

PUBLIC COPY

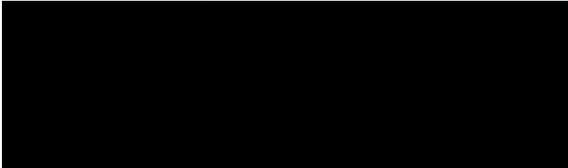
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

BL

U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536*



File: WAC 02 129 53483 Office: CALIFORNIA SERVICE CENTER

Date: **APR 07 2004**

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:



INSTRUCTIONS:

This is the decision 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a janitorial service. It seeks to employ the beneficiary permanently in the United States as a janitorial supervisor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

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.

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.

Eligibility in this matter hinges on the petitioner's 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. Here, the Form ETA 750 was accepted on August 7, 1996. The proffered wage as stated on the Form ETA 750 is \$8 per hour, which equals \$16,640 per year.

With the petition counsel submitted a letter, dated November 12, 2001, on the petitioner's letterhead and signed by the petitioner's president. The letter states that the petitioner was then employing the beneficiary and paying her \$8 per hour.

In support of those assertions, counsel submitted a pay statement for the pay period from June 1, 2001 to June 15, 2001. That pay statement indicates that, during that period, the petitioner paid the beneficiary \$400. This office notes that, although that pay statement supports that the petitioner employed the beneficiary during that period, it does not indicate that the petitioner paid the beneficiary \$8 per hour for two 40-hour weeks during that pay period. Had the beneficiary earned \$8 per hour for 80 hours, her gross pay would have been \$640.

Counsel also submitted the 1999 and 2000, Form 1040 joint income tax return, including Schedule C, Profit or Loss from Business (Sole Proprietorship), of the petitioner's owner and the owner's spouse. Those returns show that the petitioner's owner and owner's wife had five dependents during both of those years.

The 1999 Schedule C indicates that the petitioner returned a net profit of \$10,206 during that year. The corresponding Form 1040 shows that the petitioner's owner declared an adjusted gross income of \$20,490 during that year.

The 2000 Schedule C indicates that the petitioner returned a net profit of \$13,564 during that year. The corresponding Form 1040 shows that the petitioner's owner declared an adjusted gross income of \$6,167 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 24, 2002, requested additional evidence pertinent to that ability. The Service Center noted that the evidence must show the ability to pay the proffered wage beginning on the priority date and continuing during each ensuing year. The Service Center also stated that, consistent with 8 C.F.R. § 204.5(g)(2), the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In addition, the Service Center noted that Part B of the Form ETA 750 indicates that the petitioner employed the beneficiary. The Service Center requested copies of the beneficiary's Form W-2 Wage and Tax Statements for each year since the beneficiary was hired.

In response, counsel submitted a 1996 W-2 form showing that the petitioner paid \$12,075 to the beneficiary during that year; a letter, dated June 11, 2002, from the petitioner's accountant; and the petitioner's owner's 1996, 1997, 1998, and 2001 Form 1040 income tax returns. Those returns show that the petitioner's owner and owner's spouse had five dependents during each of those years.

The 1996 return shows that the petitioner declared a net profit of \$60,253. The corresponding Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income, including all of the petitioner's profit offset by the losses of another business, of \$26,916 during that year.

The 1997 return shows that the petitioner declared a net profit of \$19,658. The corresponding Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income, including all of the petitioner's profits offset by the losses of another business, of \$24,153 during that year.

The 1998 return shows that the petitioner declared a loss of \$10,167. The corresponding Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income, including the petitioner's losses and the profits of another business, of \$19,196 during that year.

The 2001 return shows that the petitioner declared a net profit of \$35,537. The corresponding Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income, including the petitioner's profits offset by the losses of another business, of \$6,027 during that year.

In his letter, the accountant noted the amount of the petitioner's gross receipts and its wage expenses, and recommended that CIS "reconsider the petitioner ability [sic] to pay the via Greg's Maintenance Services Gross Receipts from Schedule C."

With that evidence, counsel submitted a cover letter, dated July 17, 2002, in which she stated that the beneficiary had provided the tax returns and W-2 forms she was able to find.

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 September 10, 2002, denied the petition.

On appeal, counsel submits an affidavit, dated October 8, 2002, from the petitioner's owner. In that affidavit, the petitioner's owner states that he owns a restaurant, in addition to the petitioning janitorial business, and lists various assets of the two businesses. Further, the petitioner's owner states that he owns a house in which he has equity of \$200,000. Further still, counsel provides Federal 1099 Miscellaneous Income forms showing amounts paid by a business to the petitioner during 2000 and by six businesses during 2001.

Finally, counsel submitted a letter, dated October 9, 2002, in which she stated, "We are still awaiting the bank statement since 1997 to prove ABILITY TO PAY WAGES." (Emphasis in the original.)

Subsequently, counsel provided copies of monthly statements of the petitioner's bank account from May 1995 through December 2002. Counsel notes that those statements indicate that the petitioner has been in business since 1995 and that the petitioner "moves quite a substantial amount of money per month."

As is stated in 8 C.F.R. § 204.5(g)(2), three types of documents are competent and probative evidence of the ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. An affidavit from the petitioner listing assets and assigning a value to them, unsupported by either evidence of those assets' existence or of their value and marketability, is certainly not an acceptable substitute for the types of evidence listed as competent in the regulations. The assets listed in the affidavit from the petitioner's owner, submitted on appeal, will not be considered.

Counsel's reliance on the petitioner's bank account statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

The position urged by the accountant in the letter of June 11, 2002, that the petitioner's gross receipts and wage expense should be considered evidence of the ability to pay the proffered wage, is unconvincing.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's Schedule C, Profit or Loss from Business (Sole

* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

Proprietorship) Line 31, Net profit (or loss).

The petitioner, however, is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own income and assets. Therefore, the petitioner's owner's income and assets, if reliably proved, may be considered in the determination of the petitioner's ability to pay the proffered wage. However, the petitioner must show the ability to pay the proffered wage out of his net income and still support his family.

In determining the petitioner's ability to pay the proffered wage, CIS will subtract the proffered wage from the petitioner's adjusted gross income. The petitioner's owner must show that it is able to support his family on the difference. CIS may rely on federal income tax returns in determining 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

Counsel submitted evidence that the petitioner paid \$12,076 in wages to the beneficiary during 1996. However, the record contains no evidence that all or even part of those wages were paid after the priority date. As such, those wages may not be included in the determination of the petitioner's ability to pay the proffered wage. Counsel submitted tax returns showing that the beneficiary had earnings during the remaining salient years, but no evidence that the petitioner was the source of those earnings. Counsel has not demonstrated that the earnings shown on the beneficiary's tax returns were paid to her by the petitioner and those earnings will not be included in the calculation of the petitioner's ability to pay the proffered wage.

The priority date is August 7, 1996. The proffered wage is \$16,640 per year. During 1996, the petitioner need not show the ability to pay the entire proffered wage, but only that portion which would have been due if it had hired the beneficiary beginning on the priority date. On the priority date, 219 days of that 366-day year had already elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 147 days. The proffered wage multiplied by $147/366^{\text{th}}$ equals \$6,683.28, which is the amount the petitioner must show the ability to pay during 1996.

During 1996, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$26,916. That amount, minus the portion of the proffered wage that the petitioner is obliged to show the ability to pay, equals \$20,232.72, which is the amount the petitioner's owner would have retained of his adjusted gross income after paying the proffered wage.

The Service Center requested no evidence of the petitioner's owner's monthly personal expenses and the petitioner's owner provided none. As such, this office is unable to determine whether the petitioner was able to support himself and his family on the amount which would have remained after paying the proffered wage out of his adjusted gross income during 1996.

During 1997 and each ensuing year, the petitioner is obliged to show the ability to pay the entire

proffered wage. During that year, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$24,153. That amount minus the proffered wage equals \$7,513.

Again, the record contains no evidence from which this office can determine whether the amount of the petitioner's adjusted gross income which would have remained after paying the proffered wage during 1997 was sufficient to support the petitioner's owner and the petitioner's owner's family during that year.

During 1998, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$19,196. That amount minus the proffered wage equals \$2,556. The record contains no evidence from which this office can determine whether the petitioner's owner could have supported his family on that amount.

During 1999, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$20,490. That amount minus the proffered wage equals \$3,850. The record contains no evidence from which this office can determine whether the petitioner's owner could have supported his family on that amount.

During 2000, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$6,167. That amount is less than the proffered wage. The petitioner has submitted insufficient evidence to show that any other funds were available during 2000 to pay the proffered wage or to support the petitioner's owner's family. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$6,027. That amount is less than the proffered wage. The petitioner has submitted insufficient evidence to show that any other funds were available during 2000 to pay the proffered wage or to support the petitioner's owner's family. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

A determination of the petitioner's ability to pay the proffered wage and support his family during 1997, 1998, and 1999, would have to rely on evidence of the petitioner's owner's ability to support his family on the amount of his adjusted gross income which would have remained during those years after paying the proffered wage. The inference that the petitioner's owner was unlikely to be able to support his family on amounts ranging from \$2,556 to \$7,513 is strong. Because no such evidence was requested, this office is not inclined to base this decision on the failure of the petitioner to show the ability to pay the proffered wage during those years.

The petitioner clearly failed, however, to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.