

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JUN 27 2006**
WAC 04 242 52132

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an adult care home. It seeks to employ the beneficiary permanently in the United States as a nurse's assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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.

On appeal, counsel submits a brief and additional evidence.

The regulation 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. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour (\$20,800 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on January 1, 1999, to have a gross annual income of \$218,233, and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;
- A duplicate certified ETA 750; and,
- The petitioner's Form 1040 for 2001–2003.

On April 15, 2005, the director issued a Request for Evidence (RFE) seeking additional evidence pertinent to that ability, noting that the petitioner's income tax returns did not show sufficient earnings to pay the proffered wage and to cover the petitioner's personal living expenses. In accordance with 8 C.F.R. § 204.5(g)(2), the director indicated that the petitioner's Form 1040 showed cash investments declining from the year 2001 to 2003, but advised the petitioner that he could demonstrate ability to pay with "assets such as real estate." The director also noted that despite an increase in wages paid by the petitioner, more than doubling between the year 2001 to the year 2003, no credit could come from this "because the new employee cannot replace current workers."

In response, the petitioner submitted:

- Documents showing the petitioner equity in his home to have an estimated value of between \$101,337.50 and \$105,337.50, which the petitioner asserts he could use to support the business if necessary; and,
- Documents showing the petitioner had mutual funds currently valued at \$11,764.22.

The director denied the petition on July 15, 2005, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director found it unlikely that the petitioner “could sell their home and business in order to pay the wage.”

On appeal, counsel submits:

- Documents and an appraisal as to the petitioner’s home value at ██████████ Tempe, Arizona;
- Documents showing the value of another of the petitioner’s real estate holdings with an estimated equity value of \$117,606.09.

Counsel asserts that, contrary to the director’s assumption, the petitioner could borrow against the two real properties to pay the proffered wage, avoiding the necessity of selling the properties.

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 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 (approximately thirty percent of the petitioner’s gross income).

In determining the petitioner’s ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, even though the petitioner paid wages in excess of the proffered wage, such proof is also insufficient to establish the petitioner's ability to pay the proffered wage, which is additional.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,800 per year from the priority date.

In 2003, the Form 1040 stated adjustable gross income¹ of \$27,446.

In 2002, the Form 1040 stated adjustable gross income of \$35,185.

In 2001, the Form 1040 stated adjustable gross income of \$28,003.

Counsel did not submit evidence of the petitioner's annualized living expenses,² although the tax returns shows the petitioner's family is married and has claimed two or three other dependents each year. The director correctly concluded, however, that for the years the record contains his income tax returns, the petitioner's adjust gross income does not establish the petitioner's ability to both pay the proffered wage plus the petitioner's own living expenses.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient income to pay both the proffered wage and petitioner's living expenses.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, does not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. As noted, counsel states that the petitioner has had sufficient mutual fund assets and real property equity to establish his ability to pay the proffered wage.

In examining the mutual funds, which estimate on January 1, 2005, a market value of \$11,764.22, we find nothing in the record showing the funds were part of the petitioner's assets on the priority date. Further, the documents indicate that the actual cash value could be less than the stated market value because part of the funds appears to be invested as retirement funds, which carries an early withdrawal penalty should the petitioner need to cash them in to pay the proffered wage.

We do not overlook counsel's argument concerning the petitioner's available assets as backup for paying the proffered wage. However, CIS will not consider gross income without also considering the expenses that were incurred to generate that income as well as the petitioner's personal living expenses, and we find the petitioner's personal holdings do not demonstrate his ability to pay the proffered wage. B&H Adult Care

¹ IRS Form 1040, Line 33.

² The RFE does not specifically request such evidence.

Home was started on January 1, 1999, and employs four employees, according to its petition. Having the opportunity to borrow against real estate or mutual funds holdings does not show that the company has the ability to pay the proffered wage.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the company's real estate equity loan capacity or its ability to borrow against or to sell its mutual fund holdings. In either instance, it is a "commitment to loan" and not an existent loan, and it is not established that the unused funds from either was available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, future loans or sale proceeds cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on these as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that how they will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although debt is an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of its wages paid, adjusted gross income, or its other liquid assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner, which raise questions whether the petitioner could 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.

Counsel's assertions on appeal have not, therefore, overcome the findings by the director and the petitioner has not demonstrated that it could 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.