

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

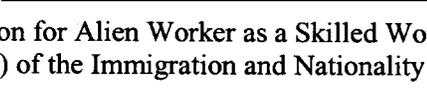
PUBLIC COPY



FILE: 
EAC 03 186 53362

Office: VERMONT SERVICE CENTER

Date: JUN 08 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 petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is an Indian restaurant and grocery. It seeks to employ the beneficiary permanently in the United States as an Indian cook. 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 September 10, 2002. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour (\$27,060.80 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, a U.S. Internal Revenue Service Form tax return for 2002.

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 April 19, 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 a copy of the petitioner's U.S. federal tax return for 2003. The director also requested the petitioner's personal monthly expenses for 2002 and 2003.

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 all requested evidence.

The director denied the petition on October 5, 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 petitioner has the ability to pay the proffered wage. Further, counsel contends that the petitioner should only be obligated to show the ability to pay for that portion of the year from September 10, 2002. Counsel asserts that that additional funds in a savings account that evidences the ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: two credit union accounts, one savings and one business checking.

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 \$27,060.80 per year from the priority date of September 10, 2002:

- In 2002, the Form 1040 stated taxable income of \$47,561.00
- In 2003, the Form 1040 stated taxable income of \$67,155.00.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports a family of five. In 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$47,561.00 and \$67,155.00 respectively that were sufficient to pay the proffered wage of \$27,060.80 per year without consideration of the petitioner's personal expenses.

As stated above, in 2002, the petitioner's adjusted gross income was \$47,561.00. There is also a statement of monthly personal expenses for 2002 of yearly total expenses of \$31,645.00. The petitioner could not pay the proffered wage of \$27,060.00 per year and also pay his family's living expenses as stated.

As stated above, in 2003, the petitioner's adjusted gross income was \$67,155.00. There is also a statement of monthly personal expenses for 2003 of yearly total expenses of \$28,000.00. The petitioner could pay the proffered wage of \$27,060.00 per year and also pay his family's living expenses as stated in 2003.

Counsel asserts in her 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,¹ 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 since the priority date is September 10, 2002, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2001 from April 30th. If this were the rule, then the petitioner's yearly taxable income would also have to be prorated which would eliminate the presumed benefits of pro-ration. Since CIS is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure income earned over a different and longer period of time against the wages earned for the shorter period of time.

Counsel advocates the use of the cash balance of the a personal and a business accounts to show the ability to pay the proffered wage. Generally, 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. However, in the particular fact situation and because of the financial strength demonstrate by the petitioner, counsel's reliance on the balances in the petitioner's bank account is justified.

¹ 8 C.F.R. § 204.5(g)(2).

In the totality of all the evidence submitted in this case,² there is evidence to demonstrate that the petitioner's business was in a profitable period in 2002 and 2003. For the years 2002 through 2003, the taxable income for the petitioner increased from \$47,561.00 to \$67,155.00. As a sole proprietor, the petitioner's income, and liquefiable assets that would include personal and business savings accounts are also considered as part of the petitioner's ability to pay. On appeal, counsel has submitted savings statements that stated a total balance of \$61,554.36. In January 2, 2003, a balance was \$158,732.50. Other statements show similar substantial balances. The petitioner's substantial cash assets as reflected in its credit union accounts shift this decision in the petitioner's favor.

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.

² See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).