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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAR 04 2005
EAC 03 081 51741

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioners are individuals. They seek to employ the beneficiary permanently in the United States as a general housekeeper – live out. 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 petitioners had not established that they 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, the petitioner submits a brief and additional evidence.

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, 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 October 17, 2000. The proffered wage as stated on the Form ETA 750 is \$12.36 per hour or \$25,708.80 annually.

The petitioners are individuals. With the petition, the petitioner failed to submit any evidence of its continuing ability to pay the proffered wage. On March 12, 2003, the director requested evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and continuing to the present. The director also specifically requested copies of the petitioner's 2000 and 2001 U.S. federal income tax returns with all schedules and attachments, an itemized list of all the petitioner's monthly expenses, copies of the beneficiary's Forms W-2, Wage and Tax Statements, and copies of Forms 941, Employer's Quarterly Federal Tax Return, for the period in question.

In response, the petitioners submitted complete copies of their 2000 and 2001 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business. The petitioners also submitted a letter from the mother/mother-in-law of the couple, and copies of the mother/mother-in-law's bank statements. The 2000 tax return reflected an adjusted gross income of \$19,627, and the 2001 tax return reflected an adjusted gross income of \$35,223. The letter from the mother/mother-in-law stated:

... please be advised that my son and daughter-in-law, [REDACTED] and [REDACTED] reside with me at [REDACTED] and [REDACTED] give me \$300 a week cash in order for me to pay [REDACTED] for her services. [REDACTED] is paid in cash.

Also, please note that I own the home at [REDACTED] a copy of my most recent mortgage statement is enclosed. I am also enclosing herewith a copy of my most recent Citibank statement.

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, and, on July 22, 2003, denied the petition.

On appeal, the petitioners, through counsel, submits copies of payroll statements for [REDACTED] for the weeks June 20, 2003 through July 18, 2003. The payroll records indicate that [REDACTED] earns \$27.55 per hour. Counsel states:

Upon being requested by the Service to submit evidence of its ability to pay the offered wage, the Petitioner submitted additional evidence from both the Petitioner and Petitioner's mother-in-law, [REDACTED] who is residing together with the Petitioner.

The Appellant is now submitting additional evidence with this appeal brief which further demonstrates its ability to pay the offered wage. Earnings statements for the Petitioner - [REDACTED] for June and July of 2003 show income sufficient to pay the salary of \$494.40 per week offered to the Beneficiary.

In determining the petitioners' ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioners employed and paid the beneficiary during that period. If the petitioners establish by documentary evidence that they employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioners' ability to pay the proffered wage. In the instant case, the petitioners have not established that they employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 and 2001.

If the petitioners do not establish that they 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 petitioners' 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).

The petitioners are individuals. Therefore the petitioners' adjusted gross income, assets and personal liabilities are also considered as part of the petitioners' ability to pay. Individual petitioners must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents.

In the instant case, the petitioners supported a family of four. In 2000, the petitioners' adjusted gross income was less than the proffered wage of \$25,708.80. In 2001, after paying the beneficiary's salary (\$25,708.80), the petitioners would have had \$9,514.20 to support a family of four. As the petitioners failed to provide a statement of monthly expenses for the years 2000 and 2001, the AAO cannot determine if the petitioners were able to pay the proffered wage and their household expenses with the remaining 2001 income. CIS may not assume that because a petitioner has an adjusted gross income above the proffered wage that the petitioner has established its ability to pay the proffered wage without also considering the petitioner's monthly expenses.

Counsel points to the financial documentation provided by the mother/mother-in-law and asserts that this documentation helps establish the petitioner's ability to pay the proffered wage. However, the mother/mother-in-law is neither listed on the Form I-140, Immigrant Petition for Alien Worker, nor on the labor certification. The mother/mother-in-law is not obligated to pay the debts of the couple or to pay the salary of the beneficiary. Therefore, the mother/mother-in-law's financial documentation will not be considered in determining the petitioners' ability to pay the proffered wage of \$25,708.80.

Counsel also contends that the 2003 payroll statements for [REDACTED] further establish the petitioners' ability to pay the proffered wage. Again, as the petitioners failed to provide a statement of monthly expenses, the AAO cannot determine if the petitioners were able to pay the proffered wage and their household expenses in 2003. In addition, the petitioners must establish their ability to pay the proffered wage from the priority date of October 2000 and continuing until the beneficiary obtains permanent resident status. *See* 8 C.F.R. § 204.5(g)(2). No other evidence, such as the petitioners bank statements, CDs, etc., was provided to aid in establishing the petitioners' ability to pay the proffered wage.

As always, the burden of proving eligibility for the benefit sought remains entirely 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.