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U.S. Citizenship
and Immigration
Services

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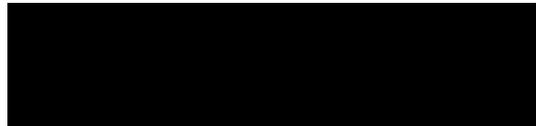


FILE: [REDACTED]
WAC 03 046 55136

Office: CALIFORNIA SERVICE CENTER

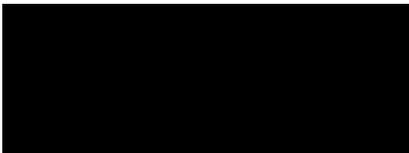
Date: MAY 13 2005

IN RE: Petitioner:
Beneficiary:



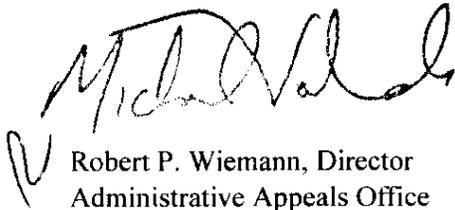
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a cloth manufacturer. It seeks to employ the beneficiary permanently in the United States as a pattern maker. 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 statement.

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 granting 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 March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.69 per hour, which equals \$32,635.20 per year.

On the petition, the petitioner stated that it was established during 1999 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$289,000 and that its net annual income is \$15,271. In Part 6 of the Form I-140 petition, the petitioner indicated that the proffered position is a new position, and is not permanent. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in [REDACTED]

With the petition counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, the California Service Center, on February 4, 2003, issued a request for evidence. The Service Center, consistent with 8 C.F.R. § 204.5(g)(2), requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also requested (1) copies of the petitioner's 2000, 2001, and 2002 tax returns or IRS printouts of the data on those returns, (2) the beneficiary's 2000, 2001, and 2002 Federal personal income tax returns and W-2 forms, and (3) the petitioner's California Form DE-6 Quarterly Wage Reports for the previous three quarters.

In response, counsel submitted (1) copies of the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (2) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002 and the first quarter of 2003, (3) the petitioner's California Form DE-6 Quarterly Wage Reports for the same quarters, (4) a copy of a 2001 W-2 form showing that the petitioner paid wages of \$16,693.75 to the beneficiary during that year, (5) printouts of pay stubs showing wage payments made to [REDACTED] by Sunsports LP of Irvine, California, [REDACTED] Sunsports Embroidery [REDACTED] California, and [REDACTED] Limited of Santa Ana, California, (6) a photocopy of a 1997 W-2 form showing wages paid by [REDACTED] of Irvine, California, to [REDACTED] (7) a photocopy of a 1998 W-2 form showing wages paid by [REDACTED] of Irvine, California, to [REDACTED] (8) photocopies of 1999 and 2000 W-2 forms showing wages paid by [REDACTED] of Irvine, California, to [REDACTED] (9) the petitioner's payroll printouts for each two-week pay period from January 18, 2002 to January 3, 2003, and (10) payroll documentation pertinent to the employment of [REDACTED] at Orange County apparel of Fountain Valley, California, prior to the priority date.

The evidence pertinent to [REDACTED] employment for [REDACTED] Sunsports LP, [REDACTED] and [REDACTED] Limited, has no apparent relevance to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. It appears to have been submitted in support of the beneficiary's claim of qualifying employment. The basis of the decision of denial is the petitioner's failure to demonstrate its ability to pay the proffered wage. The evidence of [REDACTED] employment by other companies shall not be considered further.

The petitioner's Form 941 quarterly returns show that the petitioner paid total wages of \$27,902.39, \$24,791.45, \$13,858.97, \$5,460.88, and \$3,935.50 during the four quarters of 2002 and the first quarter of 2003, respectively. The California Form DE-6 reports confirm those total wage amounts, and show that the petitioner employed between two and twelve workers during those quarters.

During each of those quarters the petitioner employed a person identified as [REDACTED]. Although that name is similar to the beneficiary's name as shown on the Form I-140 petition, whether [REDACTED] is the beneficiary is not made clear by the petitioner's Form 941 quarterly returns.

The petitioner's 2002 payroll printouts also show that the petitioner employed [REDACTED] at \$9 per hour during that year, and paid her amounts ranging from \$360 to \$720 during those two-week pay periods. Again, those documents do not demonstrate that [REDACTED] is the beneficiary in this matter.

¹ [REDACTED] and Sunsports Embroidery share the same address in Irvine, California.

The Schedules C submitted with the petitioner's owner's tax returns show that the petitioner is a sole proprietorship. The tax returns show that the petitioner's owner has one dependent.

The 2001 Schedule C shows that the petitioner returned a profit of \$15,271 during that year. The tax return shows that the petitioner's owner declared adjusted gross income of \$14,192, including the petitioner's profit, offset by deductions.

The 2002 Schedule C shows that the petitioner returned a profit of \$20,289 during that year. The tax return shows that the petitioner's owner declared adjusted gross income of \$18,855, including the petitioner's profit offset by deductions.

On May 20, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center requested a list of the recurring monthly expenses of the petitioner's family, to include housing, food, automobile, insurance, health, utility, clothing, and other household expenses. The Service Center requested copies of the 2001 and 2002 W-2 forms showing wages the petitioner paid to the beneficiary. The Service Center also requested a clarification of the petitioner's statement, on the Form I-140 petition, that the proffered position is not permanent.

In response, counsel submitted the petitioner's owner's budget, showing that he requires \$2,633.50 per month for his household expenses.

Counsel submitted copies of 2001 and 2002 W-2 forms showing that the petitioner paid \$16,693.75 and \$14,735.25 during those years respectively. Those W-2 forms also show that lists the same home address as is shown for the beneficiary on the Form I-140 petition and the Form ETA 750.

Counsel also submitted a statement that he and the petitioner's owner signed, stating that the proffered position is permanent.

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 October 22, 2003, denied the petition.

On appeal, counsel stated,

- A) THE PETITIONER HAS THE ABILITY TO PAY THE PROFFERED WAGES
- B) THE ANALYSIS PERFORMED BY CALIFORNIA SERVICE CENTER WAS INCORRECT AND WAS NOT PROPERLY CONSIDERED.

No further information, argument, or documentation was submitted by the petitioner or on the petitioner's behalf.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed and paid [REDACTED] \$16,693.75 and \$14,735.25 during 2001 and 2002. The W-2 forms also show that [REDACTED] address is the same as that of the beneficiary. This office is convinced that [REDACTED] is the beneficiary. The amounts shown on the W-2 forms will be included in the computations pertinent to the petitioner's ability to pay the proffered wage, although they are insufficient in themselves.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$32,635.20 per year. The priority date is March 27, 2001.

Having demonstrated that it paid the beneficiary \$16,693.75 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$15,941.45 balance of the proffered wage. During 2001 the petitioner's owner declared adjusted gross income of \$14,192, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$14,735.25 during 2002 the petitioner is obliged to demonstrate the ability to pay the \$17,889.95 balance of the proffered wage. During 2002 the petitioner's owner declared adjusted gross income of \$18,885, including the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, only \$985.05 with which to support himself and his household during that year. The budget in the record shows that the petitioner's owner requires \$2,633.50 per month, or \$31,602 annually, to support his household. The petitioner's owner's adjusted gross income was insufficient during that year to pay the proffered wage and support the petitioner's owner's household. No reliable evidence was submitted of any other funds available to the petitioner during 2002 with which he could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.