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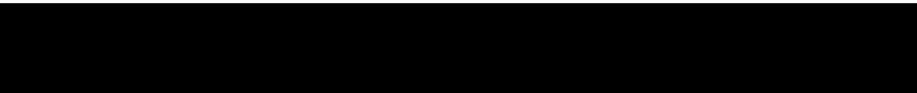
Date:

NOV 16 2005

WAC-04-080-53654

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 preference 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a residential live in manager. 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, the petitioner submits a brief statement and/or 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 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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$19.53 per hour (\$40,622.400 per year). The Form ETA 750 states that the position requires 2 years experience. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner.¹

On the petition, the petitioner claimed to have been established in 1996 and to currently employ 8 workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The petition was filed with Form 1040 US Individual Income Tax Return filed by the owner of the petitioner for 2001 and 2002 pertinent to the ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 5, 2004, the director issued a RFE pertinent to that ability. The director specifically requested that evidence for 2003, a statement of monthly expenses for the petitioner's family, and the beneficiary's W-2 forms if employed with the petitioner.

¹ On Form G-325 signed by the beneficiary on December 15, 2003, he claimed that he had worked for State College Center Care since February 1996. On June 25, 2004, in response to the director's request for additional evidence (RFE) counsel indicated that "the beneficiary is currently not employed with the petitioner."

In response, the petitioner submitted Form 1040 for the year 2003, and a statement of monthly expenses, and claimed that the beneficiary was not employed with the petitioner.

On July 21, 2004, the director determined that the petitioner had not demonstrated that he had the ability to pay the proffered wage since the priority date with amount after subtracting his household's expenses from the adjusted gross income and accordingly denied the petition.

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 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. In the instant case, the petitioner did not submit W-2 forms for the beneficiary and did not claim that he hired and paid the beneficiary the proffered wage.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2001 through 2003. The record before the director closed on June 28, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. 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 (approximately thirty percent of the petitioner's gross income).

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,622.40 per year from the priority date.

In 2001, the Form 1040 stated adjustable gross income² of \$55,668.

In 2002, the Form 1040 stated adjustable gross income³ of \$47,795.

In 2003, the Form 1040 stated adjustable gross income⁴ of \$65,013.

Counsel submitted a statement of monthly expenses for the owner's household. The petitioner's total expenses, including insurance, mortgage, auto and utilities, are \$6,552.00 per month, or \$78,624.00 per year.

² IRS Form 1040 for 2001, Line 33.

³ IRS Form 1040 for 2002, Line 35.

⁴ IRS Form 1040 for 2003, Line 34.

The petitioner's adjusted gross income on Form 1040 was \$15,005.60 in 2001, \$7,132.60 in 2002 and \$24,350.60 in 2003 more than the beneficiary's proffered wage. The petitioner had sufficient income to pay the proffered wage to the beneficiary for years 2001 through 2003. However, the petitioner's household expenses are \$6,552 per month or \$78,624 per year. Taking the petitioner's living expenses into account, the petitioner must prove that he had at least \$63,618.40 in 2001, \$71,491.40 in 2002 and \$54,273.40 in 2003. The record of proceeding does not document any other source of liquefiable assets that would be available to pay the wage. It is not likely that the petitioner could meet his and his dependent's personal expenses with those adjusted gross incomes.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the petitioner's liquid assets. The petitioner should address this issue in any subsequent proceedings.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001, 2002 or 2003. The adjusted gross income in each year reported in tax returns demonstrated the ability to pay the proffered wage, however, failed to establish that the surplus would cover the petitioner's living expenses in each of the years 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

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.