

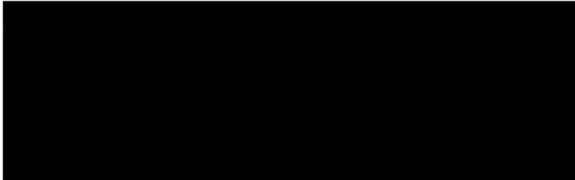
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 20 2007**

WAC-06-031-53397

IN RE:

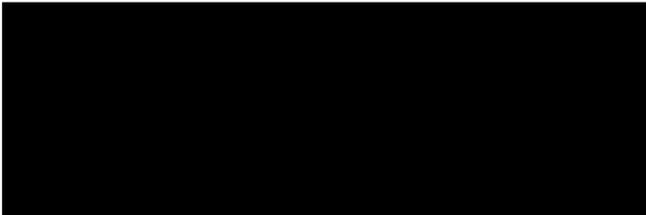
Petitioner:



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 a barber shop. It seeks to employ the beneficiary permanently in the United States as a barber. 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 June 21, 2006 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 23, 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 two (2) years of experience in the proffered position. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$80,125, and to have a net annual income of \$23,442. The petitioner did not provide information about the number of its current employees on the petition. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, he claimed to have worked for the petitioner as a barber since August 2000.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence in the record includes the beneficiary's 1099 forms for 2003 through 2005, the beneficiary's forms 1040 U.S. Individual Income Tax Returns for 2001 through 2005, [REDACTED] Forms 1040 U.S. Individual Income Tax Returns for 2001 through 2004, a brief from counsel, a copy of *In Re: X*, 11 Immig. Rptr. B2-72 (Dec. 18, 1992), a copy of Interoffice Memorandum from [REDACTED] Associate Director for Operations, Citizenship and Immigration Services (CIS), dated May 4, 2004, HQOPRD 90/16.45 (Yates' memorandum). The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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, 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 the beneficiary's 1099 forms for 2003 through 2005 and individual income tax returns for 2001 through 2005. The 1099 forms show that the petitioner paid the beneficiary \$25,000 in 2003, \$27,000 in 2004 and \$27,000 in 2005. The beneficiary's tax returns show that the beneficiary had business income of \$2,405 in 2001 and \$2,400 in 2002, however, the record does not contain any evidence showing that the income was from the petitioner. Therefore, the evidence demonstrates that the petitioner has been paying the beneficiary the proffered wage since 2003, and thus the petitioner established its ability to pay the proffered wage in 2003 through 2005 through wages paid to the beneficiary. However, the petitioner failed to demonstrate that it paid the beneficiary the proffered wage in 2001 and 2002.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 2003, according to the language in the [REDACTED] memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that [REDACTED] has instructed adjudicators to make a favorable ability to pay determination in cases where the petitioner not only is employing the

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).

beneficiary but also has paid or currently is paying the proffered wage. Counsel urges CIS to consider the proffered wage rate paid in 2003 through 2005 as satisfying that particular method of demonstrating a petitioning entity's continuing ability to pay.

The [REDACTED] memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the [REDACTED] memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the [REDACTED] memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 23, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2003 through 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 and 2002. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, the petitioner is still obligated to demonstrate that it could pay the full proffered wage of \$24,960 in 2001 and 2002.

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 next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. The evidence in the record of proceeding shows that the petitioner 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 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2004. Since the petitioner has established its ability to pay the proffered wage in 2003 through 2005 with wages paid to the beneficiary, the AAO will review the tax returns for 2001 and 2002 in determining the petitioner's ability to pay

² The line for adjusted gross income on Form 1040 is Line 33 for 2001 and Line 35 for 2002.

in these years. The sole proprietor's tax returns for 2001 and 2002 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage as of the priority date in 2001 and 2002:

In 2001, the Form 1040 stated adjusted gross income of \$6,976.

In 2002, the Form 1040 stated adjusted gross income of \$22,899.

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 the sole proprietor established her ability to pay the proffered wage as well as sustain her family's living expenses. However, in 2001 and 2002 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage in each of these years, even without taking into account the sole proprietor's household living expenses. Therefore, the petitioner failed to establish its ability to pay the proffered wage with the sole proprietor's adjusted gross income in 2001, the year of the priority date, and 2002.

CIS will consider the sole proprietor's income and her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain 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. 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 and 2002.

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 and 2002 were uncharacteristically unprofitable years for the petitioner in a framework of profitable or successful years.

In his brief, counsel refers to a decision issued by the AAO *In Re: X*. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel argues that the gross income of the petitioner has progressively increased since 2001 and these increases reflect reasonable expectations for an increase in business and profits. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. In addition, the record shows that the sole proprietor's adjusted gross income has not significantly increased each year since 2001. The sole proprietor's adjusted gross income was \$6,976 in 2001, \$22,899 in 2002, \$25,800 in 2003 and \$21,799 in 2004.

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 as well as to cover the sole proprietor's living expenses as of the priority date in 2001 to the year of 2002 through an examination of wages paid to the beneficiary, or its adjusted gross income or other liquefiable assets.

Counsel's assertions on appeal cannot overcome the director's decision that the petitioner failed to demonstrate its continuing ability to pay the proffered wage as well as the sole proprietor's living expenses from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.