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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BC

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 01 2007
EAC 05 249 51475

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section
203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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

The petitioner is an individual householder. He seeks to employ the beneficiary permanently in the United States as a housekeeper and childcare worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

With the appeal, counsel submits additional evidence and asserts that the director erred in determining that the petitioner had not established his ability to pay the proffered salary.

On the notice of appeal, filed June 29, 2006, counsel indicates that she requires an additional 30 days to submit a brief and/or evidence to this office. In response to a recent facsimile inquiry, she submits duplicates of the documents provided with the appeal and indicates that she did not file a brief or submit additional evidence as requested on the notice of appeal.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2)(2006) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner, [REDACTED], 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 CFR § 204.5(d). Here, the Form ETA 750 was

¹ It is noted that the employer(s) identified on the labor certification are [REDACTED].” Mr. [REDACTED] is the only named petitioner on the Immigrant Petition for Alien Worker (I-140).

accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$11.25 per hour, which amounts to \$23,400 annually.²

The beneficiary indicates on her ETA 750B, which she signed on April 16, 2001, that she has worked for the petitioner since March 1996 until the present.

As evidence of its ability to pay the proffered salary of \$23,400 and in response to the director's request for evidence instructing the petitioner to submit copies of the petitioner's 2001, 2002, 2003 and 2004 tax returns, as well as copies of documentation of the amount of wages paid to the beneficiary if he employed her in 2001-2004, the petitioner provided copies of Mr. [REDACTED]'s individual federal income tax returns (Form 1040) for 2001, 2002, and 2003. These returns indicate that he filed as a married person filing separately and declared no dependents.

These tax returns reflect the following information:

	2001	2002	2003
Taxable refunds, credits, or offsets of state and local income taxes	\$ 65		
Business income or (loss)	-\$ 55,747	-\$176,978	-\$ 95,570
Other Income (Form 1040)	-\$ 142,488	-\$198,235	\$199,231
One-half of self-employment tax	n/a	n/a	\$ 11,770
Adjusted gross income (Form 1040)	-\$ 198,170	-\$375,213	\$ 91,891

Together with these tax returns, the petitioner, through counsel, submitted a copy of a deed conveying ownership of a property listed on the I-140 as Mr. [REDACTED] address, from Mr. [REDACTED] to his wife. Also provided are copies of corporate tax returns for two corporations, "Artemide, Inc.," and "Aram Realty, Inc." Accompanying documents indicate that Mr. [REDACTED]'s wife is the sole shareholder and director of Artemide and that the petitioner is the president, secretary and treasurer. Mrs. [REDACTED] is also identified as the president of [REDACTED]. Mr. [REDACTED] ownership interest in either of these companies is not identified on the corporate tax returns or accompanying documents. A partial copy of an appraisal report submitted in support of a real estate loan on the leased fee interest of a building held by [REDACTED] is also provided in support of the petitioner's ability to pay the proffered wage to the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 12, 2006, denied the petition.³ The director declined to consider the value of the business real estate as a cash asset and concluded that the adjusted gross income reported on the petitioner's individual tax returns was insufficient to cover the proffered wage.

² The director misstated the proffered wage as \$44,980.

³ The director erroneously referred to the petitioner's 2003 adjusted gross income of \$91,891 as the 2004 income.

On appeal, the petitioner, through counsel, resubmits partial copies of the petitioner's 2002 and 2003 individual tax returns. She also provides a partial copy of the petitioner's 2004 individual Form 1040, consisting of the first two pages. They contain the following:

	2004
Wages, salaries, tips, etc.	\$70,000
Ordinary dividends	\$ 11
Qualified dividends	\$ 11
Other Income "See Statement 1"	none listed
Adjusted gross income (Form 1040)	\$ 70,011

Counsel also submits a letter, dated June 23, 2006, from the petitioner's accounting firm. The letter states that the true income for 2002, as stated on the petitioner's individual tax return, is a loss of \$176,978, because the return reflects a net operating loss carryover generated in 2001 and is not relevant to the petitioner's income in 2002. The letter also claims that the petitioner's actual income for 2003 totaled \$478,874 because this return also showed a carryover loss from 2002 in the amount of \$375,213 as shown by a copy of statement 1 provided on appeal. Finally, the letter indicates that the petitioner's income for 2004 is \$70,011.

With the exception for the 2003 total, as explained below, the letter's statements are well taken. If deductible expenses for a tax year exceed a business' gross income, certain businesses may deduct the loss from their income in another year or years. The loss claimed in a year other than the year in which it was incurred is called a net operating loss, and as suggested above, should not be considered as affecting the operations of the current year's tax return. Taxable income before a net operating loss will be considered in order to determine whether a petitioner had sufficient income in the year of filing to pay the proffered wage.

In this case, the petitioner's individual income tax return for 2001 indicates that -\$142,488 designated as "other income" on line 21, reflects a "prior year NOL." Therefore, his current 2001 adjusted gross income of -\$198,170 would adjusted by the NOL amount to be "\$55,682."

In 2002, line 21 (other income) also reflects a prior year NOL of -\$198,235. Without considering this NOL, the petitioner's adjusted gross income in 2002 was -\$176,978, as stated in the accounting firm's letter.

In 2003, the petitioner's other income is listed as \$199,231 and refers to statement 1, which contains a carryover in the amount of -\$375,213. Adjusted for this amount, the petitioner's total income (line 22) would be \$478,874.⁴ Minus the self-employment tax of \$11,770, the petitioner's adjusted gross income is \$467,104 for 2003.

On the notice of appeal, counsel suggests that the regulation at 8 C.F.R. § 204.5(g)(2) has been amended and that federal tax returns are no longer required. It is noted that the prescribed evidence necessary to

⁴ This total is noted on the accountant's letter, but does not include the deduction of the self-employment tax.

demonstrate a petitioner's financial ability to pay a proffered wage is defined in 8 § C.F.R. 204.5(g)(2). This regulation is currently in force and has not been amended. If a petitioner is concerned that a federal tax return would present a less persuasive financial profile, then it may elect to submit an audited financial statement or an annual report. Counsel may be referring to the rulemaking activity that consists of a unified agenda, which is published semiannually. This regulatory agenda is a "semiannual summary of all current and projected rulemakings, as well as actions completed since the publication of the last regulatory agenda." See 70 Fed. Reg. 26892 (May 16, 2005).⁵ This agenda provides information about the actions of the Department of Homeland Security (DHS) and provides the public with information and opportunity to effectively participate in the Department's regulatory process. *Id.* Until the current regulation at 8 C.F.R. § 204.5(g)(2) is amended, it remains as guidance as to the evidence required to establish a petitioner's ability to pay a proffered wage.

Although this is a case of an individual petitioner where the totality of circumstances of that petitioner would be considered, we will not consider corporate tax return information where there is no documentation of the petitioner's ownership interest, the value of such stock, and where there is no corporate contractual obligation to pay the proffered wage of a personal housekeeper and child care worker. "Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." See *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Similarly, an appraisal of the market value of a leased fee estate on real property submitted in support of a loan sought by a separate corporate owner will not be considered in support of the individual petitioner's ability to pay the proffered wage. Moreover, real property interests are generally reflected as longer-term assets and are not considered a readily available resource out of which a certified wage may be paid.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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. If the petitioner paid wages less than the proffered salary, those amounts will also be considered. In this case, although the record suggests that the beneficiary worked for the petitioner, the petitioner elected not to submit any documentation of compensation paid.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as is asserted here. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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). 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 the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically

⁵ This unified agenda contained summaries of numerous rules including a proposed amendment to 8 C.F.R. § 204.5(g)(2) (cited as 70 FR 26916).

rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, because the petitioner is an individual, the analysis is slightly different. Similar to the analysis of a sole proprietorship, an individual petitioner's adjusted gross income, personal cash or cash equivalent assets and personal liabilities are considered as part of the petitioner's ability to pay. Any business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Individual petitioners must show that they can cover their existing expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. 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). Thus in many cases involving an individual petitioner, a summary of household expenses is solicited or submitted for consideration.

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 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, even without considering any household expenses, the petitioner has not demonstrated the ability to pay the proffered wage in 2001 because his adjusted gross income amounted to -\$55,682.

In 2002, the petitioner's adjusted gross income of -\$176,978 could not cover the certified wage of \$23,400 and does not demonstrate the ability to pay during this period.

In 2003, the petitioner's adjusted gross income of \$467,104 established his ability to pay the proffered wage.

In 2004, the petitioner's reported adjusted gross income of \$70,011 demonstrated an ability to pay the proffered wage of \$23,400 per annum.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage. Based on the evidence submitted to the record and on appeal, the petitioner has not established his continuing ability to pay the certified salary.

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.