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U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: FEB 15 2005

WAC 03 012 53766

IN RE:

Petitioner:

Beneficiary:



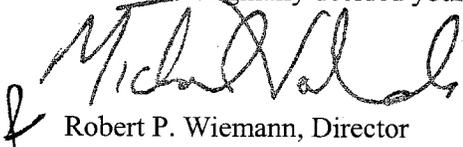
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

DISCUSSION: The employment based immigrant 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 foreign specialty cook. 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 and denied the petition accordingly.

On appeal, counsel asserts that the director erred in evaluating the evidence and maintains that the petitioner has established its financial ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of 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) 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 the Service.

Eligibility in this case rests upon whether the petitioner's 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. *See* 8 C.F.R. § 204.5 (d). Here, the petition's priority date is February 21, 2001. The beneficiary's salary as stated on the labor certification is \$10.50 per hour, which amounts to \$21,840 per year. The ETA 750B, signed by the beneficiary on February 5, 2001, indicates that she has worked for the petitioner since June 2000. The record also contains a G-325A, Biographic Information form, signed by the beneficiary on September 30, 2002, which also reflects that the petitioner employed the beneficiary from June 2000 until the present time.

The record indicates that the petitioner is structured as a sole proprietorship. Part 5 of the visa petition reflects that the petitioner was established in May 2000, claims a gross annual income of approximately \$314,000, and currently employs four workers.

As evidence of its ability to pay the proffered wage, the petitioner initially submitted copies of the sole

proprietor's Form 1040, U.S. Individual Income Tax Return for 1999, 2000, and 2001.¹ They indicate that the sole proprietor filed jointly with his spouse and declared two dependents in 2000 and 2001. In 2000, he reported an adjusted gross income of \$39,665, including a net business loss of \$45,643, which is reflected on Schedule C, Profit or Loss from Business. This attachment also shows that the petitioner reported \$107,709 in gross income and \$153,352 in total expenses, including \$53,215 in wages paid.

As the 2001 tax return covers the priority date of the labor certification, it is more relevant. In that year, the sole proprietor declared an adjusted gross income of \$27,352, including a net business loss of \$7,747 as shown on Schedule C. Schedule C also shows that the petitioner reported \$206,186 in gross income, \$213,933 in total expenses, including \$63,943 in wages paid.

On March 3, 2003, the director issued a notice of intent to deny the petition. The director discussed the figures presented on the sole proprietor's 2000 and 2001 tax returns and afforded the petitioner thirty additional days to provide additional evidence to support the petitioner's continuing ability to pay the proffered wage. The director noted that the tax returns did not indicate that the petitioner produced sufficient income to support both the sole proprietor's individual household expenses and pay the proffered wage. He requested the petitioner to submit a summary of the sole proprietor's recurring monthly expenses, including such items as rent or mortgage, food, utilities etc. The director also requested the petitioner to provide copies of the beneficiary's Wage and Tax Statements (W-2s) from the priority date of February 21, 2001 to the present. Finally, the director advised the petitioner that if the sole proprietor proposed to use personal assets to pay the proffered wage, documentation of such assets must be provided.

In response, the petitioner submitted a summary of the sole proprietor's monthly household expenses, which totaled \$2,215.00 per month, or \$26,580 per year. The petitioner also submitted a copy of the sole proprietor's mortgage reflecting the same payment of \$1,818 per month that was claimed as part of the sole proprietor's monthly household living expenses, as well as a copy of his spouse's retirement plan statement. This statement indicates that as of December 31, 2002, the sole proprietor's spouse had approximately \$10,000 invested in a defined contribution plan, based on seven years of employment with the University of California.

The petitioner also resubmitted signed copies of the sole proprietor's 2000 and 2001 individual tax returns. The figures on page 1 are the same as those shown on the 2000 and 2001 tax returns submitted with the petition, however, the new version of the 2001 tax return contains an additional dependent claimed on line 6(c). The petitioner further offered a copy of the petitioner's federal Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return for the year 2000. It shows total payment of wages to employees at \$59,265.48.

The petitioner also submitted copies of its Transmittal of Wage and Tax Statements (W-3s) for 2000, 2001 and 2002, as well as copies of its state quarterly wage reports and various copies of the employees' W-2s for each year. The beneficiary's name is not included on any of these documents as an employee. Counsel's transmittal

¹ In 1999, prior to the establishment of the petitioning business, the sole proprietor filed jointly and declared four dependents. His occupation was listed as a sales consultant.

letter, dated March 27, 2003, states that there is no W-2 for the beneficiary since the petitioner had not employed her since February 21, 2001.

The petitioner further offered a copy of a "property profile," which purports to reflect a value of the sole proprietor's personal residence, as well as a copy of an investment summary from MFS Investment Management indicating that as of December 31, 2001, the sole proprietor held an investment portfolio valued at \$25,398. No evidence of the value of this portfolio was submitted for 2002.

The director denied the petition on May 12, 2003. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date of February 21, 2001. The director noted that the evidence relating to the petitioner's employment of the alien beneficiary was contradictory. He subsequently concluded that after deducting the proffered wage of \$21,840 from the sole proprietor's 2001 adjusted gross income of \$27,352, the remaining \$5,512 was insufficient to support the sole proprietor, his spouse, and three dependents.

On appeal, counsel asserts that the director ignored the sole proprietor's other assets and that the director failed to consider that the petitioner had already been paying substantial wages to its employees, including a cook. Counsel claims that the existing cook was going to be replaced by the alien beneficiary.

With regard to counsel's claim that alien was intended to replace an existing cook, it is noted that the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not name the worker, state his or her wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. Although as mentioned, no information about the existing employee is provided, it is also noted that the labor certification and the immigrant petition process are intended to enable the employment and immigration of qualified alien workers where there are not sufficiently willing and qualified U.S. workers available to perform the offered position.

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 may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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 during a given period. To the extent that a petitioner may be paying a beneficiary less than the proffered wage, consideration will be given to those wages. If the shortfall can be paid out of either a petitioner's net income or net current assets, a petitioner will be deemed to have established its ability to pay the proffered wage during a given period.²

² Net current assets are the difference between current assets and current liabilities. It represents the level of liquidity that a petitioner may possess as of the date of filing and represents cash or cash equivalents that may be available to pay the proffered wage during a given period.

In the instant matter, the AAO concurs with the director's conclusion that the evidence contained in the record regarding when the petitioner has employed the beneficiary is contradictory. While the beneficiary's assertions reflected on the Part B of the labor certification and on a biographic information form indicate that she has been working for the petitioner since June 2000, the petitioner's submissions in response to the director's intent to deny the petition did not provide any documentation to support such employment. Counsel's assertion in his March 2003 cover letter that no W-2 was available because the beneficiary had not worked for the petitioner since February 2001, is also confusing in light of the fact that copies of the W-2s issued in 2000 to other employees were provided but failed to include one for the beneficiary. As no evidence was submitted to establish the specifics of the beneficiary's employment with the petitioner, consideration of payment of wages to the beneficiary cannot be included as part of the review of the petitioner's ability to pay the proffered salary. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If the petitioner does not establish that it may have 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). Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. Similarly, showing that the petitioner paid cumulative wages to other employees is also insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner has provided a copy of the sole proprietor's individual tax return for 2001. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, cash or cash equivalent 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 *Ubedâ*, 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, or approximately thirty percent (30%), of the petitioner's gross income.

Counsel's contention that a sole proprietor's other personal assets may be considered in support of a sole proprietorship's ability to pay a proposed wage offer is accurate, but this must be viewed in a reasonable context. In this case, neither the value of the sole proprietor's personal residence, nor his spouse's retirement plan holdings will be included in a review of the sole proprietor's cash or cash equivalent assets available to pay the proffered salary. CIS does not consider real estate holdings or a petitioner's willingness to liquidate or borrow against the value of a personal residence as representative of a cash resource readily available to pay a certified wage. It is noted that in assessing an individual sole proprietor's net current assets available to pay the proffered salary, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase a petitioner's liabilities and will not improve the overall financial position. Similarly, the spouse's retirement plan statement showing a balance of approximately \$10,000 as of December 31, 2002, will also not be considered because there is no indication that such a resource could be readily accessed to pay a proffered wage.

The sole proprietor's investment portfolio balance, however, represents a more credible example of a cash asset that might be available to cover a proffered wage and the AAO finds the director should have considered this resource for 2001. In order to pay the proffered wage of \$21,840 and the annual household expenses of \$26,580, the sole proprietor needed to have about \$48,420 available. His 2001 annual adjusted gross income of \$27,352 combined with the portfolio balance of approximately \$25,000, yields about \$52,352, which would be enough to cover these expenses during 2001. It is noted, however, that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay a proffered wage. Although it can be concluded that the petitioner has sufficiently established the ability to pay the proffered wage in 2001 with the aid of the portfolio account, the record contains insufficient evidence that this ability could have been sustained after depletion of the portfolio account. Thus, while the AAO finds that the director should have considered the sole proprietor's portfolio account in reviewing its ability to pay for 2001, the petitioner failed to present convincing evidence that its financial ability continued after 2001. Other than as discussed above, the record of proceeding does not contain any other convincing evidence or source of the petitioner's ability to pay the proffered wage beyond 2001.

Based on a review of the record and considering the argument presented on appeal, the AAO cannot conclude that the director erred in finding that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date.

Beyond the decision of the director, the AAO notes that Part 14 of the labor certification requires that the alien beneficiary possess two years of work experience in the position offered of foreign specialty cook. The employer's letter offered by the petitioner to establish that the beneficiary possesses sufficient work experience as of the priority date of February 21, 2001, only documented that the beneficiary was employed as an "assistant cook" at a restaurant in the Philippines. The regulation at 8 C.F.R. § 204.5(g)(1) provides that "evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties

performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. The Filipino employer's letter contained in this record fails to describe the beneficiary's duties during her employment as an assistant cook and cannot be concluded to sufficiently corroborate that the beneficiary either was a foreign specialty cook as set forth in the labor certification or acquired the requisite work experience as a foreign specialty cook.

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.