



U.S. Citizenship
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FILE: WAC-04-124-51903 Office: CALIFORNIA SERVICE CENTER Date: **MAY 02 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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 a private individual. She seeks to employ the beneficiary permanently in the United States as a Home Care Attendant (Live-in). 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 it 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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$13.07 per hour, which amounts to \$27,185.60 annually. On the Form ETA 750B, signed by the beneficiary on November 30, 2000, the beneficiary claimed to have worked for the petitioner beginning in October 1983 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on February 4, 2004.

The I-140 petition was submitted on April 13, 2004. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 23, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested additional evidence relevant to the petitioner's date of birth and to the petitioner's citizenship of the United States or the petitioner's legal status in the United States.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on September 10, 2004.

In a decision dated October 19, 2004, 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, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the director erred in relying only on the petitioner's net income in evaluating the petitioner's ability to pay the proffered wage. Counsel states that the record before the director also included evidence of substantial assets of the petitioner which should also have been considered. Counsel states that a recent appraisal report of the petitioner's home is being submitted on appeal and that the report shows a value of \$524,000.00 based on sales comparisons. Counsel states that the petitioner's loan balance is \$170,617.00, leaving her with \$353,383.00 in estimated equity, based on the sales comparisons analysis of the home's value. Counsel also states that investment account statements of the petitioner show substantial funds in accounts with several investment houses.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 November 30, 2000, the beneficiary claimed to have worked for the petitioner beginning in October 1983 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2002 and 2002. The beneficiary's Form W-2's show compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$10,420.80	\$27,185.60	\$16,764.80
2002	\$10,420.80	\$27,185.60	\$16,764.80
2003	\$14,625.61	\$27,185.60	\$12,599.99

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.

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 (9th 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 (7th 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. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner and her husband for 2000, 2001, 2002 and 2003.

The record before the director closed on September 10, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the federal tax return of the petitioner for 2003 was the most recent return available.

A private individual's income and personal obligations are considered as part of the petitioner's ability to pay. Private individuals report income on the Form 1040 U.S. Individual Income Tax Return. A private individual must show sufficient resources for his or her own support and for that of any dependents as well as to pay the proffered wage. *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 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 two dependents. Therefore the household size of the petitioner is four persons.

The record contains a statement of the petitioner's monthly household expenses, itemizing expenses which total \$2,506.88 per month, a figure which amounts to \$30,082.56 on an annual basis. The petitioner's monthly household expenses include one item which appears to be a health insurance payment on behalf of the beneficiary of \$387.00 per month, which amounts to \$4,644.00 on an annual basis. Since those payments do not pertain to the petitioner's own household, they will not be considered as part of the petitioner's monthly household expenses, leaving the petitioner's monthly expenses as \$2,119.88, equivalent to \$25,438.56 on an annual basis. The petitioner's statement of monthly household expenses is not dated, but it was submitted with the petitioner's responses to the RFE, which were received by the director on September 10, 2004. Since no statements of monthly expenses were submitted for earlier years, the figures on the statement submitted on September 10, 2004 will be used for each of the years at issue in the instant petition.

For a private individual, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the petitioner's Form 1040 U.S. Individual Income Tax Return. The petitioner's tax returns state amounts for adjusted gross income as shown in the table below.

Tax year	Adjusted gross income	Household expenses	Available income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	\$18,504.00	not applicable	not applicable	not applicable	not applicable
2001	\$37,256.00	\$25,438.56	\$11,817.44	\$16,764.80*	-\$4,947.36
2002	-\$24,570.00	\$25,438.56	-\$50,008.56	\$16,764.80*	-\$62,568.65
2003	-\$11,501.00	\$25,438.56	-\$36,939.36	\$12,599.99**	-\$64,125.16

* Crediting the petitioner with the \$10,420.80 actually paid to the beneficiary in 2001 and 2002.

** Crediting the petitioner with the \$14,625.61 actually paid to the beneficiary in 2003.

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.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The record contains copies of investment account statements of the petitioner. Account 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 account statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a private individual, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner. 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's owner does not duplicate information already found on the Form 1040 tax returns.

The record contains a partial copy of an account statement dated December 31, 2000 with [REDACTED]. The statement consists of two pages of transactions, nearly all of them check transactions, except for two deposits. Although the heading for the statement gives the dates covered as January 1, 2000 to December 31, 2000, the only transactions included on the partial copy submitted in evidence are those from March 16, 2000 through December 31, 2000. Highlighted on the copy are the two deposit entries, one a deposit of \$100,000.00 on March 16, 2000 and the second a deposit of \$300,000.00 on April 4, 2000. On the copy, space in the right side of the statement is blank, suggesting that one or more columns have been omitted from the copy submitted in evidence. A partial heading of "Comm" appears at the top of the blank area. The account statement contains no information on the account balances after each transaction, information which is customarily found on account statements.

Counsel states in his brief that the [REDACTED] account statement is an example of the balances of the petitioner's portfolio assets. Counsel describes the Schwab account statement as showing [REDACTED] deposits for as high as \$300,000.00." The grammar of counsel's assertion on this point is unclear. But under any reading of counsel's language, counsel's assertions do not accurately describe the information in the Schwab account statement.

Nothing in the Schwab account statement indicates the balance in the account at any time. Moreover, the transactions immediately prior to the two deposit transactions are omitted from the copy in the record. In any event, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Because of the absence of balance information, the account statement of [REDACTED] provides no further evidence to help establish the petitioner's ability to pay the proffered wage. Moreover, the statement contains no reference to the name of the account holder. The petitioner's tax returns for 2000 and 2001 mention interest and dividends received from [REDACTED], but no account number is stated.

The record contains a partial copy of an account statement dated January 31, 2004 of the petitioner and her husband with OptionsXpress, of Chicago Illinois. The copy consists of pages one through four and page six of a six-page report. The report shows a total net portfolio value of \$18,984.70.

The record contains a partial copy of an account statement from Fidelity Investments dated June 27, 2002 for an account of the petitioner, as trustee for a family trust in her family's name. The copy consists of pages one and two of a three-page report. It shows holdings of shares in a mutual funds with total value of \$63,269.83.

The record contains a copy of an account statement from Franklin Templeton dated December 8, 1999 for three accounts of the petitioner and her husband as trustees for a family trust in their family name. The statements show the account values to be \$44,671.90 for one account, \$33,818.99 for a second account, and \$32,443.76 for the third account.

The record contains a copy of an account statement from Putnam Investments dated June 30, 2003 for an IRA account of the petitioner's husband. The statement shows the total value of the account to be \$2,621.70. The record also contains a copy of an account statement from Putnam Investments dated June 30, 2003 for an IRA account of the petitioner. The statement shows the total value of the account to be \$2,251.58.

The record contains a copy of an account statement from ReliaStar Life Insurance Company dated December 16, 1998 for an insurance policy owned by a family trust in the petitioner's family name, with the petitioner's husband as the insured person. The statement shows two payments of \$1,140.00 each from the insurance account, made to two sub-accounts identified as Putnam mutual funds. The total values of the two mutual funds are stated to be \$14,574.85. The record also contains a copy of another account statement on that same account, dated September 18, 2000, again showing two payments of \$1,140.00 each from the insurance account, made to the two Putnam mutual funds. The total values of the two mutual funds are stated to be \$31,273.27 as of September 18, 2000.

The record contains a copy of an account statement from the Bank of America, Rancho Cordova, California, dated November 28, 2001 for a checking account of the petitioner and her husband. The account shows an ending balance of \$21,738.97. The record also contains a copy of another statement on that same account, dated February 26, 2002, which shows an ending balance of \$10,783.37.

Assets held in the name of the petitioner's family trust cannot be considered as financial resources available to pay the beneficiary the proffered wage, absent any evidence explaining the permissible uses for such assets held in trust. Similarly, the life insurance policy owned by the family trust also cannot be considered to represent financial resources available to pay the proffered wage, absent any evidence that the policy has a cash value and that any such value would be available to the petitioner, rather than to the family trust. Also, assets held in IRA retirement accounts cannot be considered as financial resources available to pay the beneficiary the proffered

wage, since the record contains no information on the terms under which such funds could be withdrawn by the petitioner or about any financial penalty which the petitioner would incur in withdrawing those funds. Finally, as discussed above, the account statement from [REDACTED] provides no additional relevant evidence, since it lacks information on balances and since the evidence does not establish that the Schwab account belongs to the petitioner

For these reasons, the only account statements in the record indicating funds potentially available to pay the proffered wage are the statements from the Bank of America showing checking account balances on November 28, 2001 of \$21,738.97 and on February 26, 2002 of \$10,783.37, and the statement from OptionsXpress, showing a portfolio balance on January 31, 2004 of \$18,984.70.

The record also includes copies of property tax bills for a house owned by the petitioner and her husband in Santa Clara, California. The address of the house is the same as the address of the petitioner and her husband shown on the ETA 750 and the work location address of the beneficiary, as well as the address of the petitioner on the I-140 petition. That information indicates that the house is the residence of the petitioner and her husband.

A property tax bill dated September 5, 2000 states the assessed value of the house as \$218,869.00, and a bill dated September 1, 2001 states the assessed value as \$223,246.00.

Copies of all of the above account statements and of the two property tax bills mentioned above were submitted for the record prior to the director's decision. On appeal, the petitioner submits additional evidence.

The evidence newly submitted on appeal includes a residential appraisal report dated March 27, 2004 on the residence of the petitioner and her husband. The appraisal estimates the market value of the property as \$524,000.00. The appraisal report states that the purpose of the appraisal is a refinancing of the property. It states that a prior sale occurred on May 12, 1999, for which the purchase price was \$351,500.00. That transaction apparently reflects the purchase of the property by the prior owners. The appraisal report does not state when the petitioner and her husband acquired the property, nor does it state the purchase price when they bought it. However, the property tax bill dated September 5, 2000, discussed above, shows that the petitioner and her husband owned the house by September 5, 2000.

The evidence newly submitted on appeal also includes a mortgage loan statement from Chase Bank dated November 12, 2004 for a mortgage on the petitioner's residence. The statement shows a principal balance of \$170,617.18.

The evidence newly submitted on appeal also includes a printout from an internet web page showing eight houses for sale in Santa Clara, California, as of December 1, 2004. The lowest offered price is \$560,000.00 for a house generally similar to the petitioner's house, and the highest offered price is \$778,000.00 for a house which is significantly larger than the petitioner's house.

The evidence in the record on appeal is sufficient to establish that as of the priority date of January 16, 2001 the petitioner and her husband were the owners of a house valued at least at \$351,500.00 and that by March 27, 2004 the value of that house had risen to \$524,000.00. The evidence also establishes that by November 12, 2004 the unpaid principal on a mortgage on the house was \$170,617.18. Nonetheless, the record lacks any evidence indicating the nature and amount of any other liabilities of the petitioner and her husband. The record contains no statement by the petitioner of her total assets and total liabilities. Nor does the record contain any audited financial report on the net worth of the petitioner and her husband during any of the years at issue in the instant petition. Although the mortgage loan statement from Chase Bank shows the amount of the first mortgage balance

as of November 12, 2004, no evidence in the record indicates that the property was free of any other encumbrances.

Moreover, although the Bank of America checking account statements in the record and the OptionsXpress account statement in the record indicate that funds were available to the petitioner on certain dates, those account statements cover only certain months within the three years at issue in the instant petition.

It is noted that during 2002 and 2003, the adjusted net income of the petitioner and her husband was negative.

For the foregoing reasons, considering the totality of the financial circumstances of the petitioner under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the evidence in the record 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 net income in 2001, 2002 and 2003. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The director did not consider the evidence of the petitioner's assets which was submitted prior to the director's decision. But, as discussed above, that evidence is insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail 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. This decision is without prejudice to the filing of a new I-140 petition based on the same approved ETA 750, supported by sufficient evidence for each of the years at issue, including for the years subsequent to 2003 and continuing to the present.

ORDER: The appeal is dismissed.