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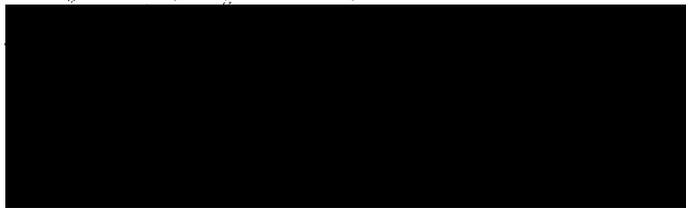
U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
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U.S. Citizenship
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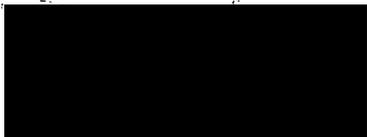
FILE: WAC 04 115 53306 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.²

The petitioner is a sole proprietorship that conducts business in the sale of bakery products. It seeks to employ the beneficiary permanently in the United States as a baker. 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.

The petitioner has operated the bakery since June 1996, and, it employs eight individuals.

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.

¹ According to the petition, the beneficiary will work at A-1 [REDACTED]

[REDACTED] The certified Alien Employment Application also states "[REDACTED]"

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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$10.47 per hour (\$21,777.60 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, the petitioner submits additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; business licenses; photos of the business premises; newspaper articles; U.S. federal income tax returns for 2001 and 2002; a financial statement for 2003; wage reports for 2003; and, the petitioner's savings account, asset list and checking account information.

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 August 12, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures, and audited financial statements for 2003. The director requested the petitioner's Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last two quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees, and, the petitioner was requested to provide job titles.

Because the petitioner's business is a sole proprietorship, the director requested the petitioner submit a statement of monthly expenses for the petitioner's family. It stated in personal part:

This statement must indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: Housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. All items may be subject to verification.

If the petitioner would use personal assets to pay the proffered wage, evidence of these assets were requested such as bank statements, checking account statements, stock account statements and the like.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, the petitioner submitted a U.S. Internal Revenue Service (IRS) Form 1040 tax return for year 2003; Employer's Quarterly State Wage Reports for two quarters; a statement of monthly expenses; and, evidence of realty holdings and rental income.

The director denied the petition on December 21, 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, the petitioner asserts that he has sufficient funds to pay the proffered wage; and, that the beneficiary will replace an employee who retired that was paid \$27,000.00 per year.

The petitioner has submitted the following documents to accompany the appeal statement: an explanatory letter; a bank account verification; Form W-3SS; and, Form W-2GU statements.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,777.60 per year from the priority date of April 25, 2001:

- In 2001, the Form 1040 stated adjustable gross income³ of <\$12,366.00>⁴ with Schedule C of the return demonstrating a net loss of <\$36,571.00> on gross receipts of \$338,159.00.
- In 2002, the Form 1040 stated no adjustable gross income of \$0.00 with Schedule C of the return demonstrating a net loss of <\$24,646.00> on gross receipts of \$300,161.00.
- In 2003, the Form 1040 stated no adjustable income \$14,588.00 with Schedule C of the return demonstrating a net loss of \$13,012.00 on gross receipts of \$316,462.00.

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 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 petitioner provided his family's personal expenses. According to the "Petitioner's Family Monthly Income/Expenses" the monthly expenses are \$3,562.00 each month or \$42,744.00 each year.

³ IRS Form 1040, Line 33.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

In the instant case, the sole proprietor is a family of two, husband and wife with the husband working in the business. In 2001, the sole proprietorship's adjusted gross income loss of <\$12,366.00> is inadequate to pay the proffered wage of \$21,777.60 per year (without consideration of replacement of the husband employee with the beneficiary). Likewise, in 2002 and 2003, the adjusted gross incomes of \$0.00 and \$14,588.00⁵ were insufficient to pay the proffered wage and living expense (without consideration of replacement of the husband employee with the beneficiary).

However, the record of proceeding contains a bank statement from the petitioner's checking and savings accounts dated January 3, 2005 with a total balance for both accounts of \$6,623.14. The balance is not substantial enough to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year. Further, the petitioner'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.

The petitioner asserts in her explanatory statement 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,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The unaudited financial statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited financial statements are of little evidentiary value in this matter.

We reject the petitioner's assertion that the petitioner's total assets, including realty owned, should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. There is however a retail property (Lot no. 7125-6-2, Dededo, Guam) that has a value of \$170,000.00 and produces a monthly rental of \$800.00 that should be considered as evidence of the ability to pay the proffered wage since the parcel is not used in the business nor used as petitioner's residence.

The petitioner asserts that the beneficiary will replace an employee (i.e. her husband, [REDACTED] who retired that was paid \$27,000.00 per year and employing the beneficiary. There is a W-2GU for [REDACTED] in the record of proceeding indicating payment of an annual wage of \$27,600.00. The petitioner has

⁵ The petitioner has provided evidence of tropical storm damages to the island and other matters that he states depressed the petitioner's business in 2002/2003. We find the evidence to be a credible reason for the depressed profitability of the established bakery business.

⁶ 8 C.F.R. § 204.5(g)(2).

submitted a letter dated March 5, 2005 indicating that [REDACTED] has retired. Generally, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In this instance since [REDACTED] is the husband of the petitioner and was in fact employed during the years 2001, 2002 and 2003, at a maximum salary of \$27,600.00, there is sufficient evidence to conclude that the petitioner has sufficient revenues to pay the proffered wage. The petitioner also indicates that with the loss of [REDACTED] in the business, there would be a hardship if the beneficiary were not employed as his replacement. This is a credible statement based upon the totality of the evidence submitted.

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.

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.