



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 08 2007

SRC-05-227-50765

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 petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body shop. It seeks to employ the beneficiary permanently in the United States as an automobile-body repairer (auto body mechanic). 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 December 15, 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 March 20, 2001. The proffered wage as stated on the Form ETA 750 is \$17.43¹ per hour (\$36,254.40 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

¹ The director mistakenly typed the hourly rate as \$17.73 in her December 15, 2005 decision.

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. Counsel submits a brief on appeal. Relevant evidence in the record includes [REDACTED] Form 1040 U.S. Individual Income Tax Returns for 2001 through 2004, a statement of monthly expenses for [REDACTED] household, bank statements for the petitioner's business checking account and [REDACTED] personal checking account, W-2 forms issued by the petitioner to its employees for 2000 through 2004 and the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2005. 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 a gross annual income of \$104,714, and to have a net annual income of \$64,438. In response to the director's request for evidence (RFE) dated November 1, 2005, counsel claimed that the petitioner was established in 1999 and employs 1 worker.³ On the Form ETA 750B, signed by the beneficiary on March 13, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the statement of monthly expenses for the sole proprietor's household reflects the figures for 2005 and should not be applied to 2001 through 2003.

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 submitted W-2 forms issued to its employees for 2000 through 2004, and its Form 941 for the first three quarters of 2005. However, no document indicates that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards. In general, wages already paid to others are not 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. Therefore, the petitioner failed to establish its ability to pay the proffered wage from the priority date in 2001 onwards through the examination of wages paid to the beneficiary.

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).

³ In his brief on appeal, counsel claims that the petitioner was established in 1990 and employs 2 workers.

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 33⁴, 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 demonstrate 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 \$58,691.

In 2002, the Form 1040 stated adjusted gross income of \$59,885.

In 2003, the Form 1040 stated adjusted gross income of \$41,877.

In 2004, the Form 1040 stated adjusted gross income of \$69,133.

In response to the director's RFE dated August 27, 2005, the petitioner stated the sole proprietor's household monthly expenses of \$2,720 (\$32,640 per year) including \$1,700 for house mortgage payment, \$45 for water, \$200 for electric, \$75 for telephone, \$350 for credit card and \$350 for a personal loan.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage of \$36,254.40, however, the balance of \$22,436.60 after paying the proffered wage from the adjusted gross income was short \$10,203.40 to cover the sole proprietor's household living expenses for that year.

In 2002 the sole proprietor's adjusted gross income of \$59,885 was sufficient to pay the beneficiary the proffered wage of \$36,254.40, however, the balance of \$23,630.60 after paying the proffered wage from the adjusted gross income was still short \$9,009.40 to cover the sole proprietor's household living expenses for that year.

In 2003 the sole proprietor's adjusted gross income of \$41,877 was sufficient to pay the beneficiary the proffered wage of \$36,254.40, however, the balance of \$5,622.60 after paying the proffered wage from the adjusted gross income was short \$27,017.40 to cover the sole proprietor's household living expenses for that year.

⁴ 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.

In 2004 the adjusted gross income of \$69,133 was sufficient to pay the beneficiary the proffered wage of \$36,254.40 and to cover the sole proprietor's household living expenses of \$32,640 for that year.

Therefore, the petitioner established its ability to pay the proffered wage as well as the proprietor's personal living expenses in 2004 with the sole proprietor's adjusted gross income. However, although the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the proffered wage in 2001 through 2003, the petitioner failed to establish its ability to pay because the balances after paying the proffered wage from the adjusted gross income were not sufficient to cover the living expenses of the sole proprietor's family of four for these years. 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 the proprietor's household living expenses for 2001, 2002 and 2003.

On appeal counsel asserts that the proprietor's statement of monthly expenses is for 2005 and should not be applied to 2001 through 2004. However, counsel does not submit any statements of monthly expenses for 2001 through 2004, nor does counsel provide any evidence to support his assertion. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO notes that the sole proprietor's monthly expenses do not include some expenses usually most households have, such as expenses for food, insurance, transportation, clothing and school. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

CIS will consider the sole proprietor's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. In the instant case, the record of proceeding contains bank statements for the petitioner's business checking account and the sole proprietor's personal checking account. However, the funds in the petitioner's business checking account are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. The bank statements from the sole proprietor's personal account covering the period February 24, 2005 through September 23, 2005, with a monthly ending balance of \$0, \$0, \$419.73, \$218.76, \$0, \$113.43 and \$32.41 respectively. The balance is not sufficient to cover the remaining living expenses for the sole proprietor's household. Additionally, counsel did not submit the statements for 2001 through 2003, therefore, the AAO cannot determine whether or not the funds in the sole proprietor's personal account are sufficient enough to cover the remaining living expenses for the sole proprietor's household in 2001 through 2003. The petitioner failed to establish that the sole proprietor had sufficient additional liquefiable assets to cover the remaining living expenses for 2001 through 2003.

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.

On appeal counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner in a framework of profitable or successful years.

Counsel's assertions cannot overcome 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.