

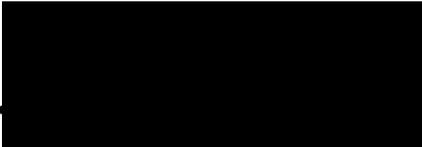
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



B6

FILE: WAC-03-194-54385 Office: CALIFORNIA SERVICE CENTER Date: **DEC 19 2005**

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:
[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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican chef. 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.

On appeal, counsel submits a brief statement and/or 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.

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 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 priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960 per year). The Form ETA 750 states that the position requires two years experience. On the Form ETA 750B, signed by the beneficiary on November 15, 2001, the beneficiary claimed to have worked for the petitioner since July 2000.

On the petition, the petitioner claimed to have been established in 1996, to have gross annual income of \$380,641, to have net annual income of \$31,540, and to currently employ six workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The petition was filed with Form 1040 US Individual Income Tax Return filed by the owner of the petitioner for 2001 and 2002, and W-2 forms for the beneficiary for 2001 and 2002 pertinent to the ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 19, 2004, the director issued a request for additional evidence (RFE) pertinent to that ability. The director specifically requested that evidence for 2003, the beneficiary's W-2 form for the year 2003 and Form DE-6, Quarterly Wager Report for all employees for the last six quarters.

In response, the petitioner submitted its Federal Tax Returns for 2003, W-2 form for the year 2003 for the beneficiary, a letter from Ron Harris, CPA including financial statements, and DE-6 forms.

On August 10, 2004, the director determined that the petitioner had not demonstrated its ability to pay the proffered wage since the priority date because Form 1040 submitted for tax years 2001 through 2003 reflect insufficient adjusted gross income to pay the proffered wage and also to cover the owner's household living expenses, and accordingly denied the petition.

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 submitted W-2 forms for the beneficiary for 2001 through 2003 claiming that he hired and paid the beneficiary the proffered wage. The submitted W-2 forms for 2001 through 2003 for the beneficiary evidence that the petitioner employed and paid the beneficiary \$8,340 in 2001, \$13,050 in 2002, and \$23,400 in 2003 respectively, which are \$16,620 in 2001, \$11,910 in 2002 and 1,560 in 2003 less than the proffered wage of \$24,960. Therefore, the petitioner did not establish that it paid the beneficiary the full proffered wage in years 2001 through 2003, but established that it paid partial proffered wages to the beneficiary for the period from the priority date through 2003. Therefore, the petitioner is obligated to establish its ability to pay the beneficiary the difference between the wages actually already paid and the proffered wage for the period with its income.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2001 through 2003. The record before the director closed on July 12, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, 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 *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 himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

The tax returns demonstrated the following financial information concerning the petitioner's continuing ability to pay the difference between wages actually already paid and the proffered wage of \$24,960 per year from the priority date with incomes:

Tax Year	Adjusted Gross income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$29,311 ¹	\$16,620	\$12,691
2002	\$18,378 ²	\$11,910	\$6,468
2003	\$(7,158) ³	\$1,560	\$(8,718)

The petitioner's adjusted gross income in 2001 had \$12,691 surplus after paying the difference between wage paid and the proffered wage in that year. However, without the owner's monthly expenses the AAO cannot determine whether or not the petitioner could have covered its household living expenses with that surplus. The petitioner should provide a statement of monthly expenses in any subsequent proceedings. The petitioner's adjusted gross income in 2002 had a \$6,468 surplus after paying the difference between wage paid and the proffered wage in 2002 and had a \$8,718 deficit in 2003. It is not likely that the petitioner could meet his living expenses with a \$1,560 surplus in 2002 or with a \$8,718 deficit in 2003.

The record of proceeding contains unaudited financial statement of the petitioner for the year 2003 and for a period from January 1, 2004 to June 30, 2004. However, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record also contains copies of bank statements for the petitioner's business account with Wells Fargo Bank for June, July and August 2004 with monthly ending balances of \$12,066.39, \$8,669.58 and \$9,189.61 respectively. With these bank statements the petitioner cannot establish its financial ability to pay the proffered wage or the difference between the wage paid and the proffered wage for the years 2001 through 2003. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

¹ IRS Form 1040 for 2001, Line 33.

² IRS Form 1040 for 2002, Line 35.

³ IRS Form 1040 for 2003, Line 34.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. However, in instant case the record of proceedings does not contain any documentation showing the petitioner's liquid assets, any other source of liquefiable assets that would be available to pay the wage. The petitioner should address this issue in any subsequent proceedings. The petitioner did not submit a statement of monthly expenses for the owner's household.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001, 2002 or 2003. The adjusted gross income in each year reported in tax returns failed to demonstrate the ability to pay the proffered wage and to cover the petitioner's living expenses in each of the years 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of 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.