel states that line nine of Form 1065 shows salaries and wages paid as \$55,453, and line ten shows guaranteed payments to partners of \$30,089. For the year 2002, counsel states that petitioner's tax form shows salaries and wages paid of \$60,705, and guaranteed payment to partners of \$29,128.

Counsel states that the petitioner's owner lives off a combination of the income that is now paid to partners and some income from the salaries and wages listed on the Form 1065. Counsel also states that two of the employees listed on the I-140 petition are part time employees, and that based on the salaries and wages listed there is at least twice as much money available as is necessary to pay the \$26,000 proffered wage. Counsel adds that a substantial amount of one of those salaries each year is paid to one of the partners who has retired and was planning to retire immediately upon the approval of the visa petition, and the beneficiary's ability to work in the United States. Since the partner would have retired upon the beneficiary's arrival in the United States, the income now being paid to the partners would have been available immediately to the beneficiary.

Subsequent to the submission of the appeal, the petitioner submitted an additional letter to the record that stated it had attempted to hire additional employees in the Stamford area, but had been unable to do so. It also called a dog grooming school in New York to advertise for employees, but received no response. The petitioner's owner states that she is 62 year old and wants to hire someone to replace her. She states that although the petitioner has two employees it is turning away business. The petitioner's owner further states that she is afraid that her health will fail or her employees may leave, and she would have no choice but to close the dog grooming business. Since the petitioner's owner cannot afford to retire yet, the petitioner filed a visa petition for her nephew [REDACTED] who is a professional dog groomer. According to the petitioner's owner, both her nephew and his wife are presently experiencing difficulties in Buenos Aires, Argentina, including robberies, theft and loss of jobs and a home.

On appeal, both the petitioner's owner and counsel state that the salary of one of the partners would be available immediately upon arrival of the beneficiary in the United States. However, the petitioner provided no breakdown as to the actual wages paid to all three employees. Similarly, the record of proceedings contains no breakdown of what was paid to the individual partners. The petitioner's owner states that she would be hiring someone to replace her. In response to the director's request for further evidence, the petitioner submitted a W-2 Form for the petitioner's owner which establishes that in 2000, the petitioner's owner earned \$5,065.50. This level of annual salary suggests that the petitioner's owner is not working full time, and it raises the issue of the actual time spent in the primary duties of the position, namely, dog grooming, and the actual wages available to pay the proffered wage. Furthermore, the record does not name any other workers, state their wages, or verify their full-time or part-time employment. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the petitioner's owner involves the same duties as those set forth in the Form ETA 750. Furthermore, there is no record of what amount of income [REDACTED] received as guaranteed payments. Moreover, the record of proceedings does not contain any documentation that supports the fact that Mrs. [REDACTED] would give up essentially all of her guaranteed payments in order to pay the proffered wage.

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 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. The petitioner did not claim to have employed the beneficiary as of the priority date. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000 and onward.

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). Showing that the petitioner's

gross receipts exceeded the proffered wage is insufficient. Similarly, despite counsel's contention that line 9 of Form 1065 demonstrates the petitioner's ability to pay the proffered wage, 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 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, now CIS, should have considered income before expenses were paid rather than net income. Forms 1065 for 2000, 2001, and 2002, indicate the following ordinary income for the petitioner, in 2000, \$62; in 2001, \$3,844; and in 2002, \$2,467. These sums are not sufficient to pay the proffered wage of \$26,000 as of the priority date and onward.

It is noted that, on appeal, the petitioner did not submit complete copies of Form 1065 for the years 2000, 2001, and 2002. In addition, the record is devoid of any documentation, such as articles of incorporation, as to the actual business structure of the petitioner. Nevertheless, based on the Forms 1065 submitted to the record on appeal, the petitioner appears to be structured as a general partnership. Each of the partners in a general partnership is jointly and severally responsible for the partnership's debts and obligations. Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets, the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage. In the instant petition, the record does not identify the petitioner's partners, other than the petitioner's owner, or their assets. The Forms 1065 submitted on appeal only indicate that in 2000, the petitioner had three partners, and that as of 2002 the petitioner had two partners. The petitioner's owner is obliged, however, to demonstrate that he or she could have paid the proffered wage out of his adjusted gross income and supported himself or herself, and his or her family, on the remaining funds.

With regard to the adjusted gross income for the petitioner's owner as of the priority date and onward, the record only contains the petitioner's owner's Form 1040, U.S. individual income tax return for the tax years 2000. According to the section of this document submitted to the record, the owner's adjusted gross income for 2000 is \$25,541.¹ This figure is less than the proffered wage, and provides no further income to the petitioner's owner to pay the monthly expenses of a family of three. Thus, the only partner whose assets are included in the record has not established that it has sufficient financial resources to both pay the proffered wage and pay its monthly personal expenses. As noted previously, the petitioner submitted incomplete tax returns. In addition, the record does not contain any further Forms 1040 to gauge the petitioner's owner and partner's ability to pay the proffered wage from 2000 and onward.

Furthermore, the petitioner did not submit any Schedules L with its Forms 1065 for 2000, 2001 and 2002 to ascertain whether the petitioner, as a partnership corporation, has sufficient current net assets to pay the proffered wage. 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. In addition, 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

¹ The director erroneously used the petitioner's total income figure of \$33,899 on line 22 on the petitioner's owner's Form 1040 in his consideration of the petitioner's ability to pay the proffered wage.

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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. However, as previously stated, the petitioner did not submit any Schedules L with its Forms 1065 tax return documentation. Therefore it cannot be determined whether the petitioner had adequate net current assets to pay the proffered wage. It is further noted that even with net current assets greater than the proffered wage, the petitioner would still have to establish that its net current assets for the years in question were sufficient to pay both the proffered wage and its own monthly expenses from 2000 to the present out of its net current assets.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

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.