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U.S. Citizenship
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FILE: WAC 03 174 50678 Office: CALIFORNIA SERVICE CENTER

Date: APR 14 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

Cc: Evelyn Sineneng-Smith
1022 West Taylor St.
San Jose, CA 95126

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

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as an uncertified nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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. The director also concluded that the petitioner had failed to submit evidence establishing the beneficiary's qualifying work experience and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage. The petitioner also submits a letter from its owner relating to the beneficiary's prior employment.

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 the granting of preference classification to other 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 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 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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act.

Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on Form ETA 750 is \$1,227.20 per month, which amounts to \$14,726.40. On Form ETA 750B, signed by the beneficiary on December 11, 1997, the beneficiary does not claim to have worked for the petitioner.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 provides that the applicant for the position of an uncertified nurse assistant in a residential care home must have three months in the job offered. The described duties for the certified position include housekeeping, cooking, as well as monitoring and assisting developmentally disabled residents with their needs.

Part 5 of the petition, filed on May 20, 2003, states that the petitioner was established on December 10, 1993, has a gross annual income of \$415,600, a net annual income of \$22,923, and currently employs seven workers.

In support of its ability to pay the proffered salary, the petitioner did not initially provide any supporting documentation. Other than a copy of a work history, dated January 11, 1999, submitted by the beneficiary to the Alien Labor Certification Office amending her own employment history to include working for [REDACTED] in Medford, Oregon, and with the petitioner beginning in January 1998, no verification of the required three months of experience in the certified position was submitted by the relevant employer.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to establish that the beneficiary possesses the requisite work experience, on April 5, 2004, the director requested additional evidence pertinent to those issues. The request for evidence stipulated that the petitioner would have until June 28, 2004, to submit the required documentation.

Relevant to the ability to pay the beneficiary's proposed wage offer of \$14,726.40, the director 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 of January 14, 1998. He instructed the petitioner to submit evidence of its ability to pay for 1998 through the year 2003. The director also requested the petitioner to supply copies of the beneficiary's Wage and Tax Statements (W-2s) that it had issued to the beneficiary for 1998 through 2003, as well as copies of its last four state quarterly wage reports that it had filed.

The director also requested that the petitioner provide additional evidence to support the beneficiary's accrual of the required three months of experience as specified on the ETA 750. The director informed the petitioner that a letter describing the beneficiary's past employment should include a description of the beneficiary's title, job duties, dates of employment, and number of hours worked per week.

The director further instructed the petitioner to submit evidence establishing that [REDACTED] who had submitted a Notice of Entry of Appearance as Attorney or Representative (Form G-28), was authorized to represent the petitioner as an accredited representative. Ms. [REDACTED] G-28, dated May 8, 2003, designates her representation on Part 4, "Others," as a "Bonded Immigration Consultant, Juris Doctor Bond [REDACTED] A copy of this bond, labeled as a "Surety Bond Immigration Consultants," had been offered with the initial filing of the visa petition. It contains a stamp indicating that it had been filed with the relevant state office and that the premium for the two-year bond was \$1,750.

In response to this request for evidence, Ms. [REDACTED] submitted a letter discussing her right to represent the petitioner. The director received this undated letter on June 23, 2004. It was accompanied by a copy of an updated bond similar

to that initially submitted, but omitting the proof of filing with the state. No other documentation was received with this letter. Ms. [REDACTED]'s letter asserts that while she is not an authorized representative recognized by the Board of Immigration Appeals (BIA), she claims that she is governed by the state of California regulations requiring her to file a \$50,000 bond as an immigration consultant. She requests to be recognized under this category.

The director's July 17, 2004, denial of the petition was principally based on his conclusion that the petitioner had failed to provide any pertinent evidence in response to the director's request for evidence supporting the petitioner's ability to pay the proffered wage and verification of the beneficiary's qualifying three months of employment experience as an uncertified nurse assistant. With regard to Ms. [REDACTED]'s contention that she should be recognized as the petitioner's authorized representative, the director found that because the petitioner had failed to submit any evidence that Ms. [REDACTED] was recognized as an accredited organization by the BIA, this argument failed and the petitioner would be treated as representing itself.

The record indicates that the petitioner submitted a second response to the director's request for evidence, which was not acknowledged in the director's denial of the petition. The envelope accompanying this response shows that it was received on June 28, 2004. The enclosed documentation relates to the petitioner's ability to pay the proposed wage offer of \$14,726.40 and to the beneficiary's prior work experience.

With regard to the beneficiary's qualifying three months of experience as an uncertified nurse assistant, a copy of an e-mail is submitted. The typed name of the author is [REDACTED], who certifies that the beneficiary "stayed with the Cardiff family, and with our relatives, upon her arrival in the United States in 1986 until 1997." An uncertified internally generated chart and list of employees and their duties is also included in the response. The chart identifies the beneficiary as a part-time employee with the petitioner in 2003 and summarizes the number of weeks worked. The list of employees and job duties is not verified by the petitioner and is not specific to dates of employment or number of hours worked.

The petitioner also submitted copies of the beneficiary's W-2s for 1998 through 2003, showing the petitioner's payment of compensation to the beneficiary. They contain the following information:

	Wages
1998	\$ 8,338.65
1999	\$16,680.27
2000	\$16,298.12
2001	\$20,338.16
2002	\$22,061.72
2003	\$ 6,809.05

In 2003, a copy of an additional W-3 indicates that the beneficiary worked for a different employer and earned \$19,235.36. The petitioner further supplied copies of its state quarterly wage reports, as well as copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998 through 2002. They indicate that the petitioner uses a standard calendar year to file its taxes. These returns did not include the 2003 corporate return or a copy of an audited financial statement or annual report relating to 2003. The 1998 tax return shows that the petitioner reported ordinary income of -\$11,541.¹ Schedule L of the tax return shows that the petitioner had \$34,365 in current assets and \$12,846 in current liabilities, resulting in \$21,519 in net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or

¹ For the purpose of this review, ordinary income will be treated as net taxable income.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On appeal, the petitioner merely asserts that it is enclosing evidence of its ability to pay and a letter relating to the verification of the beneficiary's qualifying employment. With the appeal, the petitioner resubmits a copy of Ms. Smith's earlier letter discussing her right to represent the petitioner. The petitioner also resubmits copies of its corporate tax returns for 1998 through 2002, copies of the beneficiary's W-2s for 1998 through 2003, and copies of the petitioner's state quarterly wage reports.

Additionally, the petitioner provides copies of the principal shareholder's individual federal tax returns for 1998 through 2002, as well as a copy of an Internal Revenue Service (IRS) application for an extension of time to file the principal shareholder's individual 2003 tax return.

Documentation relating to the beneficiary's qualifying employment is provided in the form of a copy of a letter, dated August 16, 2004, signed by the owner, [REDACTED]. She states that the beneficiary's former employer lives in Oregon and that she has been unable to establish contact. Ms. [REDACTED] does not confirm the name of this employer but states that the employer's brother informs her that the employer is incapacitated at the present time and might be able to send a verification letter later.

It is noted that the regulation at 8 C.F.R. § 103.2(a)(3), relating to representatives authorized to file appeals, provides in pertinent part:

Representation. An applicant or petitioner may be represented by an attorney in the United States as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

The regulation at 8 C.F.R. § 1.1(f) defines an attorney as a person who is a member of good standing in any state bar. The regulation at 8 C.F.R. § 292.1(a)(4) provides that an accredited representative is a person "representing an organization described in § 292.2 of this chapter who has been accredited by the Board."² There is no indication in the record that Ms. [REDACTED] is an attorney or an accredited representative authorized by the Board.

It is further noted that 8 C.F.R. § 292.1(a)(2)(i), (iii), and (iv) provides that a law graduate not yet admitted to the bar may act as a representative if he or she is appearing at the request of the person requiring representation, that he or she has permission from the official "before whom he or she wishes to appear (namely an immigration judge, district director, officer-in-charge, regional director, the Commissioner, or the Board)," and that he or she "has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents..." The record in this case contains only a copy of a state-required surety bond that Ms. [REDACTED] filed and a G-28. The record fails to establish that Ms. [REDACTED] falls within any of the relevant categories of representatives authorized by federal immigration regulations, regardless of any state surety bond requirements. The AAO concludes that this individual is not authorized to act as a representative in immigration proceedings.

² "Board" means the Board of Immigration Appeals." 8 C.F.R. § 1.1(e).

CIS jurisdiction encompasses a review of the qualifications of a beneficiary for the designated position. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). It may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In this case, the record does not sufficiently establish that the beneficiary accrued the required three months of work experience as of the priority date of January 14, 1998. Her employment with the Cardiffs, as suggested by the e-mail submitted with the petitioner's response, was not identified in any specific way and was not verified by the relevant trainer or employer. Ms. [REDACTED]'s letter provided on appeal provides no additional evidence except to show that the necessary proof is not available.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will initially review whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during a given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, as noted above, the beneficiary's W-2s for 1999-2002 indicate that the petitioner paid her more than the certified wage. For that reason, it is not necessary to examine the petitioner's federal tax returns for those years as the actual payment of these wages demonstrates the petitioner's ability to pay during this time. In 1998, the petitioner paid the beneficiary \$8,338.65 or \$6,387.75 less than the proffered salary of \$14,726.40. As this shortfall could be covered by the petitioner's net current assets of \$21,519, the petitioner's ability to pay the proffered salary in 1998 has also been demonstrated. However, no documentation probative of the petitioner's ability to pay the proffered wage in 2003 was provided, other than the beneficiary's 2003 W-2, which showed that she received \$6,809.05 from the petitioner and was principally employed by a different employer.

It is noted that individual tax returns or the 2003 application for extension of time to file the individual tax return of the petitioner's owner are not determinative of the corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders. As such, CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

If a 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 also 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*, *supra*); 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). 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 the Service should have considered income before expenses were paid, rather than net income.

As set forth above, although the petitioner established its ability to pay the proffered wage in 1998-2002, the director specifically requested financial documentation for those years including 2003, in the April 2004 request for additional evidence. The petitioner's evidence did not include a federal tax return, an audited financial statement, or an annual report demonstrating that it could cover the \$7,917.35 shortfall between the actual wages paid and the proffered wage in 2003. Without such evidence, or other convincing documentation, the petitioner has not demonstrated its continuing ability to pay the proffered salary as required by 8 C.F.R. § 204.5(g)(2). The failure to submit requested evidence that precludes a material line of inquiry is also considered to be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In view of the foregoing, the AAO cannot conclude that the petitioner established that the beneficiary obtained the requisite work experience as of the priority date or demonstrated its continuing ability to pay the proffered wage.

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.