

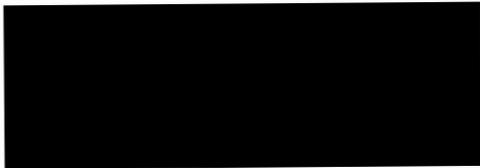
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FILE: WAC-05-051-52931 Office: CALIFORNIA SERVICE CENTER

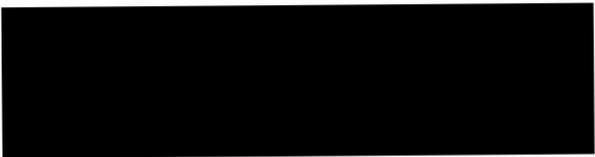
Date: FEB 13 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 jewelry manufacturer. 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 August 16, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960 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 appeal¹. Relevant evidence in the record includes [REDACTED]'s Form 1040 U.S. Individual Income Tax Returns for 2001 through 2004, a statement of monthly expenses for [REDACTED] household, and bank statements for [REDACTED] equity line of credit. 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 1991, to have a gross annual income of \$1,750,000 (projected), to have a net annual loss of \$105,000 (projected), and to currently employ 10 workers. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel submits the sole proprietor's 2004 tax return and asserts that the household income of \$75,447 in 2004 exceeds the total of his personal expenses of \$39,240 and the offered wage of \$24,960.

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 petitioner did not submit any evidence showing that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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).

¹ 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).

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 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record shows that [REDACTED] is the sole proprietor of the petitioner and the record contains his Form 1040 U.S. Individual Income Tax Returns for 2001 through 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2001, the Form 1040 stated adjustable gross income of \$28,561.
- In 2002, the Form 1040 stated adjustable gross income of \$57,215.
- In 2003, the Form 1040 stated adjustable gross income of \$32,190.
- In 2004, the Form 1040 stated adjustable gross income of \$70,715.

In response to the director's request for evidence the petitioner stated the sole proprietor's household monthly expenses total \$3,270 (\$39,240 per year) including \$350 for food, \$500 for insurance, \$1,320 for mortgage, \$300 for utilities, \$500 for car, \$150 for clothing and \$150 for school.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage of \$24,960, however, the balance of \$3,601 after paying the proffered wage from the adjusted gross income was short of \$35,639 to cover the sole proprietor's household living expenses for that year.

In 2002 the sole proprietor's adjusted gross income of \$57,215 was sufficient to pay the beneficiary the proffered wage of \$24,960, however, the balance of \$32,255 after paying the proffered wage from the adjusted gross income was still short of \$6,985 to cover the sole proprietor's household living expenses for that year.

In 2003 the adjusted gross income of \$32,190 was sufficient to pay the beneficiary the proffered wage of \$24,960, however, the balance of \$7,230 after paying the proffered wage was short of \$32,010 to cover the sole proprietor's household living expenses for that year.

However, the adjusted gross income for 2004 was sufficient to cover the proffered wage and the sole proprietor's household living expenses.

The AAO concurs counsel's assertion that the petitioner has established its ability to pay the proffered wage in 2004. However, the record shows that the sole proprietor's adjusted gross income was not sufficient to pay the beneficiary the proffered wage and to cover the sole proprietor's household living expenses in 2001 through 2003. The regulation expressly requests that the petitioner demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The petitioner's 2004 ability to pay cannot automatically establish its ability to pay for the years 2001 through 2003. The petitioner failed to establish its ability to pay the proffered wage as well as its household living expenses for 2001, 2002 and 2003.

² The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains bank statement for the sole proprietor's equity line of credit. The statements show that the sole proprietor had equity credit line of \$220,000, used \$61,800 and had available credit of \$158,200 as of August 26, 2004; and used \$199,998.79 and had available credit of \$20,001.21 as of June 25, 2005. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's adjusted gross income by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds as of August 26, 2004 and June 25, 2005 from the line of credit are available at the time of filing the labor certification application onwards. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the business' liabilities and will not improve its overall financial position.

Counsel also asserts on appeal that the sole proprietor owns a resident house with the value of \$600,000, which can be borrowed in the event he requires funds for personal expenses. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his homes and business to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's real properties to demonstrate his ability to pay is misplaced. There is no evidence in the record regarding its value or the mortgage on it anyways. 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).

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 through 2003.

Counsel's assertions cannot over the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.