



U.S. Citizenship
and Immigration
Services

B2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2004**

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

PETITION: 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:

[Redacted]

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.

for
Robert P. Wiemann, Director
Administrative Appeals Office

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prevent disclosure of unarranged
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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 Mexican bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 accordingly denied the petition.

On appeal, counsel states that the petitioner's financial evidence establishes its ability to pay the proffered wage.

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.

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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 13, 2000. The proffered wage as stated on the Form ETA 750 is \$11.60 per hour, which amounts to \$24,128.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2000.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$301,750.00, and to currently have five employees.

The evidence submitted initially and in response to a request for evidence (RFE) issued by the director consists of the following documents: a copy of a letter dated October 11, 2000 from a former employer of the beneficiary in Mexico attesting to her experience as a baker from February 1994 to November 1999; copies of Form DE6 California quarterly wage and withholding reports for the last quarter of 2001 and the first two quarters of 2002; copies of Form 1040 U.S. individual income tax joint returns for the petitioner's owner and her husband for 2000, 2001 and 2002; partial copies of Form 540 California resident income tax joint returns for the petitioner's owner and her husband for 2000, 2001 and 2002; copies of Form 1040 U.S. individual income tax joint returns for the beneficiary and her husband for 2000, 2001 and 2002, with accompanying Form W-2 wage and tax statements; copies of Internal Revenue Service transcripts of the Form 1040 returns for the beneficiary and her husband for 2000 and 2001; and a letter dated July 16, 2003 from the petitioner's owner itemizing his monthly personal household expenses.

In a decision dated August 21, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

Counsel states on appeal that the petitioner's financial evidence establishes its ability to pay the proffered wage. Counsel states that the beneficiary has been working for the petitioner since 1999, but that she was paid in cash for the years 1999, 2000, 2001 and 2002, except for the last four and one half weeks of 2002, when she was put on the payroll. Counsel states that the beneficiary was issued a Form W-2 Wage and Tax Statement for that period in the amount of \$2,141.00.

On appeal, counsel submits additional evidence, all of which consists of duplicate copies of documents previously submitted for the record, except for a copy of Schedule CA540, California Adjustments – Residents, of the petitioner's owner and his wife for 2000. That schedule is newly-submitted on appeal. The copy of the 2000 California tax return for the petitioner's owner and his wife submitted previously lacked a copy of Schedule CA540.

The single document newly submitted on appeal contains no information directly relevant to the instant petition. All other documents submitted on appeal are duplicate copies of documents submitted prior to the director's decision. The AAO therefore will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, counsel states in his notice of appeal that the beneficiary worked for the petitioner in 1999, 2000, 2001 and 2002, and that she was paid in cash for all of that work except for the last four and one half weeks of 2002, when she was on the petitioner's payroll and for which she was issued a Form W-2 Wage and Tax Statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions are only partially supported by evidence in the record. On the Form ETA 750B the beneficiary states that she began working for the petitioner in August 2000. A copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002 is in the record, showing compensation in the amount of \$2,141.42 paid to her by the petitioner. The amount of \$2,141.42 is less than the proffered wage of \$24,128.00 by the amount of \$21,986.58. The record contains no other information on the amount of compensation paid by the petitioner for any of the years for which counsel and the beneficiary assert that the beneficiary was working for the petitioner. Therefore the evidence concerning the beneficiary's employment by the petitioner fails to establish the petitioner's ability to pay the proffered wage at any time during the relevant time period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as a sole proprietorship. For a sole proprietorship, CIS considers net income to be the figure shown for adjusted gross income on the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. In the instant case, the joint tax returns of the petitioner's owner and his wife show the following amounts for adjusted gross income: \$59,962.00 for 2000; \$52,084.00 for 2001; and \$41,919.00 for 2002.

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. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the adjusted gross income figures for the petitioner's owner and his wife are greater than the proffered wage for each of the relevant years. However, the amounts remaining to the petitioner's owner and his wife after paying the proffered wage are insufficient to pay for their personal household expenses. On their returns for 2000, 2001 and 2002 the petitioner's owner and his wife claim no dependents. Therefore, their household is a two-person household. A letter from the petitioner's owner dated July 16, 2003 contains an itemized statement of his monthly household expenses. Those expenses total \$4,023.00 per month, which is equal to \$48,276.00 per year. The owner does not provide any different figures for monthly household expenses in earlier years, so the same figure will be used in analyzing in all three years at issue in the instant petition. The petitioner must therefore show the ability to pay the proffered wage of \$24,128.00 plus yearly household expenses of \$48,276.00 for each year at issue. For the year 2002, for which the petitioner submitted a Form W-2 Wage and Tax statement of the beneficiary, the amount shown on that Form W-2, \$2,141.42, will be credited toward the petitioner.

For 2000, calculating from an adjusted gross income of \$59,962.00, the owner's yearly household expenses of \$48,276.00 would leave \$11,686.00 available to pay the proffered wage. That amount is \$12,442.00 less than the proffered wage. For 2001, the adjusted gross income of \$52,084.00 after paying the owner's household expenses would leave \$3,808.00 available to pay the proffered wage. That amount is \$20,320.00 less than the proffered wage. For 2002, the adjusted gross income of \$41,919.00 is less than the owner's stated household expenses, leaving a deficit of -\$6,357.00. Since that figure is negative, no funds would be available in 2002 to pay the increase of \$21,986.58 needed to raise the beneficiary's compensation to the proffered wage (crediting the petitioner with the \$2,141.42 shown on the beneficiary's W-2 form for that year). The figures for the adjusted gross income of the petitioner's owner and his wife therefore fail to establish the petitioner's ability to pay the proffered wage during the relevant years.

In his decision the director correctly based his analysis on the adjusted gross income of the petitioner's owner and his wife for the years at issue and correctly credited the petitioner with the amount of \$2,141.42 shown on the beneficiary's Form W-2 Wage and Tax Statement for 2002. The director also properly considered the

petitioner's household expenses as part of his analysis. The decision of the director to deny the petition therefore was correct.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.