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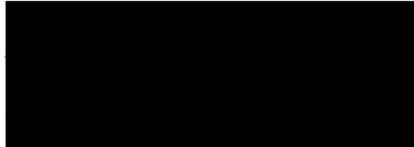
U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

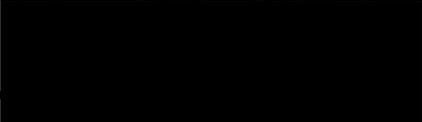
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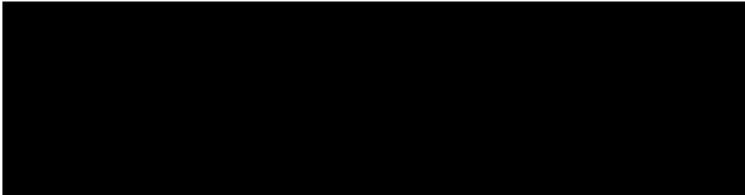
FILE: EAC 04 029 50915 Office: VERMONT SERVICE CENTER Date: JUL 25 2006

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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

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 dismissed.

The petitioner is an accounting office business providing physician medical service according to the petitioner's tax returns.¹ It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 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 June 20, 2003. The proffered wage as stated on the Form ETA 750 is \$19.65 per 35 hour/week (\$35,763.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted 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 2001.

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 June 24, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

¹ Form 1040, Schedule C.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns, audited financial statements and annual reports for 2002 and 2003.

The petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, the director requested petitioner submit a statement of recurring monthly expenses for the petitioner 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, petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2002 and 2003; an explanatory letter from the petitioner; and, a statement of the petitioner's personal expenses as well as other documentation.

The director denied the petition on November 3, 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.

Counsel has appealed the denial.

Counsel has resubmitted the following documents to accompany the appeal statement: the petitioner's 2003 U.S. federal income tax; a statement of the petitioner's personal expenses; and, the petitioner's letter of August 24, 2004.

Counsel submitted a Form I-290B appeal in this matter. In the section reserved for the basis of the appeal, counsel states that the petitioner has satisfied his burden of proof his ability to pay the proffered wage by evidence submitted and already reviewed by the director including the petitioner's letter of August 24, 2004 that shows that funds paid to outside companies were available to pay the beneficiary.

The tax returns² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,763.00 per year from the priority date of June 20, 2003:

- In 2003, the Form 1040 stated an adjusted gross income of \$40,778.00.

Therefore in tax year 2003, the petitioner adjusted gross income was sufficient to pay the proffered wage of \$35,763.00 per year. The petitioner's personal expenses must also be considered for all years as discussed below.

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.

² Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 2001, the Form 1040 stated adjusted gross income of \$17,472.00. In 2002, the Form 1040 stated adjusted gross income of \$59,320.00.

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 2003 the sole proprietorship's adjusted gross income of \$40,778.00 was sufficient to pay the proffered wage of \$35,763.00 per year. However, there is also a statement of monthly personal expenses for 2003 of \$3,315.00 per month that calculates to a yearly expense of \$39,780.00. The petitioner could not pay the proffered wage of \$35,763.00 per year and also pay his family's living expenses as stated in 2003.

The petitioner stated in a letter dated August 24, 2004, in the record of proceeding available in this case that that the receipt of the visa by the beneficiary will increase the business' income. He argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has provided a standard or criterion for the evaluation of such earnings. He states in the letter that the beneficiary speaks the most common languages of his ethnic clientele, and, "Although this is not a requisite for bookkeeping it will allow us to increase our revenues and decrease cost leaving more available funds to pay ... [the beneficiary] in the future." Proof of ability to pay begins on the priority date, that is June 20, 2003, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

In this instance the petitioner asserts how the beneficiary's employment as a bookkeeper will significantly increase petitioner's profits. According to the petitioner, the beneficiary will replace a medical billing firm that was paid \$17,101.00 in 2003; \$16,000.00 paid to "outhouse" (i.e. outside) bookkeepers; and, \$500.00 "... were paid as professional fees to book-keepers to keep the records on my personal property." Based upon the above, the petitioner expended \$33,601.00 in bookkeeping services on "Gross Income"³ of \$250,000.00, which calculates to a cost for this function of 13% of gross profits. Reviewing the 2003 U.S. federal tax return submitted there is an expense item listed on Schedule C, Part V, entitled "Medical Billing" in the amount of \$17,101.00. A further review shows that the petitioner stated on a supporting statement to Schedule C an expense item in the amount of \$6,000.00 for accounting fees. Therefore based upon the tax return as submitted, the petitioner has declared a total of \$23,101.00 on the 2003 tax return. Since the proffered wage is \$35,763.00, the expenses stated on the 2003 tax return are less than the proffered wage.

³ IRS Form 1040, Schedule C, Part I, Line 7.

The petitioner has asserted that it would replace independent bookkeeping contractors with the beneficiary; however there is no proof of wages actually paid on 1099-MISCs, and, there is no specific information if they did work in the same capacity as the proffered position?

The petitioner advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the tax return for 2003 including the petitioner's personal expenses as submitted by petitioner that shows that the petitioner has not 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 not met that burden.

ORDER: The appeal is dismissed.