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U.S. Citizenship
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FILE: WAC-05-115-54425 Office: CALIFORNIA SERVICE CENTER

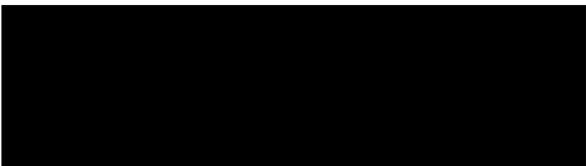
Date: APR 20 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional 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 petition¹ 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 jewelry production and distribution business. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 29, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The instant petition is the second petition the petitioner filed on behalf of the beneficiary based on the same approved labor certification. The previous petition (WAC-03-031-54392) was filed on November 8, 2002 and denied on February 21, 2004. No subsequent motion or appeal was filed against the denial.

Here, the Form ETA 750 was accepted on March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour (\$27,040 per year). The Form ETA 750 states that the position requires four (4) years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence in the record includes Form 1040 U.S. Individual Income Tax Return [REDACTED] for 2001 through 2004, monthly expenses statement for [REDACTED], Form DE-6 Quarterly Wage Reports for [REDACTED] for the third and fourth quarters of 2004 and the first quarter of 2005, and W-2 forms issued by the petitioner to its employee. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$160,896, to have a net annual income of \$70,814, and to currently employ 1 worker. On the Form ETA 750B, signed by the beneficiary on February 22, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel suggests using poverty guidelines as an objective indicia of necessary living expenses and asserts that when the objective measure of reasonable monthly expenses is applied, the tax returns show that each and every year from the priority date the petitioner had income more than sufficient to pay the proffered wage.

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, Citizenship and Immigration Services (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 during a given period, 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any evidence that it employed and paid the beneficiary any compensation in the relevant years. The petitioner submitted its Form DE-6 Quarterly Wage Reports for the third and fourth quarters of 2004 and the first quarter of 2005, and W-2 forms issued to its employee. These documents indicate that the petitioner paid wages to its current employee but not to the beneficiary. In general, wages already paid to others are not

² 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).

available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date in 2001 through examination of wages actually paid to the beneficiary, and therefore, it is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$27,040 in each of relevant years.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. 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).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor and his wife for 2001 through 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date:

In 2001, the Form 1040 stated adjusted gross income of \$58,261.

In 2002, the Form 1040 stated adjusted gross income of \$62,281.

In 2003, the Form 1040 stated adjusted gross income of \$93,742.

In 2004, the Form 1040 stated adjusted gross income of \$92,292.

In response to the director's request for evidence (RFE) dated June 10, 2005, counsel provided a statement of monthly expenses from the sole proprietor for his family of three. The statement of monthly expenses indicates that the household's monthly expenses total \$3,890 (\$46,680 per year) including mortgage payment \$2,470, food \$300, car payment \$500, auto insurance \$500, electric bill \$45, gas bill \$25, and telephone bill \$50. The director found it hard to believe that the petitioner does not spend any money on clothing for his family, and pays his electric bill of \$45 and a gas bill of \$25 in a high cost of living area such as Los Angeles, California. On appeal the petitioner submits the gas bill for a period from July 13, 2005 to August 11, 2005 showing that the household was charged \$25.34 for this period and paid \$36.18 for the previous billing period. A monthly statement for his telephone service is also submitted showing he is paying \$17.94 for the current billing period and paid \$19.44 for the last month. The evidence in the record supports the petitioner's monthly expense statement. Therefore, the AAO will consider the statement of the sole proprietor's household's monthly expenses in determining the petitioner's ability to pay the proffered wage.

³ The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003 and Line 36 for 2004.

The above information from the tax returns and the statement of monthly expenses shows that in 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage, however, the surplus of \$31,221 after paying the proffered wage from the adjusted gross income was not sufficient to cover the living expenses for the sole proprietor's household with shortage of \$15,459; and in 2002, the sole proprietor's adjusted gross income was sufficient to pay the proffered wage, however, the surplus of \$35,241 after paying the proffered wage from the adjusted gross income was not sufficient to cover the living expenses for the sole proprietor's household with shortage of \$11,439. However, the sole proprietor's adjusted gross income in 2003 and 2004 was sufficient to pay the beneficiary the proffered wage as well as to cover the sole proprietor's household living expenses each of the years. Therefore, the petitioner established its ability to pay the proffered wage as well as its household living expenses for 2003 and 2004, but failed to establish such ability for 2001 and 2002 with a shortage of \$15,459 and \$11,439, respectively.

CIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay, such as available balances in savings accounts, money market accounts, certificates of deposits, or other similar accounts at the ends of 2001 and 2002. In the instant case, the record of proceeding does not contain any evidence showing the sole proprietor had extra income or liquefiable assets to be sufficient to cover the shortage in 2001 and 2002 respectively.

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 wages paid to the beneficiary, its adjusted gross income or other-liquefiable assets in 2001 and 2002.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits printouts of Federal poverty guidelines for 2001 through 2004 and argues that the poverty guidelines should be considered as the sole proprietor's living expenses. However, poverty guidelines are a measure for poverty thresholds. Programs using the guidelines in determining eligibility include Head Start, the Food Stamp Program, the National School Lunch Program, the Low-Income Home Energy Assistance Program, and the Children's Health Insurance Program. In general, cash public assistance programs do not use the federal poverty guidelines in determining eligibility. The Earned Income Tax Credit program also does not use the federal poverty guidelines to determine eligibility. Similarly the AAO does not concur with counsel's assertion. The federal poverty guidelines will not be used to determine the petitioner's ability to pay the proffered wage to the beneficiary as they fail to account for local geographical difference in the cost of living. In addition, the federal poverty guidelines do not reflect the sole proprietor's actual expenses and further cannot determine whether the sole proprietor has sufficient actual available funds to be used to pay the proffered wage after considering his cost of living.

Counsel's assertions cannot overcome the director's decision and the evidence submitted does not establish that the petitioner had the ability to pay the proffered wage as well as to cover the sole proprietor's living expenses in 2001 and 2002.

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.