

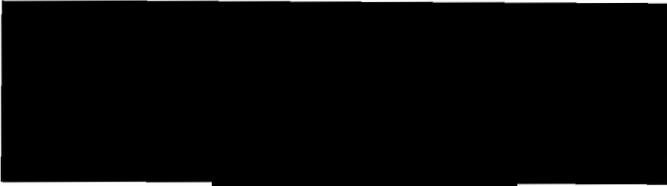
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

JUL 08 2008

SRC 05 199 53036

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 employment based visa petition was denied by the Director, Texas Service Center and was appealed to the Administrative Appeals Office (AAO). The case was remanded to the director for further investigation and review. The director subsequently denied the petition and certified her decision to the AAO. The director's decision will be affirmed.

The petitioner is a financial estate planning and insurance company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, a Form 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.

On appeal, the AAO determined that further information was required in order to properly calculate the petitioner's continuing financial ability to pay the proffered wage and remanded the case to the director on September 14, 2007 for further investigation. Following the petitioner's response to the director's request for additional evidence, the director denied the petition and certified her decision to the AAO on April 30, 2008.

Counsel asserts on certification that the petitioner has demonstrated its financial ability to pay the proffered salary.

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 procedural history of this case is documented by the record and incorporated in this decision. Further reference to the procedural history will be made only as required.

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 at 8 C.F.R. § 204.5(g)(2) 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)].

In this case, the ETA 750 reflects that the proffered wage is \$11.70 per hour, or \$24,336 per year. The priority date is April 30, 2001. The petition was filed on June 30, 2005. Part B of the 750 indicates that the beneficiary does not claim to have worked for the petitioner.¹

The petitioner is structured as a sole proprietorship. The individual tax returns for 2001, 2002 and 2003 reflect that the sole proprietor filed jointly with her spouse and claimed three dependents. The returns also indicate that the sole proprietor reported adjusted gross income of \$96,309 in 2001; \$162,478 in 2002; and \$288,036 in 2003. The petitioner supplied a copy of the sole proprietor's Wage and Tax Statement (W-2) for 2004 indicating that she received wages of approximately \$227,278 but as noted on page 3 (footnote 5) and page 4 (footnote 6) of the AAO's September 14, 2007 decision, the petitioner failed to provide the sole proprietor's tax return or audited financial statement for 2004.

Additionally, as reflected in its previous decision, the AAO noted that 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 (line 12). Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this regard, the AAO further observed that the record did not contain any evidence of the personal monthly recurring expenses and remanded the case to the director to secure this as well as other evidence such as complete copies of the sole proprietor's tax returns.

Following the petitioner's response to the director's solicitation of evidence related to the petitioner's ability to pay the proffered wage of \$24,336 including a request for either the 2001-2003 tax returns, audited financial statements or annual reports, as well as evidence of current assets and liabilities, the petitioner provided copies of the sole proprietor's 2001 to 2003 individual tax returns, copies of the sole proprietor's monthly recurring personal expenses amounting to approximately \$7,356 per month or \$88,272 per year, as well as a copy of a bank statement, dated March 11, 2008, indicating a balance of \$56,341.18.

The director reviewed the sole proprietor's adjusted gross income for 2001, 2002 and 2003 as well as her individual household expenses and concluded that although the petitioner had established the ability to pay the proffered wage in 2003, it had not demonstrated the ability to pay in 2001 and 2002.

¹ This is in contrast to a Form G-325A, Biographic Information signed by the beneficiary and submitted in connection with her application for permanent residency or to adjust status (I-485) which was filed on June 30, 2005, concurrently with the I-140. On the G-325A, the beneficiary states that she has worked for the petitioner since January 1999.

On certification, counsel contends that the director erred in her calculations for 2001 and 2002 because the sole proprietor's personal monthly recurring expenses had already been demonstrated to be the amount needed to support her family of five and that the director's determination of an inability to support the family after payment of the proffered wage was inaccurate.

Counsel is partially correct. In 2002, after covering the household annual expenses of \$88,272 out of the petitioner's reported adjusted gross income of \$162,478, the remaining \$74,206 was sufficient to pay the proffered salary of \$24,336 and demonstrate the ability to pay in this year.

In 2001, after covering the household annual expenses of \$88,272 out of the sole proprietor's adjusted gross income of \$96,309, the remaining \$8,037 was not enough to meet the proffered salary of \$24,336 or demonstrate the petitioner's ability to pay the proffered wage in this year.

It is noted that the director prorated the household expenses in 2001 that occurred after the priority date. She did not prorate the proffered wage or the sole proprietor's adjusted gross income in order to make an accurate comparison because there was insufficient evidence in the record. In general, it is noted that CIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or, for example payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not the case here.²

Counsel's assertion that the balance reflected on the bank statement of March 11, 2008, should be used for each of the years from 2001 to 2003 as an additional source of payment for the proffered wage just as the household expense summary was used for each year is misplaced. Although the director's request for evidence might have been articulated differently, it remains the petitioner's burden to demonstrate a *continuing* ability to pay the designated proffered salary as of the priority date and as set forth by the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

In this case, the petitioner failed to establish its ability to pay the certified salary in 2001. Moreover, the petitioner failed to provide a federal tax return, audited financial statement or annual report covering 2004. The provision of only the sole proprietor's W-2 for this year is not sufficient. The petitioner has not demonstrated the continuing ability to pay the proffered wage. 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 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.

² Even using a calculation of eight months of evenly divided expenses, adjusted gross income, and proffered wage, the resulting comparison would yield the same result of insufficient funds remaining to pay the proffered wage after covering household expenses.

ORDER: The director's decision to deny the petition is affirmed.