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U.S. Citizenship
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Services



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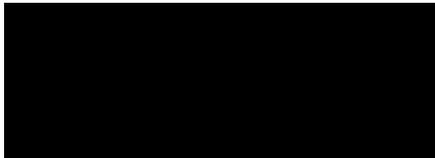
Office: CALIFORNIA SERVICE CENTER

Date: **JUL 06 2005**

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

PETITION: Immigrant Petition for Other Worker pursuant to § 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, 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 skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a certified nurse assistant. 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 brief and additional evidence.

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 28, 2001. The proffered wage as stated on the Form ETA 750 is \$8.75 per hour, which equals \$18,200 per year.

On the petition, the petitioner stated that it was established during 1994 and that it employs 71 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since February 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Pomona, California.

In support of the petition, counsel submitted the 2000 Form 1120 U.S. Corporation Income Tax Return of Trinity Oakland Incorporated. (Trinity) That return shows that Trinity was established during 1994 and that it reports taxes pursuant to the calendar year. During 2000 Trinity reported a loss of \$317,159 as its taxable income before net operating loss deduction and special deductions. At the end of that year Trinity's current liabilities exceeded its current assets. Counsel did not then submit evidence of any relationship between Trinity and the petitioner.

Counsel submitted the beneficiary's 2000 Form 1040 U.S. Individual Income Tax Return including a 2000 Form W-2 Wage and Tax Statement. The W-2 form shows wages paid to the beneficiary by RHS Management. No evidence was then submitted that the petitioner paid the beneficiary any wages during that year. In any event, the priority date in this matter is March 28, 2001. Evidence of the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted two 1999 W-2 forms. Those forms show wages paid to the beneficiary by Pacific Homes and Sun Healthcare Incorporated as agent for Regency Health Services Management. Counsel submitted no evidence that the petitioner paid the beneficiary wages during 1999. Again, however, evidence pertinent to 1999 is not directly relevant to this case.

On March 31, 2003 the California Service Center requested that the petitioner provide original computer printouts from the IRS of information from all tax returns since 2001.

In response, counsel submitted a letter, dated June 19, 2003. In that letter, counsel stated that he was submitting the petitioner's 2001 tax return as Exhibit A. No tax returns were submitted and no Exhibit A was submitted.

Counsel also stated that the beneficiary had worked for the petitioner during 2001 and 2002 and submitted W-2 forms showing that the petitioner paid wages of \$12,252.40 and \$10,140.78 to the beneficiary during those years, respectively.

Counsel did not submit the requested IRS printouts.

On July 1, 2003 the California Service Center issued another Request for Evidence. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested evidence pertinent to 2001 and 2002 and noted that, to that point, the petitioner had provided only its 2000 tax return.

In response, counsel submitted a letter dated September 5, 2003. In that letter, counsel again stated that he was providing a copy of the petitioner's 2001 tax return as Exhibit A. No tax returns were submitted with the response to the Request For Evidence.

On September 22, 2003 the Director, California Service Center issued a Notice of Intent to Deny the instant petition. The director noted that the submitted copies of the petitioner's tax returns were incomplete and illegible. The director requested that the petitioner provide complete, legible copies of its 2001 and 2002 tax returns.

In response, counsel submitted copies of the petitioner's 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns. Both of those returns state that the petitioner was established during 1994.

The 2001 return shows that during that year the petitioner declared a loss of \$118,015.¹ The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$838,473 and current liabilities of \$1,921,628. The petitioner, therefore, had negative 2001 year-end net current assets.

The 2002 return shows that during that year the petitioner declared a loss of \$21,372 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$886,005. The petitioner had year-end current liabilities of \$1,910,232. The petitioner, therefore, had negative 2002 year-end net current assets.

Counsel submitted monthly statements of a bank account belonging to Trinity doing business as Sierra View Care Center, Villa Maria Care Center, and Yuba Manor.² Counsel submitted a letter, dated October 17, 2003, from the petitioner's president. That letter states that the petitioner's profit or loss has no relationship to the stability of the proffered position.

Finally, counsel submitted a cover letter, dated October 20, 2003. Counsel stated that the petitioner's 2001 net current assets were \$646,311 and that its 2002 net current assets were \$694,972. Counsel notes that those amounts exceed the proffered wage. This office is unable to determine where counsel obtained those figures, but notes that they do not correspond with the petitioner's 2001 and 2002 year-end net current assets as computed from the tax returns counsel provided.

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 January 28, 2004, denied the petition.

On appeal counsel submits a letter dated February 4, 2004 from the petitioner's Staff Developer. That letter states that the beneficiary works full-time for the petitioner, but that the petitioner's definition of full-time is in excess of 30 hours per week. That letter states that the beneficiary began work as a nursing assistant on March 5, 2001 at \$8.75 per hour; that on September 16, 2001 her wage increased to \$9.00 per hour; that it was increased to \$9.10 per hour on April 5, 2002, and to \$9.30 per hour on November 20, 2002.

Counsel submits payroll detail reports purporting to show amounts the petitioner paid to the beneficiary on dates from March 25, 2001 through January 8, 2004. Those reports indicate that the petitioner paid the beneficiary \$10,846.30 during 2001, \$9,292.98 during 2002, \$13,126.99 during 2003, and 697.50 during 2004. Counsel also submits a 2003 W-2 form showing that the petitioner paid the beneficiary \$14,229.36 during that year.³

¹ The petitioner did not enter a figure for its 2001 taxable income before net operating loss deduction and special deductions. The loss of \$118,015 is shown as the petitioner's taxable income. However, because the petitioner entered no net operating loss deduction and no special deductions, its taxable income before net operating loss deduction and special deductions was apparently equal to its taxable income.

² Why the name of the petitioner, Country Oaks Care Center, was omitted from the dba names on that bank account is unknown to this office. Because the petitioner is a corporation, however, all of the funds of that same corporation may be included in the determination of the petitioner's ability to pay the proffered wage.

³ That the amounts shown on the W-2 forms exceeds the amounts shown on the payroll detail printout for the same years may be due to the omission, without explanation, of some pay periods from the payroll detail printout. The amounts

Counsel also submits additional bank statements with the appeal.

In the brief, counsel argues that the petitioner's tax returns and its bank statements, taken together, plus the wages the petitioner has paid to the beneficiary during various years, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also notes that the beneficiary took maternity leave during the period since the priority date, and had she worked more hours, she would have been paid more in each of the salient years. Counsel states that the fact that the petitioner paid the beneficiary \$8.75 per hour for those hours that she did work, in itself, demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel notes that the petitioner has been in operation for over 25 years and has never failed to pay its employees.

Finally, counsel notes that the petitioner complied with the Department of Labor regulations requiring advertising and posting the availability of the proffered position, and stated that to deny the instant petition "would severely injure the work force of qualified Nurse Assistants that [the petitioner] employs."

Notwithstanding counsel's claims, 8 C.F.R. § 204.5(g)(2) contains no exception in the event that hardship would be visited upon a petitioner's staff by denial of the petition. Neither is the necessity to prove the ability to pay the proffered wage excused by the petitioner having complied with the regulations pertinent to advertising and posting the proffered position. Neither of those circumstances excuses a failure to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's statement that the petitioner has been in operation for more than 25 years is insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, in the instant case, where the petitioner has stated, on the petition and on all of the tax returns submitted, that it was established during 1994, counsel's statement is not supported by the evidence.

The statement of the petitioner's Staff Developer that the beneficiary began work for the petitioner on March 5, 2001 is directly contradicted by the statement of the beneficiary, on the Form ETA 750, Part B, that she has worked for the petitioner as a certified nursing assistant since February 2000. No explanation for this discrepancy was submitted. 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. Further, 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).

Counsel's reliance on the bank 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

shown on the payroll detail are apparently not, therefore, exhaustive. This office finds the higher figures shown on the W-2 forms to be the more credible figures.

the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

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 established that it paid the beneficiary \$12,252.40 during 2001, \$10,140.78 during 2002, \$14,229.36 during 2003, and 697.50 during 2004. Having demonstrated that it paid the beneficiary those amounts, the petitioner must demonstrate that it was able to pay the beneficiary the balance of the proffered wage during the salient years.⁵

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 total 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 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.

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁵ The assertion by counsel that if the beneficiary had worked additional hours the petitioner would have paid the requisite additional wages is insufficient. The petitioner must demonstrate that it had the additional funds available to it to pay the entire annual amount of the proffered wage, not merely allege, through counsel, that it was able to pay it.

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 proffered wage is \$18,200 per year. The priority date is March 28, 2001.

Having demonstrated that it paid the beneficiary \$12,252.40 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$5,947.60 balance of the proffered wage during that year. During that year the petitioner suffered a loss of \$118,015. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to demonstrate that any other funds were available to it with which it could have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$10,140.78 during 2002 the petitioner is obliged to demonstrate the ability to pay the \$8,059.11 balance of the proffered wage during that year. During that year the petitioner suffered a loss of \$21,372. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence to demonstrate that any other funds were available to it with which it could have paid the proffered wage during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The appeal in this matter was submitted on February 27, 2004. On that date, the petitioner's 2003 tax return may not have been available. The petitioner is excused, therefore, from submitting evidence pertinent to 2003 or later years.

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.

This case contains an additional issue not relied upon in the decision of denial. On March 31, 2003 the California Service Center requested that the petitioner provide original computer printouts from the IRS of information from all tax returns since 2001. That evidence was never submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason.

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.