



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 21 2007

SRC-04-246-50976

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

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a horse trainer. 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 \$22.03 per hour (\$45,822.40 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

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] and [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2000 through 2004, financial analysis of the tax returns for 2000 through 2004, a letter from a CPA and bank statements for the petitioner's checking accounts. 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 did not provide information about the date established, gross annual income, net annual income and current number of employees. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had the sufficient funds to meet its business expenses and to pay the proffered wage after utilizing the additional funds taken as deductions for depreciation and amortization.

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 W-2 forms, 1099 forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present.

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

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).

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 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Counsel's reliance on depreciation reported on Schedule C is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2000 through 2004. The priority date in the instant case is April 30, 2001, therefore, the tax return for 2000 is not necessarily dispositive. The AAO will review the tax returns for 2001 through 2004. The tax returns for 2001 through 2004 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$45,822.40 per year:

In 2001, the Form 1040 stated adjusted gross income of \$33,072.

In 2002, the Form 1040 stated adjusted gross income of \$29,613.

In 2003, the Form 1040 stated adjusted gross income of \$60,459.

In 2004, the Form 1040 stated adjusted gross income of \$32,618.

In 2001, 2002 and 2004 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in that year without taking into account the sole proprietor's household living expenses.

In 2003, the sole proprietor had adjusted gross income of \$60,459, which was \$14,636.60 more than the proffered wage, therefore, the petitioner had sufficient funds to pay the proffered wage that year. The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor's family of two can be sustained with the balance of \$14,636.60, and thus further cannot determine whether or not the petitioner established its ability to pay the proffered wage as well as to sustain his family's living expenses.

In response to the director's notice of intent to deny (NOID) dated July 11, 2005, counsel argued that the petitioner had sufficient funds to pay the proffered wage with depreciation added and submitted financial analysis of tax returns for 2000 through 2004 from [REDACTED] and a letter from [REDACTED] CPA of [REDACTED] to support his assertions. However, counsel's reliance on depreciation in determining the petitioner's ability to pay is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

² 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.

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

CIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. Evidence for liquefiable assets includes any documents showing the sole proprietor's liquid assets, 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 contains copies of bank statements for checking account 209346988 covering January through August 2005 and for checking account 101256445 covering January, February, June, July and August 2005. However, the statements indicate that these accounts are checking accounts, and it is not clear who is the owner of the accounts, the sole proprietor or the petitioner. While the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses, however, if the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of each year 2001 through 2004.

In conclusion, the sole proprietor's adjusted gross income was insufficient to pay the beneficiary the proffered wage in 2001, 2002 and 2004 even without taking into account the sole proprietor's household living expenses; the record does not contain any evidence showing that the sole proprietor had extra available funds to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income in these years. Although the sole proprietor's adjusted gross income was sufficient to pay the proffered wage in 2003, the AAO cannot determine whether or not the balance was sufficient for the sole proprietor to sustain his family of two that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage and the sole proprietor's household living expenses for 2001 through 2004.

On appeal counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel asserts that the beneficiary will expand the business by bring in additional revenue. However, no detail or documentation has been provided to explain how the beneficiary's employment as a horse trainer will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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 2004.

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.