



U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC-03-072-52232

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 21 2006**

IN RE:

Petitioner:

Beneficiary:



PETITION: Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 an owner of three private houses. She seeks to employ the beneficiary permanently in the United States as a caretaker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that she had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$6.00 per hour, which amounts to \$12,480.00 annually. On the Form ETA 750B, signed by the beneficiary on December 19, 1997, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on February 8, 2002.

The I-140 petition was submitted on January 2, 2003. On the petition, the items for the date on which the petitioner was established, the petitioner's current number of employees and the petitioner's gross annual income were left blank. The petitioner stated her net annual income as \$7,842.00. With the petition, the petitioner submitted supporting evidence.

In a notice of intent to deny (ITD) dated May 6, 2003, the director stated that the evidence failed to establish that the petitioner intended to hire the beneficiary on a permanent full-time basis and that the evidence failed to establish the petitioner's ability to pay the proffered wage to the beneficiary. The director informed the petitioner of his intention to deny the petition, and afforded the petitioner thirty days to submit additional information, evidence or arguments to support the petition.

In response to the ITD, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on June 6, 2003.

In a decision dated December 5, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director further determined that the evidence did not establish that the position offered is a permanent full-time position. The director therefore denied the petition.

On appeal, former counsel submits a brief and no additional evidence. Former counsel also submits additional copies of some documents which were submitted for the record prior to the director's decision.

Former counsel states on appeal that the petitioner has ample financial resources to pay the proffered wage. Former counsel states that although in certain years the petitioner's net income was lower than the proffered wage, the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Former counsel states that the petitioner has rental income from three houses which she owns, income from providing school van service to children, and income from rental of a room in her home and from bed spacer. The pages in former counsel's brief are numbered 1 through 6 and 8 through 14. The brief contains duplicate copies of pages 5 and 11, but page seven is missing from the brief.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on December 19, 1997, the beneficiary did not claim to have worked for the petitioner.

The record contains a copy of a sworn declaration dated June 5, 2003 by the petitioner. In that declaration, the petitioner states in relevant part as follows:

6. I declare that presently, I hire [the beneficiary] on a contractual basis as a Caretaker.
7. I further declare that presently, I, [the petitioner] compensates [the beneficiary] on cash-basis with free board and lodging. This explains the unavailable of DE-6 Quarterly Wage Report and/or W-2 Wage and Tax Statement Forms.

(Declaration of the petitioner, June 5, 2003, at 1).

No evidence in the record indicates that any cash compensation has been paid to the beneficiary for his services as a caretaker for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a private individual engaged in rental of private houses, operating a rental business as a sole proprietorship under the name of the petitioning individual, with no separate business name. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner and her husband for 1998, 1999, 2000, and 2001. The record before the director closed on June 6, 2003 with the receipt by the director of the petitioner's submissions in response to the ITD. As of that date the federal tax return of the petitioner for 2002 should have been available. However, not copy of that return was submitted for the record prior to the director's decision, nor has a copy of that return been submitted on appeal.

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 returns each year. Rental income and expenses are reported on Schedule E and are carried forward to the first page of the tax return. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner are joint returns of the petitioner and her husband. Those returns show no dependents. Therefore the household size of the petitioner is two persons.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The tax returns of the petitioner and her husband show the amounts for adjusted gross income as shown in the following table.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	-\$13,567.25	not submitted	\$12,480.00*	-\$26,047.25
1999	-\$19,264.00	not submitted	\$12,480.00*	-\$31,744.00
2000	-\$9,303.00	not submitted	\$12,480.00*	-\$21,783.00
2001	\$7,842.00	not submitted	\$12,480.00*	-\$4,638.00
2002	not submitted	not submitted	\$12,480.00*	no information

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. In none of the years is the adjusted gross income of the petitioner and her husband greater than the proffered wage.

The record also contains copies of receipts showing payments received by the petitioner for rentals and for services to children in 2002 and 2003. The services to children are presumably the van services mentioned in former counsel's brief. Payment receipts are not one of the forms of acceptable evidence described in the regulation at 8 C.F.R. § 204.5(g)(2). That regulation requires evidence in one of three alternative forms, namely copies of annual reports, federal tax returns, or audited financial statements. As noted above, the petitioner failed to submit a copy of her federal income tax return for 2002. The submission of rent receipts and payment receipts for 2002 is not an acceptable form of evidence in lieu of evidence in one of the three alternative required forms specified in the regulation at 8 C.F.R. § 204.5(g)(2).

Concerning the year 2003, the record before the director closed on June 6, 2003, therefore the petitioner's federal income tax return for 2003 was not yet available. The relevance of rent receipts and payment receipts for 2003 would be to provide corroboration for evidence submitted for prior years. However, in the instant petition, the evidence for the prior years fails to establish the petitioner's ability to pay the proffered wage.

The record also contains a copy a bank statement of the petitioner dated April 13, 2003. That statement shows and ending balance of \$19,191.94. Since the petitioner's business is a sole proprietorship, the petitioner is personally liable for the financial obligations of the business. For this reason, assets held in the name of the petitioner are relevant to the issue of the petitioner's ability to pay the proffered wage.

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner does not duplicate information already found on the Form 1040 tax returns.

In the instant petition, however, the petitioner has submitted copies of no other bank statements other than the statement dated April 13, 2003. A single bank statement is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record also contains a copy of an insurance company check dated September 25, 2003 payable to the petitioning individual and her husband in the amount of \$30,058.00. The check contains the notations: "Earthquake Earthquake Contents; Earthquake Rental Reimbursement; In Full and Final Settlement." The record contains no other evidence indicating the event which led to the issuance of that insurance company check. Although the assets of the petitioner are relevant evidence, a single check is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Former counsel asserts that the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Former counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that the years 1998 through 2002 were years of uncharacteristically low income for the petitioner.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's adjusted gross income for the years 1998 through 2001. The director correctly found that those amounts were insufficient to establish the petitioner's ability to pay the proffered wage in any of those years. The director failed to note the absence of a federal tax return of the petitioner for the year 2002, a year which is also at issue in the instant petition.

The director also stated a second reason for denying the petition, that the evidence failed to establish that the position offered is a permanent full-time position. As reasons for that conclusion the director stated the following:

As to being a full-time position, there is no hard supportable evidence to show that as a "caretaker" for the petitioner's three rental properties (see Schedule E, Form 1040) that there will be sufficient duties to keep the beneficiary employed 40 hours a week, or 2080 hours a year. Also, the job description would be better suited to that of a "domestic household worker" rather than that of a "caretaker," if we are to believe that the beneficiary will be performing the duties as described in the ETA 750. It also should be noted that "exhibit D" is a notarized statement by the beneficiary who in part states "I further declare that I have been rendering part-time service to [the petitioner] since 1999 until the present."

Further, the question must be asked would a reasonable person believe that the petitioner includes, as part of the rentals, the services of a “caretaker” who will “dust and clean furnishings, hallways, and lavatories.” “Wash windows and wax and polish floors.” “Remove and hang draperies.” “Replace light switches and repair broken window screens latches or doors,” and “Paint exterior structures, mow and rake lawn, groom and exercise dogs.” The Service does not believe so.

(Director’s decision, December 5, 2003, at 3).

The Department of Labor has certified the offered job of “caretaker” with the job duties as stated on the ETA 750. Those duties are as follows:

Will keep three private homes clean and in good condition. Clean and dust furnishings, hallways, and lavatories. Wash windows and wax and polish floors. Remove and hang draperies. Replace light switches and repair broken screens, latches or doors. Paint exterior structures. Mow and rake lawn. Groom and exercise dogs.

(ETA 750, Part A, block 13)

A certification of an ETA 750 by the Department of Labor is a certification that there are not sufficient available workers to perform the labor of the offered position and that the employment of the alien beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Act § 212(a)(5)(B). The determination of whether a particular beneficiary shall be granted an immigrant visa based on an approved ETA 750 is the responsibility of CIS, which has authority to adjudicate I-140 employment-based immigrant petitions. *See* Act §§ 203(b)(3), 204(a)(1)(F).

Former counsel asserts that in the instant petition the job duties specified on the ETA 750 are very similar to the duties stated in the Dictionary of Occupational Titles for the position of “caretaker.” Former counsel has submitted for the record a printout of the relevant entry from the Dictionary of Occupational Titles. On that printout, the job title is stated as “Caretaker (domestic ser.) alternate titles: odd-job worker.” The job duties are stated as follows:

Performs any combination of following duties in keeping private home clean and in good condition: Cleans and dusts furnishings, hallways, and lavatories. Beats and vacuums rugs and scrubs them with cleaning solutions. Washes windows and waxes and polishes floors. **Removes and hangs draperies. Cleans and oils furnace. Shovels coal into furnace and removes ashes.** Replaces light switches and repairs broken screens, latches, or doors. Paints exterior structures, such as fences, garages, and sheds. May drive family car. May mow and rake lawn. May groom and exercise pets. When duties are confined to upkeep of house, may be designated House Worker (domestic ser.).

(Printout from Dictionary of Occupational Titles, Caretaker)

The above information in the printout from the Dictionary of Occupational Titles (DOT) supports former counsel’s assertions that the duties of the offered position of “caretaker” are very similar to the duties for that job title as stated in the DOT.

In his decision, the director states that the record lacks evidence that there will be sufficient duties to keep the beneficiary employed for 40 hours a week throughout any given year. The reasons for the director's doubts on that point are not clear from the record. If the beneficiary were to divide his time equally among the three rental properties of the petitioner, he would be spending about thirteen hours per week at each property. The job duties on the ETA 750 begin with the general statement "Will keep three private homes clean and in good condition." The further duties listed include responsibility for interior cleaning and maintenance and for exterior cleaning and maintenance, including yard work and painting. No evidence in the record indicates that such duties would not reasonably require an average of about thirteen hours per week at each property. The director's conclusion that the position offered is not a permanent full-time position is not supported by the evidence in the record. The portion of the director's decision discussing that issue is therefore withdrawn.

Although the director's finding that the offered position is not a permanent full-time position is incorrect, the director's decision to deny the petition is correct, since the failure of the petitioning individual to establish her ability to pay the proffered wage during the relevant period is a sufficient reason to deny the petition.

For the reasons discussed above, the assertions of former counsel on appeal are insufficient to overcome the decision of the director.

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.