



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 03 2006

WAC 04 054 51618

IN RE:

Petitioner:



Beneficiary:

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:



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, Director
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 a private individual. It seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief;
- A CPA's letter dated October 28, 2004, regarding net operating loss carryovers on the petitioner's Form 1040 for 1996–2003;
- A Department of Veterans Affairs letter dated December 27, 2002 indicating that \$2,318 is the “new monthly” benefit awarded to the petitioner [REDACTED] Mr. [REDACTED] and,
- A partial transcript of an October 26, 1995, court-approved personal injury settlement awarding Mr. [REDACTED] \$605,000.

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 November 20, 1996. The proffered wage as stated on the Form ETA 750 is \$8.83 per hour (\$18,366.40 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on July 1, 1996, the beneficiary claimed to have worked for the petitioner since September 1989.

With the petition, the petitioner submitted the following documents:

- The original certified ETA 750.

On April 19, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence of the petitioner's ability to

pay the proffered wage for the years 1996–2003, and the petitioner’s federal income tax returns for those years.

In response, the petitioner submitted:

- The petitioner’s Form 1040 for 1996–2003;
- Counsel’s unsworn assertion that:
 - The petitioner’s living expenses, totaling \$3,545 per month; and,
 - The beneficiary can produce no W-2 Wage and Tax Statements for the years she has worked because she has no valid Social Security number or work authorization.

The director denied the petition on August 23, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director based her decision upon the negative adjusted gross income for the years 1996–2003.

On appeal, counsel asserts that the petitioners have established their ability to pay the proffered wage based upon income not appearing on any of the petitioner’s submitted Form 1040. Based upon the December 27, 2002 letter from the Veterans Administration, Mr. [REDACTED] has been receiving \$2,318 since the end of 2002.¹ Counsel further asserts the petitioners have demonstrated their ability to pay based upon Mr. [REDACTED]’s one-time personal injury court settlement of \$605,000, as evidenced by the partial transcript from an October 26, 1995, court hearing.

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, through

¹ Counsel does not submit documentation showing, previous to the letter, whether or for how much or for how long Veterans Affairs had been sending such payments. Also, the letter indicates that current deductions from the petitioner’s monthly benefits may reduce the \$2,318 allotment.

documentary evidence such as W-2s, that it employed and paid the beneficiary the proffered wage or partial wages in the pertinent 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).

The tax returns demonstrated the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$18,366.40 per year from the priority date.

In 2003, the Form 1040 stated adjustable gross income² of \$59,145.
In 2002, the Form 1040 stated adjustable gross income of \$35,437.
In 2001, the Form 1040 stated adjustable gross income of \$33,206.
In 2000, the Form 1040 stated adjustable gross income of \$8,645.
In 1999, the Form 1040 stated adjustable gross income of \$12,242.
In 1998, the Form 1040 stated adjustable gross income of \$18,537.
In 1997, the Form 1040 stated adjustable gross income of \$0.
In 1996, the Form 1040 stated adjustable gross income of \$40,380.

The petitioner's annualized expenses are \$42,540.

In the year 2003, the petitioner's adjusted gross income was \$59,145. That amount is more by \$1,761.40 than the combined total of the proffered wage and the \$42,540 in the petitioner's yearly personal expenses.

However, even though the petitioner's adjusted gross income is sufficient for 2003, that year's adjusted gross income is the highest of any of the pertinent years, and shows that the petitioner's adjusted gross income is insufficient to pay the proffered wage and the petitioner's living expenses in any of the pertinent earlier years.

Therefore, for the years 1996 through 2002, the petitioner did not have sufficient net income, based upon his Form 1040, 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. 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.

²While this office in general determines a sole proprietor's ability to pay the proffered wage in a particular year from the figure on the petitioner's Form 1040, Line 33, in the instant case, because of the large net loss carryovers for all pertinent years, this office has calculated the petitioner's adjusted gross income after excluding the net loss carryover amounts for each year.

Counsel has not documented the Veterans Affairs the petitioner was receiving previous to that agency's letter announcing an increased allotment. Nor has counsel documented that the petitioner in fact received the \$605,000 in a one-time court settlement, despite the court hearing that occurred previous to the priority date. That the petitioner and his spouse appear to have lived without reportable income suggests they have been receiving the Veterans Affairs payments and did receive the settlement amount. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has failed to establish his ability to pay the proffered wage from the priority date and continuously to the present time.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has 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 liquid assets. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 dismissed.