



U.S. Citizenship
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FILE: [REDACTED]
WAC 03 238 53526

Office: CALIFORNIA SERVICE CENTER

Date: NOV 10 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:



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 on appeal. The appeal will be dismissed.

The petitioner is a [REDACTED] restaurant. It seeks to employ the beneficiary permanently in the United States as a [REDACTED] cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 petitioner had not established that the beneficiary has the education required by the Alien Employment Certification accompanying the petition specified. The director denied the petition accordingly.

On appeal, the counsel submits 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00 per year). The Form ETA 750 states that the position requires 8 years of grade school education and 4 years of high school education as well as two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax return for 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Also, because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence on December 17, 2003, of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested copies of signed U.S. federal tax returns for 1998, 1999, 2000, 2001 and 2002; and, the Director requested a statement of monthly expenses for the petitioner and his family. Also, the Director requested the beneficiary's W-2 Wage and Tax Statements/form 1099-MISC for the same years mentioned above.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax return for year 2002.

Because the evidence submitted was insufficient to demonstrate that the beneficiary has a high school education, the Director also requested additional evidence pertinent to the beneficiary's education in the request for evidence. The Director specifically requested evidence of the beneficiary's high school education. To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of cook, Yemenite as follows:

14.	Education (enter number of years)	
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Blank
	Experience
	Job Offered
	Number -Years Mos.	<u>2</u>
	Related Occupation



Number –Years Mos.	Blank
Related Occupation
Specify	Blank

There was no response to the above Request for Evidence concerning the beneficiary's education.

The director denied the petition on April 15, 2004, finding 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, that there was no evidence submitted that demonstrated that the beneficiary has the requisite four years of high school education.

On appeal, counsel submitted additional evidence. Counsel stated that he is submitting a copy of the beneficiary's high school diploma, and, also evidence of sufficient personal assets available to pay the proffered wage.

On appeal, petitioner has submitted a grade transcript from [REDACTED] evidencing "completed studies, Grade "A" in 1968." Counsel asserts that this is evidence of completion of a high school education. The beneficiary according to the record of proceeding was born on December 4, 1956. Therefore, according to counsel assertion, the beneficiary completed 8 years of grade school and 4 years of high school education (which are the requirements stated in the certified Alien Employment Application) by the age of 12. This is not a credible assertion. On this same issue, previously, the petitioner had stated that he was attempting to obtain the beneficiary's high school record from [REDACTED] Since the beneficiary is a native of [REDACTED] the director questioned the attempt and the assertion.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. A statement dated January 6, 1998, was submitted to show that the petitioner employed the beneficiary as a cook in his restaurant from October 1986 to December 1988, but there are no wage or compensation statements provided.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns submitted in the record¹ of proceeding demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000.00 from the priority date of January 12, 1998:

- In 1998, the Form 1040 stated adjusted gross income of \$24,364.00.
- In 1999, the Form 1040 stated adjusted gross income of \$24,526.00.
- In 2000, the Form 1040 stated adjusted gross income of \$36,942.00.
- In 2001, the Form 1040 stated adjusted gross income of \$34,879.00.
- In 2002, the Form 1040 stated adjusted gross income of \$36,547.00.

If the adjusted gross income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. There was no evidence provided that the petitioner employed the beneficiary but petitioner had paid the beneficiary's personal expenses.

The petitioner is a sole proprietorship. A sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 or approximately thirty percent (30%) of the petitioner's gross income.

The petitioner has submitted a monthly expense statement that states monthly personal expenses of \$2,426.59 (a yearly expense of \$29,119.08) for his family:

- In 1998, petitioner's Form 1040 stated adjusted gross income of \$24,364.00. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00) per year. There are insufficient funds to pay the proffered wage from taxable income.
- In 1999, petitioner's Form 1040 stated adjusted gross income of \$24,526.00. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00) per year. There are insufficient funds to pay the proffered wage from taxable income.
- In 2000, petitioner's Form 1040 stated adjusted gross income of \$36,942.00. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00) per year. The petitioner's yearly personal expense² is \$29,119.08. There are insufficient funds to pay the proffered wage from taxable income and pay the petitioner's personal expenses.

¹ Additional evidence was submitted that includes tax returns and a personal expense budget.

² The statement was received with the 1998 tax return, so although undated, we will assume it was for the year 1998.

- In 2001, petitioner's Form 1040 stated adjusted gross income of \$34,879.00. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00) per year. The petitioner's yearly personal expense is \$29,119.08. There are insufficient funds to pay the proffered wage from taxable income and pay the petitioner's personal expenses.
- In 2002, petitioner's Form 1040 stated adjusted gross income of \$36,547.00. The proffered wage as stated on the Form ETA 750 is \$500.00 per week (\$26,000.00) per year. The petitioner's yearly personal expense is \$29,119.08. There are insufficient funds to pay the proffered wage from taxable income and pay the petitioner's personal expenses.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an examination of the personal assets of the petitioner. Counsel cites no legal precedent for the contention, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel submits one money market statement for the period March 1, 2004 to March 31, 2004, and, one interest bearing account statement for the period March 24, 2004 to April 23, 2004. Counsel advocates the use of the cash balance of the two accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. 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.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the five personal tax returns and personal expense budget as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. There is no credible evidence submitted that that the beneficiary has the requisite four years of high school education required by the certified Alien Employment Application.

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.

³ 8 C.F.R. § 204.5(g)(2).