



U.S. Citizenship  
and Immigration  
Services

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**PUBLIC COPY**



FILE: EAC 03 073 52123

Office: VERMONT SERVICE CENTER

Date: MAR 29 2006

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:

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.

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont 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 live-in housekeeper/child monitor. 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, the petitioner submits:

- A brief;
- A resubmitted copy of the petitioner's Form 1040 for 2002; and,
- A resubmitted copy of the cover letter of the ETA 750.

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 15, 1999. The proffered wage as stated on the Form ETA 750 is \$12.24 per hour for 44 hours each week (\$28,005.12 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 November 9, 1999, the beneficiary claimed to have worked for the petitioner since April 1998.

With the petition, the petitioner submitted the following documents:

- An original ETA 750 without the cover page.

On November 4, 2003, the director issued a Request For Evidence (RFE) seeking 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:

- The original cover letter of the ETA 750;  
An itemized list of all the petitioner's monthly expenses for 1999 through 2002;

- Evidence of the petitioner's savings, investments and/or financial statements and portfolios; and,
- The petitioner's income tax returns for 1999–2002, or the beneficiary's W-2 Wage and Tax Statements for 1999–2002.

In response, the petitioner submitted:

- A duplicate of the ETA 750 cover letter;
- The petitioner's Form 1040, filed jointly with her husband, for 1999–2002.

The director denied the petition on March 30, 2004, 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.

On appeal, the petitioner asserts that the director miscalculated the petition's priority date, which if corrected would show that her 2002 Form 1040 demonstrates earnings of more than the proffered wage. As to whether enough would remain to support the family, she asserts the director "does not have the standing to dictate" whether the petitioner's earnings can pay for both the proffered wage and the support of the petitioner's family.

At the outset, we note the provisions of 8 C.F.R. § 204.5(d), which provides in part:

(d) *Priority date.* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor.

Here, as is set forth on the ETA 750 the petitioner filed, the petitioner filed the application for labor certification on November 15, 1999, which became the priority dates.

Under 20 C.F.R. §565.20 (c), the regulations pertain to the filing of the ETA, and states, in pertinent part, that the prospective employer must have the ability to pay the proffered wage as of the time of filing the ETA 750. The regulation provides:

(c) *Job offers filed on behalf of aliens on the Application for Alien Employment Certification form* must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work; ....

Furthermore, a petitioner must establish eligibility at the time of filing the ETA 750. A petition cannot be approved at a later date, as the petitioner here asserts, after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The petitioner also asserts that CIS cannot "dictate" how much money the petitioner in the instant case needs to support her family and to have the ability to pay for the beneficiary's services. However, 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 (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 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 the instant case, the director found that based upon the petitioner's 1999 Form 1040, which showed "total income" of \$20,677, an amount she determined did not demonstrate both the petitioner's ability to pay the proffered wage and to support herself, her spouse and two children.<sup>1</sup>

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 submit any of the beneficiary's W-2 Wage and Tax Statements, as requested in the RFE, nor did she submit any Form 1099-MISC she might have issued to the beneficiary, to establish that she employed and paid the beneficiary the full proffered wage in the years 1999, 2000, 2001 or 2002.

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 (7<sup>th</sup> Cir. 1983). Reliance on a petitioner's gross receipts and wage expense would be misplaced. Showing that the petitioner's gross receipts, or in this case the family's earnings, exceeded the proffered wage, is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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

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<sup>1</sup>The petitioner's dependent exemption claims rose from two to three on the Form 1040 between its tax years 2000 and 2001 because of a newborn child. The director's determination of the petitioner's ability to pay family household expenses is based upon estimating what it costs to support a married couple and two children.

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. (Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,005.12 per year from the priority date.

In 2002, the Form 1040 stated adjusted gross income<sup>2</sup> of \$36,586.

In 2001, the Form 1040 stated adjusted gross income of \$18,887.

In 2000, the Form 1040 stated adjusted gross income of \$18,634.

In 1999, the Form 1040 stated adjusted gross income of \$19,368.

The petitioner has not submitted an estimate of her annualized household expenses for 1999–2002, as requested in the RFE.

In the year 2002, the petitioner's adjusted gross income was \$36,586. That amount is \$8,580.88 greater than the proffered wage. It is not likely that the petitioner could meet her and her three minor dependents' personal expenses with that amount.

In the years 2001, 2000 and 1999, the petitioner's adjusted gross income was \$18,887, 18,634, and \$19,368, for each year respectively, none of them as much as the proffered wage. It is not likely that the petitioner could meet her and her dependents' personal expenses, with each year's deficit below the proffered wage amount.

Therefore, for the years 1999 through 2002, 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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.

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.

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.

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<sup>2</sup> IRS Form 1040, Line 33. It is noted the director relied on "total income" from Form 1040, Line 22.

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**ORDER:** The appeal is dismissed.