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FILE: [REDACTED]  
EAC-03-019-54372

Office: VERMONT SERVICE CENTER

Date: **AUG 30 2005**

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

PETITION: 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 preference 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 sustained. The petition will be approved.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a live-in household worker. 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 denied the petition accordingly.

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 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:

*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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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)].

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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$12.67 per hour, for 44 hours a week, which amounts to \$28,988.96 annually. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 7, 2002. On the petition, the items for the date on which the petitioner was established, the current number of employees, the gross annual income and the net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 16, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on December 8, 2003.

In a decision dated March 19, 2004, 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.

On appeal, counsel submits a brief and no additional evidence. Counsel also submits an additional copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner and his wife for 2002, a copy of which had been submitted prior to the director's decision.

Counsel states on appeal that the director failed to consider a capital gain realized by the petitioner on the sale of his personal residence in 2002, which was not taxable. Counsel states that the petitioner's adjusted gross income plus the capital gain that year were sufficient to pay the petitioner's household expenses and also to pay the proffered wage to the beneficiary that year.

Since no additional evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 a individual. The petitioner is offering the beneficiary employment in his personal household. In such a situation, the petitioner must show financial resources

sufficient for his or her own support and for that of any dependents as well as to pay the proffered wage. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For an individual petitioner, CIS considers net income to be the figure for Adjusted Gross Income on the owner's Form 1040 U.S. Individual Income Tax Return.

The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2001 and 2002. The record before the director closed on December 8, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet available. Therefore the petitioner's tax return for 2002 was the most recent return available.

The record also contains statements of the petitioner's itemized monthly household expenses for 2001 and 2002, with calculations of total household expenses for each year.

The petitioner's adjusted gross income and yearly household expenses for 2001 and 2002 are shown in table below.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$67,384.00	\$38,136.00	\$28,988.96*	\$259.04
2002	\$34,641.00	\$38,280.00	\$28,988.96*	-\$32,627.96

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures establish the petitioner's ability to pay the proffered wage in 2001, but they fail to establish the petitioner's ability to pay the proffered wage in 2002.

In his brief, counsel asserts that the petitioner's adjusted gross income as shown on his tax return for 2002 does not reflect his full income that year, since the petitioner realized a capital gain of \$170,000.00 that year on the sale of his personal residence, income which was excluded from taxable income under Section 121 of the Internal Revenue Code. Counsel states that the petitioner's adjusted gross income plus the capital gain that year were sufficient to pay the petitioner's household expenses and also to pay the proffered wage to the beneficiary that year.

Under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. In the instant petition, the Schedule D, [REDACTED] and Losses, contains an entry showing a capital gain of \$170,000.00 on the sale of a home acquired on November 1, 1995 and sold on March 20, 2002. On the following line is an entry stating "Section 121 Exclusion" and the amount of -\$170,000.00.

Under Section 121 of the Internal Revenue, up to \$250,000.00 of gain from the sale of a principal residence may be excluded from income by an individual taxpayer and up to \$500,000.00 of gain may be excluded from income on a joint return. See *Selling Your Home*, I.R.S. Pub. No. 523, at 3, <http://www.irs.gov/pub/irs-02/p523.pdf> (2002). If the entire gain is to be excluded, no entry of the gain should be made on the Schedule D, Capital Gains and Losses. If only a portion of the gain is to be excluded, the entire gain should be reported on Schedule D, followed by a second entry on the following line stating the Section 121 exclusion and the amount of the exclusion. *Id.*, at 18.

The Schedule D attached to the petitioner's tax return for 2002 indicates that the entire gain of \$170,000.00 is to be excluded from income. For this reason, it appears that the petitioner was not required to make any reference to the gain on the Schedule D attached to the Form 1040 U.S. Individual Income Tax Return for 2002 of the petitioner and his wife. Nonetheless, in stating the entire amount of the gain on Schedule D on one line, followed by the exclusion statement on the following line, the petitioner followed the format described in the I.R.S. publication cited above.

The petitioner's reporting of the \$170,000.00 of income from the sale of the petitioner's principal residence is sufficient to establish that the petitioner had additional income in 2002 beyond the amount shown on line 35 of the Form 1040 for 2002 as adjusted gross income. This is a circumstance relevant to the petitioner's ability to pay the proffered wage. It is therefore appropriate to consider both the petitioner's adjusted gross income and the excluded capital gain in evaluating the petitioner's ability to pay the proffered wage in 2002. The result of adding the capital gain in 2002 to the petitioner's gross income is shown below.

Tax year	AGI + excluded capital gain	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$67,384.00	\$38,136.00	\$28,988.96*	\$259.04
2002	\$204,641.00	\$38,280.00	\$28,988.96*	\$137,372.04

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures are sufficient to establish the petitioner's ability to pay the proffered wage in both 2001 and 2002.

In his decision, the director considered only the adjusted gross income of the petitioner and his wife as evidence of the financial resources available to the petitioner. In a letter dated November 28, 2003 submitted in response to the RFE, counsel mentioned the \$170,000.00 capital gain as additional available resources. Counsel failed to explain in that letter that the capital gain was from the sale of the petitioner's principal residence and that the gain was therefore excluded from the petitioner's income for that year. Nonetheless, the Schedule D for 2002 submitted in evidence showed both the amount of the gain and its exclusion from income under section 121. Although counsel failed to state his reasoning clearly in his November 28, 2003 letter, the director should have considered the evidence on the Schedule D under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his brief on appeal, counsel clearly explains the nature of the capital gain reported on the Schedule D for 2002 and its exclusion from income. Counsel's assertions are supported by the evidence on the Schedule D and by the information in the Internal Revenue Service publication cited above.

For the reasons discussed above, the assertions of counsel on appeal are sufficient 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved