



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 24 2005
SRC-04-027-50711

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a thoroughbred racing horse trainer. It seeks to employ the beneficiary permanently in the United States as a groom. 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.

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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$375.00 per week, which amounts to \$19,500.00 annually. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 31, 2003. On the petition, the petitioner claimed to have been established in 1986, to currently have four employees, to have a gross annual income of \$250,000.00, and to have a net annual income of \$100,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 21, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence relevant to the beneficiary's experience.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on January 27, 2005.

In a decision dated February 3, 2005, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the petitioner is a sole proprietorship and that the petitioner's owner has paid salaries to his employees during each of the years relevant to the instant petition. Counsel also states that the losses shown on the owner's federal tax returns are due in part to non-cash expenses of depreciation. Counsel states that the petitioner has had substantial gross sales during the relevant period. Finally, counsel states that the personal assets of the petitioner's owner have been nearly \$1 million during each of the years at issue, and that those assets were available to pay the beneficiary the proffered wage if necessary.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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 corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were

paid rather than net income. Finally, there is no precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner’s owner for 2001, 2002 and 2003. The owner’s federal tax return for 2002 was not submitted for the record prior to the decision of the director, but that return has been submitted on appeal. The record before the director closed on January 27, 2005 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 was the most recent return available when the record before the director closed.

Unlike a corporation, 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary’s proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner’s gross income.

In the instant petition, the tax returns of the petitioner’s owner show his filing status as single, and they show no dependents. Therefore the household size of the petitioner’s owner is one person, who is the owner himself.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner’s Form 1040 U.S. Individual Income Tax Return. The owner’s tax returns show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$432,108.00	not submitted	\$19,500.00*	\$412,608.00
2002	-\$237,586.00	not submitted	\$19,500.00*	-\$257,086.00
2003	-\$271,831.00	not submitted	\$19,500.00*	-\$291,331.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is sufficient to establish the petitioner’s ability to pay the proffered wage in the year 2001, but not in the years 2002 and 2003.

The record also contains copies of brokerage account statements of the petitioner’s owner containing information on the years 2001 through 2005. Those statements were not submitted for the record prior to the decision of the

director, but they have been submitted on appeal. Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business.

Brokerage account statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as brokerage statements may be considered as supplemental evidence to the types of evidence required by the regulation. As noted above, where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

The brokerage account statements show the following amounts as total market values on the dates indicated.

July 20, 2001	\$906,049.74
December 31, 2001	\$1,363,869.68
December 31, 2002	\$943,738.01
January 31, 2004	\$1,004,493.67
February 23, 2005	\$1,005,721.18

The brokerage account statements list assets in the form of cash, money market funds, mutual funds and stock holdings. All of the non-cash assets are ones which appear to be readily convertible into cash. The statements shown no loans against the value of the owner's investments.

The statement dated January 31, 2004 shows that the total market value of the account had increased by \$12,788.83 since the previous statement on December 31, 2003. Subtracting that amount from the January 31, 2004 figure produces a total marked value on December 31, 2003 of \$991,704.84.

The brokerage account statements show that during each of the years at issue, the petitioner's owner had available assets valued at many multiples of the proffered wage. The foregoing information is sufficient to establish the petitioner's ability to pay the proffered wage during each of the years at issue in the instant petition.

In his decision, the director correctly stated the adjusted gross income of the petitioner's owner in 2001 and 2003. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. As noted above, the tax return of the petitioner's owner for 2002 was not submitted prior to the decision of the owner, but has been submitted on appeal. Furthermore, as discussed above, the record before the director did not contain copies of brokerage account statements of the petitioner's owner, which show assets of approximately \$1 million throughout the period relevant to the instant petition.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.