



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN-03-230-50246

Office: NEBRASKA SERVICE CENTER

Date: SEP 26 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, Nebraska 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 private household. 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 brief 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 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$9.46 per hour, which amounts to \$19,676.80 annually.

The petitioner is a private household, which is analytically akin to a sole proprietorship. With the petition, the petitioner submitted its Form 1040, U.S. Individual Income Tax Return for 2000 and 2001, on which the petitioner's occupation as a trader/broker is represented.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 25, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested additional evidence of the ability to pay above the adjusted gross income reported by the petitioner in 2001, which was \$14,630.

In response, the petitioner submitted a letter from counsel explaining that the petitioner is employed as a commodity trader and thus his income fluctuates, however, "[o]verall, the [p]etitioner has more than enough

income to pay the [b]eneficiary's salary. His tax returns are reflective of income realized during the period, not the actual value of his portfolio, wealth, and income which vary." The petitioner submitted its bank statements from two different banks, one at [REDACTED] and one at [REDACTED]. The statements cover the following periods of time: April 1999 through June 1999, March 2001, June 2001, and September 2001 at [REDACTED] and [REDACTED] and October through December 2001 at [REDACTED]. The bank statements reflect ending balances of a high of \$181,467.36 to a low of \$655.44.

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 May 7, 2004, denied the petition because the petitioner's adjusted gross income in 2001 was less than the proffered wage and the statements from the petitioner's bank accounts were too intermittent to show enough income to consistently pay the proffered wage.

On appeal, counsel asserts that the director erred by failing to consider the fluctuations in income based on the petitioner's occupation and that the petitioner's 2001 tax returns reflect an anomaly in the context of other years and shows an intentional loss to offset income. The petitioner submits a letter stating the same. Additionally, the petitioner submits a letter from USA Trading, dated June 9, 2004, which states that the petitioner has made a profit of \$1,146,551.33 for that year to date and has been an outstanding client for many years. Counsel submits a definition for a trader. The petitioner also submits a copy of Form 1099-B, Proceeds From Broker and Barter Exchange Transactions reflecting that [REDACTED] reported that the petitioner realized \$16,440,088.40 as gross proceeds from stocks and bonds to the IRS and a profit of \$1,220,036.79 in 2003. Counsel explains that the petitioner's 2002 and 2003 individual income tax returns have not been filed yet due to their complexity. The petitioner also submits copies of his individual income tax returns from 1997 to 1999 in addition to previously submitted copies of the petitioner's 2000 and 2001 individual income tax returns. Finally, the petitioner submits additional bank statements from Lakeside Bank from December 2000 through May 2004, the same statements submitted previously from Mid Town Bank, and bank statements from MidAmerica Bank reflecting a checking account with an ending balance of \$127,362.13 from April through June 2004.

Subsequent to filing the appeal, the petitioner filed another petition on behalf of the beneficiary, which was denied because it was not accompanied by an original Form ETA 750 that is attached to the instant petition and properly denied an appeal. On that visa petition, the petitioner indicated that he had not filed any other immigrant visa petitions on behalf of the beneficiary. Although the AAO is concerned about that misrepresentation and procedural tactic, that issue is not before us on appeal.

The petitioner's tax returns reflect the following information for the following years¹:

| | <u>Adjusted gross income (Form 1040)</u> |
|-------|--|
| 1997: | \$346,031 with four dependents |
| 1998: | \$250,298 with two dependents |
| 1999: | \$290,355 with two dependents |
| 2000: | \$247,771 with two dependents |
| 2001: | \$11,618 with two dependents |

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 has not established that it has previously employed the beneficiary.

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, CIS will next 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).

The petitioner is a private household, akin analytically to a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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.

In the instant case, the petitioner supports a family of three in 2001. In 2001, the petitioner's adjusted gross income of \$11,618 is less than the proffered wage of \$19,676.80. It is impossible that the petitioner could support himself and his family and pay the proffered wage. The director failed to request the petitioner's expenses, but since the net income is not even sufficient for the proffered wage, the AAO need not consider the petitioner's expenses. The petitioner did not establish its ability to pay the proffered wage beginning on the priority date out of its net income in 2001.

However, counsel explains that the petitioner's occupation results in income fluctuations and explains that 2001 was an anomaly. This is an apparent reference to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a

resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner's situation is analogous to *Sonegawa*, since the petitioner's anomalous net income amount in 2001 in the context of very substantial net income in the four years immediately preceding 2001 reflects one year of trading losses. That coupled with the petitioner's personal assets, as reflected in his bank accounts, shift the weight of the evidence into the petitioner's favor. The amounts reflected in the petitioner's three accounts are substantial. Although the balance for Mid Town Bank is only demonstrated for intermittent time periods, the petitioner shows substantial deposits and balances. Additionally, the ending balances in his Lakeside Bank accounts run from \$38,083.72 in January 2001 and a high of \$31,821.23 and a low of \$78.13, with substantial credits and debits thereafter. Although the petitioner's bank account balance in its MidAmerica Bank is only relevant for 2004 onwards, it also reflects a very substantial amount. Combined with the petitioner's letter showing an approximately \$1 million profit in 2003, the totality of circumstances weigh in the petitioner's favor. Although his income fluctuates, as he concedes, the petitioner has also demonstrated consistent and substantial wealth and liquid assets.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage beginning on 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 met that burden.

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