



U.S. Citizenship
and Immigration
Services

B-6



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

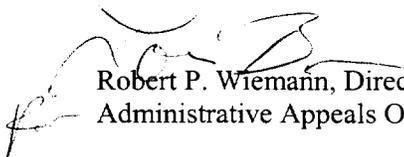
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter, in part, hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is October 31, 2000. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 4, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's 2000, 2001, and 2002 federal income tax return and evidence of wage payments to the beneficiary if any.

The petitioner is structured as a sole proprietor. Counsel submitted the sole proprietor's 2000 and 2001 Form 1040 U.S. Individual Income Tax Return. The federal tax return for 2000 reflected an adjusted gross income of \$22,636. Schedule C of the return reflected that the petitioner experienced a net profit of \$20,284. The tax return for 2001 reflected an adjusted gross income of \$16,099. Schedule C of the return reflected that the petitioner experienced a net loss of \$515.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits the sole proprietor's 2002 Form 1040 federal tax return. The return reflected an adjusted gross income of \$4,164. Schedule C of the return reflected that the petitioner experienced a net loss of \$53,525. Counsel states that the priority date for the beneficiary is October 31, 2000. Therefore, the petitioner would only be required to pay 2 months salary during 2000. Counsel further states that the petitioner operates four retirement homes and that the profits derived from one of these operations, \$24,284, was not claimed on its federal tax returns. Counsel states that these funds as well as claimed depreciation and a tax refund of \$347 reflect more than sufficient funds to pay the proffered wage during 2001. Counsel claims similar net profits from two other retirement homes during 2002, reflecting net profits of \$18,997 and \$27,940, respectively. Counsel indicates that these amounts were not claimed on its taxes.

Counsel also states that he is submitting evidence of a separate stock portfolio held by the petitioner that has more than sufficient liquid funds 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years.

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).

Counsel's claim that CIS should consider as liquid assets "net profit" figures purportedly earned by selected residences in addition to adjusted gross income, is not persuasive. Such figures, submitted on appeal, appear in conflict with the federal tax returns previously submitted. Further, counsel states that the net profits claimed on appeal were not reported on the petitioner's federal taxes. Therefore, the unreported income will not be considered. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp.647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

Counsel claims that the petitioner has additional liquid assets in a stock portfolio to pay the proffered wage. The stock portfolio is dated May 27, 2003 and no evidence is provided that details when the stocks were purchased. The stock summary sheet submitted on appeal is not conclusive proof that funds were available as of the priority date through May 3, 2003.

Counsel's claim that the petitioner was obligated to pay only 2 months wages during 2000 is corroborated by the record of proceeding. The petitioner, however, has not demonstrated that at least \$4,004 of its 2000 earnings were earned in the last two months. We will not consider 12 months of income for two months of the proffered wage any more than we would consider two years of net income towards payment of the annual wage.

The tax return for 2001 reflected an adjusted gross income of \$16,099. Schedule C of the return reflected a net loss of \$515. These amounts are insufficient to demonstrate an ability to pay the proffered wage.

On appeal, counsel submits the sole proprietor's 2002 Form 1040 federal tax return. The return reflected an adjusted gross income of \$4,164. Schedule C of the return reflected a net loss of \$53,525. The petitioner could not pay the proffered wage out of these funds. The AAO concurs with the director's decision. Even if we do not reduce the adjusted gross incomes for the relevant years by any family living expenses, the petitioner could not pay the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.