



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food establishment. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 at 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, the day 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). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.56 per hour, which equals \$24,044.80 per year.

The Form I-140 petition was submitted on June 30, 2005 and states that the petitioner's gross annual income is \$63,167 and that its net annual income is \$17,663. On the Form ETA 750, Part B, signed by the beneficiary on December 23, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Fort Lupton, Colorado.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED] (2) two FNMA Form 2055 Desktop Underwriter Quantitative Analysis Appraisal Reports, (3) a copy of the appraiser's license, (4) two warranty deeds, (5) two tax bills, (6) two deeds of trust, (7) a statement pertinent to a certificate of deposit (CD), and (8) an unrelated CD. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The tax returns submitted show that [REDACTED] had no dependents during any of the salient years. Schedules C attached to those returns show that [REDACTED] held the petitioner as a sole proprietorship during the salient years.

During 2001 the petitioner returned a net profit of \$10,085. The petitioner's owner and owner's spouse declared adjusted gross income of \$31,039 during that year; including the petitioner's net profit.

During 2002 the petitioner returned a net loss of \$2,104. The petitioner's owner and owner's spouse declared adjusted gross income of \$6,188 during that year, including the petitioner's loss.

During 2003 the petitioner returned a net profit of \$2,521. The petitioner's owner and owner's spouse declared adjusted gross income of \$17,663 during that year; including the petitioner's net profit.

During 2004 the petitioner returned a net profit of \$3,066. The petitioner's owner and owner's spouse declared adjusted gross income of \$6,302 during that year; including the petitioner's net profit.

One of the appraisal reports provided is dated October 25, 2005 and is an estimate of value of the property at [REDACTED] in Fort Lupton, Colorado, the address at which the beneficiary would be employed. The legal description of the property is the North half of Lots 5 and 6 in Block 5, in Fort Lupton, Colorado. The report indicates that the current owner is "[REDACTED]" and estimates that the value of the property is \$142,000.

That report states that the appraisal was based on an exterior inspection only, that the property is zoned for commercial use, and that its current use is its highest and best use. Although the report does not state whether the property is currently being used for residential or commercial use, photographs attached indicate that it is a commercial establishment. Photographs of the comparable properties indicate that they are similar commercial properties. The appraisal report appears to have been designed for use in valuation of residential properties and does not appear to be designed for, or suited to, use in valuation of commercial properties.

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

Further, the appraiser's credential indicates that he is a Licensed Appraiser. According to the Rules of the Colorado Board of Real Estate Appraisers 4 CCR 725-2 1.13 the usual scope of practice for a Licensed Appraiser is appraisal of one to four unit residential properties. Section 1.15 indicates that appraisals of commercial properties are typically performed by Certified General Appraisers. The record does not indicate that the appraiser who performed this appraisal is competent to perform appraisals of commercial properties.²

The report utilized three allegedly comparable sales to indicate a value for the subject property. Although the neighborhood is deemed suburban, the comparable sales selected are between 6.3 miles and 18.42 miles distant. The sale of comparable two was almost a year old on the date of the appraisal.

Comparable one indicated a value for the subject of \$141,820. Comparable two indicates a value of \$194,955. Comparable three indicates a value of \$185,720. The indicated value of comparable two is more than 35% greater than the value indicated by comparable one. This office believes that this is an unusually large range in indicated values. Whether those sales were sales of real estate only, sales of the real estate and the business, or sales of the real estate, the business, and the inventory is unstated. Further, although the appraiser indicated that he was according most weight to comparable two, he valued the property at \$142,000, which is almost exactly the value indicated by comparable one. The tax bill for that property shows that its actual value is \$74,178.

One of the warranty deeds indicates that on September 30, 1969 the petitioner's owner and his wife took title to the North half of Lots 5 and 6 in Block 5, in Fort Lupton, Colorado, the property that was the subject of the appraisal report.

The other appraisal report provided is of a property at [REDACTED], also in Fort Lupton. The legal description of the property is Lot 3, Block 3, Grandview Addition. The report indicates that the current owner is [REDACTED]. That appraisal is also based upon an exterior inspection only. That appraisal estimates the market value of the subject property to have been \$180,000 on October 25, 2005.

The other deed provided indicates that on January 16, 1973 the petitioner's owner and his wife took title to Lot 3, Block 3, Grandview Addition, in Fort Lupton, Colorado, the property that was the subject of the appraisal report. The tax bill pertinent to that property indicates that its actual value is \$178,219.

One deed of trust indicates that on May 17, 1988 [REDACTED] borrowed \$21,553.39 secured by the property at Lot 3, Block 3, Grandview Addition. The other deed of trust indicates that on June 26, 2000 they borrowed \$8,064.75 secured by the same property.

The statement pertinent to a CD indicates that [REDACTED] opened that account on November 21, 2000 and on May 24, 2005 withdrew \$100,020.55 from that account, reducing the balance to zero. The

² The appraiser has apparently violated no law in producing the appraisal, as the Colorado Revised Statutes Title 12, Article 61, Part 7 appears not to criminalize performance of real estate appraisals without the appropriate licensure or certification except in transactions related to federally guaranteed or federally regulated debt instruments. This office does not question the legality of the performance of the appraisal, but only the competence of the appraiser to perform the appraisal.

unrelated CD is dated May 23, 2005 and is a 12-month certificate. It indicates that [REDACTED] deposited \$80,000 into that account.

In a letter dated November 12, 2005 counsel stated that the value of the petitioner's owner's real property represents his "current net assets."

The acting director denied the petition on December 8, 2005.

On appeal, counsel noted that the petitioner is a sole proprietorship and that the petitioner's owner's income and assets are, therefore, available to pay the proffered wage.

Counsel cited the value of the petitioner's owner's real property and the certificates of deposit as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Showing that a petitioner's end-of-year net current assets exceeded the annual amount of the proffered wage during a given year is one way of demonstrating that petitioner's ability to pay the proffered wage during that year. Whether counsel, in referring to the petitioner's "current net assets," intended to refer to its net current assets is unknown to this office.

"Net current assets" is a term of art with a specific meaning. It is the product of a specific calculation, the taxpayer's current assets minus its current liabilities. A current asset is one that is expected to be converted to cash or cash equivalent in the short term, generally within a year. A current liability is one due to be paid with cash or cash equivalent in the short term, generally within a year.³ It would not generally include the value of real estate unless that value was expected to be realized in cash or cash equivalent within a year. No reason exists, in the instant case, to classify the petitioner's owner's real estate as a net current asset.

Further, the evidence pertinent to the value of the petitioner's owner's real estate, and his equity in it, is flawed. Although the residential appraisal in the record is not manifestly defective, as the commercial appraisal is, considerable reason exists not to consider the petitioner's owner's real estate holdings in the determination of the petitioner's ability to pay the proffered wage.

Even if the value of the properties were reliably established, the ownership and the amount of any encumbrances would remain in doubt. The deeds provided show that at one time the petitioner's owner and owner's spouse acquired the appraised properties. They do not show that they continue to own them.

The appraiser stated that [REDACTED] owns the two properties. The basis of the appraiser's knowledge is not stated. There is no indication that the appraiser performed a title search, which would be the way ownership of a real property would typically be established.

Even if the value and fee ownership were established, the record does not reliably demonstrate the amount of any encumbrances, without which the amount of the owner's equity cannot be determined. The record

³ Because the meaning of these accounting terms is settled and elementary an authoritative source is difficult to locate. Reference to any introductory accounting text, however, will confirm the definitions given.

contains two deeds of trust, but no indication that the properties are otherwise unencumbered. A property's encumbrances would typically be determined by a title search.

Even if the ownership and equity in the properties were established, real estate would not typically demonstrate ability to pay additional wages. Equity in real estate is not, ordinarily, the sort of liquid asset available to pay wages.⁴ For all of the reasons listed, the petitioner's owner's real estate will not be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 examine whether the petitioner employed 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 that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's owner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of 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 its income tax returns, rather than on its gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

⁴ Although the equity in the real estate could be used to secure a mortgage loan, and the proceeds used to pay wages, this would create an obligation to repay. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that she could have paid her existing business expenses and the proffered wage, and still supported herself and her household on her remaining adjusted gross income and assets.

The proffered wage is \$24,044.80 per year. The priority date is April 30, 2001.

During 2001 the petitioner's owner and owner's spouse declared adjusted gross income of \$31,039. That amount exceeds the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, however, she would have been left with only \$6,994 with which to support herself and his spouse for a year. No evidence pertinent to the petitioner's owner's monthly budget was presented and none was submitted. To believe that the petitioner's owner and owner's spouse could have supported themselves for a year on \$6,994, however, is unreasonable. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$6,188. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner and owner's spouse declared adjusted gross income of \$17,633. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner and owner's spouse declared adjusted gross income of \$6,302. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on June 30, 2005. On that date the petitioner's owner's 2005 tax return was unavailable. On August 23, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on

the priority date. On that date the petitioner's owner's 2005 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.⁵

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁵ The record indicates that on May 23, 2005 the petitioner's owner and owner's spouse purchased an \$80,000 CD. The amount paid for that CD could apparently have been used to pay wages. Further, on May 24, 2005 the petitioner's owner and owner's spouse liquidated a CD in the amount of \$100,020.55. That amount could apparently also have been used to pay wages. If the petitioner were obliged to show the ability to pay the proffered wage during 2005 it would be able to show that ability with those funds.