

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

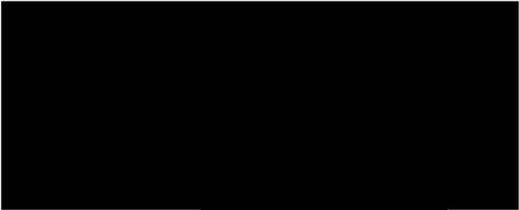
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

86



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: DEC 28 2006  
SRC 03 258 51826

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center denied the instant preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a janitorial service. It seeks to employ the beneficiary permanently in the United States as a janitorial services supervisor. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$27,800 per year.

The Form I-140 petition in this matter was submitted on September 23, 2003. On the petition, the petitioner stated that it was established during 1996 and that it employs two workers. The petition states that the petitioner's gross annual income is \$73,020 and that its net annual income is \$45,163. On the Form ETA 750, Part B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Powder Springs, Georgia.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup>

In the instant case the record contains (1) the joint 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED], (2) an unaudited 2001 income statement, and (3) a monthly statement pertinent to a bank account held by [REDACTED]. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Schedules C attached to the tax returns submitted show that [REDACTED] and [REDACTED] own the petitioner as a sole proprietorship and that they had one dependent during 2001 and 2002 and two dependents during 2003.

During 2001 the petitioner returned a profit of \$18,637.<sup>2</sup> The petitioner's owners declared adjusted gross income of \$44,645 during that year, including the petitioner's profit.

During 2002 the petitioner returned a profit of \$20,855. The petitioner's owners declared adjusted gross income of \$51,664 during that year, including the petitioner's profit.

During 2003 the petitioner returned a profit of \$22,460. The petitioner's owners declared adjusted gross income of \$50,337 during that year, including the petitioner's profit.

The director denied the petition on March 23, 2005. On appeal, counsel asserted (1) that the amount of the proffered wage the petitioner is obliged to show the ability to pay during 2001 should be prorated to reflect that approximately two-thirds of that year remained on the priority date, (2) that the director should have taken into account the assets of the petitioner's owners, and therefore erred in not requesting evidence of those assets prior to denying the petition, (3) that, given that the petitioner indicated that the proffered position of supervisor is not a new position, the beneficiary would replace one or the other of the petitioner's owners, whose wages would then be available to pay the proffered wage, and (4) that the petitioner's owners' adjusted gross income minus the annual amount of the proffered wage would have been sufficient to support the petitioners' household during each of the salient years.

Reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management.

---

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

<sup>2</sup> This profit was divided between two Schedules C, but all of it appears to have come from the petitioning business.

The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Reliance on the bank statement provided is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>3</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement somehow reflects additional available funds that were not reported on its owners' tax returns.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel is correct that, because the petitioner is a sole proprietorship, the personal assets of the petitioner's owners balanced against the owners' liabilities would be considered, if evidence of any such assets were present, in the determination of the petitioner's ability to pay the proffered wage. Given that counsel was aware of that fact, counsel was free to provide evidence pertinent to the petitioner's owners' assets with the petition, in response to the notice of intent to deny, or on appeal. Counsel thus was accorded three opportunities to provide such evidence, but failed to do so. Consequently, this office finds that the petitioner through counsel has already been accorded sufficient opportunity to present such evidence.

Counsel argued that the beneficiary will apparently replace one of the petitioner's owners, and that the wages of the owner so replaced will become available to pay the proffered wage.

The total income shown on the petitioner's owners' tax returns as available to pay the proffered wage and maintain the petitioner's owners' household is their adjusted gross income. That amount was \$44,645 during 2001, \$51,664 during 2002, and \$50,337 during 2003. The decision of one or both of the petitioner's owners

---

<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

to forego their salary would not increase that total amount. That the beneficiary may replace one or both of the petitioner's owners would not increase the total funds available.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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. (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 establish that it employed and paid 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, however, is a sole proprietorship. Because the petitioner's owners are obliged to satisfy the petitioner's debts and obligations out of their own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owners are obliged to demonstrate that they could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, they must show that they could still have sustained themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$27,800 per year. The priority date is April 27, 2001.

During 2001 the petitioner's owners declared adjusted gross income of \$44,645. If they had been obliged to pay the proffered wage out of their adjusted gross income they would have been left with \$16,845 to support their household of three people. No evidence pertinent to the petitioner's owners' personal expenses was requested and none was provided. This office finds unlikely, however, the supposition that the petitioner's owners could have supported themselves on that amount.<sup>4</sup> The petitioner has provided no evidence of any

---

<sup>4</sup> If the petitioner's owners can demonstrate that they were able to live on that amount they may do so

other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owners declared adjusted gross income of \$51,664. If they had been obliged to pay the proffered wage out of their adjusted gross income they would have been left with \$23,864 to support their household of three people. No evidence pertinent to the petitioner's owners' personal expenses was requested and none was provided. This office finds unlikely, however, the supposition that the petitioner's owners could have supported themselves on that amount. The petitioner has provided no evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owners declared adjusted gross income of \$50,337. If they had been obliged to pay the proffered wage out of their adjusted gross income they would have been left with \$22,537 to support their household of four people. No evidence pertinent to the petitioner's owners' personal expenses was requested and none was provided. This office finds unlikely, however, the supposition that the petitioner's owners could have supported themselves on that amount. The petitioner has provided no evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this ground which has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of denial.

First, the petitioner's owners and the beneficiary share the same family name. This raises the possibility that the petitioner's owners and the beneficiary may be related.

Pursuant to 20 C.F.R. §656.20(c) (8) the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood, by marriage, through friendship, or where the two have a financial relationship. *See Matter of Sunmart* 374, 2000-INA-93 (May 15, 2000). Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further, counsel deduces that the beneficiary will replace one or the other of the petitioner's owners in assuming the proffered position of supervisor. The underlying purpose of the instant visa category is to provide U.S. employers with alien workers to fill positions they are unable to fill with U.S. workers. If the petitioner is hiring an alien worker to replace a U.S. worker out of preference, this raises the possibility that the instant visa category may not be appropriate to the petitioner's plan.

---

pursuant to motion.

Further still, the evidence shows that the petitioner has only two employees who are also the petitioner's owners. That the owners are hiring someone to supervise both of them is suspicious. If they intend to terminate the employment of one of them and to employ the beneficiary to supervise the other, this raises the possibility that the petitioner, with only one other remaining employee, may not require a supervisor at all, and the job offer may not be realistic. Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

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.