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**U.S. Citizenship
and Immigration
Services**

Blp



114 12 2004
Date:

FILE: EAC 02 249 51709 Office: VERMONT SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker 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

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as an other worker. The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has established her financial ability to pay the proffered salary.

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) provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon whether the petitioner's continuing ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$12.67 per hour or \$26,353.60 annually, based on a 40-hour week. The ETA 750B, signed by the beneficiary, indicates that the petitioner has employed her since 1999.

As evidence of its ability to pay the beneficiary's wage offer, the petitioner initially submitted a copy of her Form 1040, U.S. Individual Income Tax Return for 2001. It shows that the petitioner filed a joint tax return with her spouse and declared two dependents. Her adjusted gross income was \$42,265.

On April 15, 2003, the director requested the petitioner to submit evidence of her continuing ability to pay the proffered wage from April 30, 2001, the priority date, to the present. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statement (W-2) showing how much she was paid in 2001. The director further requested that the petitioner submit a list of her monthly living expenses.

The petitioner's response was received on July 16, 2003. The petitioner submitted a list of monthly living expenses, which amounted to \$34,720 annually. She failed to submit any financial information relevant to 2002 or 2003 and failed to submit any W-2s or other evidence showing wages paid to the beneficiary.

The director denied the petition. The director concluded that the petitioner could not reasonably pay the proffered wage as well as provide enough income to support her household.

On appeal, counsel asserts that a \$20,963 deduction for real estate expenses taken on the 2001 tax return should be added back to the petitioner's 2001 income because it represents a non-recurring expense for household repairs that was financed by a loan. Counsel submits copies of correspondence from a finance company indicating that the loan was paid on October 24, 2002.

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 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). Claiming that an expense taken for real property improvements should be added back because it may represent a non-recurring expense is not persuasive. 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.

A sole proprietorship is not legally separate from its owner. As the petitioner is a sole proprietor, her income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietor and her dependents must be reviewed when determining her continuing ability to pay the beneficiary's proposed annual salary of \$26,353.60. She must be able to demonstrate that she can sustain her individual living expenses as well as pay the beneficiary's proposed salary.

In the instant case, the documentation submitted on appeal reveals that the petitioner's annual adjusted gross income, as set forth on her tax returns, does not establish the continuing ability to pay the proffered wage of \$26,353.60. As noted by the director, after deducting the proffered wage from the sole proprietor's declared adjusted gross income of \$42,265, the result of \$15,912 left to support a family of four does not represent a plausible amount. It is less than the proffered wage itself and does not even consider the \$34,720 per year individual living expenses that the petitioner itemized in response to the director's request for evidence. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983).

The petitioner failed to submit any evidence of wages paid to the beneficiary and also failed to submit any evidence of her financial ability to pay the proffered wage, beyond the 2001 tax return, although the director's April 2003 request specified that evidence should be provided from the priority date to the present. Failure to submit requested evidence that precludes a material line for inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(14). The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage beginning at the priority date. In this case, that continuing ability has not been demonstrated by the information provided.

Accordingly, based on a review of the evidence submitted, the AAO cannot conclude that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the present.

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.