



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 17 2006
WAC 03 135 52478

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:

[REDACTED]

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 sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook Mexican specialty. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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. The director denied the petition accordingly.

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 March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

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; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 on May 13, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2001 and 2002 as well as proof of the beneficiary's salary and his W-2 Wage and Tax Statements. The director also requested a statement of monthly expenses stating all the petitioner's household's living expenses.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted, among other items, the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2001 and 2002.

On July 10, 2003, the director issued a notice of intent to deny the petition, and, again requested evidence. There was no response to the notice.

The director denied the petition on April 30, 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.

On appeal, counsel asserts that the director erred "... in assuming that the adjusted gross income of the petitioner for the years, 2001 and 2002, was BEFORE considering the wages to be paid to the beneficiary ..." and, that the beneficiary has received the prevailing wage since July 2004. Counsel states that the beneficiary wages are stated in the tax returns submitted as part of "cost of goods sold." Also, counsel contends that depreciation can be added back to the adjusted gross income. Counsel asserts that the petitioner has sufficient adjusted gross income after paying the proffered wage to meet yearly personal expenses. Counsel asserts that the monthly bank statements submitted are evidence of the ability to pay the proffered wage.

Counsel has submitted the following documents on June 16, 2004, to accompany the appeal statement: an explanatory letter from counsel; and, a letter from an accountant dated June 8, 2004.

On September 7, 2004, counsel has also submitted the following documents to accompany the appeal statement: a legal brief; approximately 337 pages of bank statements; the petitioner's 2003 U.S. federal tax return extension; a deed; a W-2 Wage and Tax Statement for 2003; the beneficiary's 2003 U.S. federal tax return; four wage payment check stubs for the wage payment periods June 22, 2004 to August 3, 2004; a letter from Conex dated October 22, 2004; the petitioner's 2003 U.S. federal tax return; and, a letter from the petitioner dated September 30, 2004.¹

¹ Although the petitioner has not submitted personal expenses, she stated that she has sufficient income to pay her own expenses after paying the beneficiary's salary.

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. Evidence was submitted to show that the petitioner employed the beneficiary from November 1998 to August 16, 2004.

- According to the W-2 Wage and Tax Statement submitted for tax year 2003, the petitioner paid the beneficiary \$20,800.00.
- A pay statement was submitted for the pay period June 22, 2004 through July 5, 2004, stating total earnings \$924.00² and year to date earnings of \$11,324.00.
- A pay statement was submitted for the pay period July 6, 2004 through July 19, 2004, stating total earnings \$924.00 and year to date earnings of \$12,248.00.
- A pay statement was submitted for the pay period July 20, 2004 through August 2, 2004, stating total earnings \$924.00 and year to date earnings of \$13,172.00.
- A pay statement was submitted for the pay period August 3, 2004 through August 16, 2004, stating total earnings \$924.00 and year to date earnings of \$14,096.00.

Counsel states that petitioner paid the beneficiary \$18,040.00 in 2001, and \$20,800.00 in 2002, and that evidence of the wages are found in the "cost of goods sold" line items in petitioner's tax returns. This assertion is insufficient, in and of itself, to prove the wage sums were paid. Counsel did not submit the beneficiary's pay statements, cancelled paychecks, pay statements, W-2 Wage and Tax Statements, or Form 1099-MISC. No independent objective evidence was submitted in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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 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

² Indicates an annual pay rate of \$24,024.00.

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 tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,024.00 per year from the priority date of March 6, 2001:

- In 2001, the Form 1040 stated adjusted gross income of \$10,656.00 on net business profits of \$10,656.00.
- In 2002, the Form 1040 stated adjusted gross income of \$28,623.00 on net business profits of \$34,027.00.
- In 2003, the Form 1040 stated adjusted gross income of \$38,934.00 on net business profits of \$42,970.00.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. 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 asserts that the director erred "... in assuming that the adjusted gross income of the petitioner for the years, 2001 and 2002, was BEFORE considering the wages to be paid to the beneficiary" The AAO reviews appeals on a de novo basis, and, evidence submitted for the first time on appeal will be considered. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1040, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

³ 8 C.F.R. § 204.5(g)(2).

Counsel advocates the use of the cash balance of the business 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. Notwithstanding the above, there are approximately 200 pages of bank statements⁴ that evidence an average monthly balance, that together with the wages paid the beneficiary and the business profits are probative of the petitioner's ability to pay the proffered wage.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001, 2002 and 2003. For the years 2001 through 2003, the taxable income for the petitioner increased from \$10,656.00, to \$28,623.00, and to \$42,970.00. According to the W-2 Wage and Tax Statement submitted for tax year 2003, the petitioner paid the beneficiary \$20,800.00. While the evidence of wage payments for 2001 and 2002 is inadequate to make a determination, it is credible to believe that wages were paid by the petitioner to the beneficiary as stated by counsel as \$18,040.00 and \$20,800.00, based upon the greater amounts stated in the cost of goods sold for each of those two years (2001, 2002) on the tax returns submitted.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner with the petitioner's business demonstrating a steady increase in profitability. By the evidence presented, the petitioner has proven its ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has 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.

⁴ Although, the AAO would have accepted a bank produced summary statement for each month rather than all statement pages.

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.