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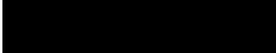


U.S. Citizenship
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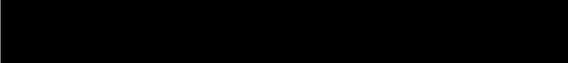
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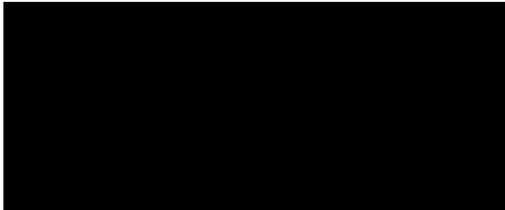
Office: VERMONT SERVICE CENTER

Date:

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, Vermont 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 and 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 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$502.80 per week, which equals \$26,145.60 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs ten workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1997. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Southboro, Massachusetts.

The petition contains spaces in which the petitioner is instructed to enter its gross annual income and its net annual income. In those spaces, the petitioner entered "See attached." The petitioner did not, however, attach any evidence of its gross and net incomes.

In support of the petition, counsel submitted the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001. Those returns show that the petitioner paid total wages of \$19,440,

\$18,760, \$14,560, and \$13,200 during those quarters, respectively. Counsel submitted no other evidence pertinent to the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 16, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center noted that the record indicates that the petitioner has employed the beneficiary since April of 1997. The Service Center asked that the petitioner provide a copy of the 2001 and 2002 Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary during those years along with whatever other evidence showed the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2003. That return shows that the petitioner paid total wages of \$10,380 during that quarter. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage. Counsel did not submit the requested W-2 forms or explain that omission.

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 August 27, 2003, denied the petition. The director also noted that the beneficiary had failed to provide requested evidence.

On appeal, counsel submits copies of the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Return. Those tax returns show that the petitioner's owner and owner's spouse had no dependents during those years. Corresponding Schedules C attached to those returns show that the petitioner is a sole proprietorship.

The 2001 Schedule C shows that the petitioner returned a profit of \$49,099 during that year. The tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$49,473 during that year, including all of the petitioner's profit.

The 2002 Schedule C shows that the petitioner returned a profit of \$27,284 during that year. The tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$33,685 during that year, including all of the petitioner's profit.

In a cover letter, dated October 15, 2003, counsel stated, "The employers has [sic] informed us that he wishes to pledge his individual income to support the companies [sic] ability to pay."

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,¹ 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 must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that

¹ The petitioner's sole-proprietor owner's obligation to pay his company's debts and obligations is not dependent on his agreement, expressed through counsel, to do so.

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 on his remaining adjusted gross income and assets.

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, although the Form ETA 750 states that the beneficiary has worked for the petitioner since 1997, the petitioner did not provide any evidence to establish that it did, in fact, employ and pay the beneficiary. Therefore, the wages the petitioner may have actually paid to the beneficiary since the priority date cannot be included in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage.

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 proffered wage is \$26,145.60. The priority date is April 16, 2001.

During 2001 the petitioner's owner and owner's spouse declared adjusted gross income of \$49,473. Had the petitioner's owner been obliged to pay the proffered wage out of that amount, it would have left him \$23,327.40 with which to support himself and his wife. The Service Center did not request any evidence pertinent to the petitioner's owner's living expenses, and none is in the record. This office is not able to state that the petitioner's owner could not have supported himself and his wife on that amount during that year. The petitioner has demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$33,685. Had the petitioner's owner been obliged to pay the proffered wage out of that amount, it would have left him \$7,539.40 with which to support himself and his wife during that year. Although the record does not contain information pertinent to the petitioner's owner's budget, to expect that the petitioner's owner could support his household for a year on that amount is unreasonable. Counsel has submitted no reliable evidence of any

other funds that were available during that year with which it 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 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.