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



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **AUG 09 2006**

WAC 03 228 51343

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

The petitioner is an auto repair shop. It seeks to employ the beneficiary permanently in the United States as a lubricator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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.

On appeal, counsel submits a brief and additional evidence.

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 CFR § 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$16.94 per hour (\$35,235 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1985, and to currently employ 19 workers. On the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary claimed to have worked for the petitioner since 1993.

With the petition, the petitioner submitted the following documents:

- An original ETA 750;
- The petitioner's Form 1040 for the years 2000, 2001 and 2002.
- DE-6 (California Quarterly Wage and Withholding Report) for the last three quarters of 2002 and for all of 2003; and,
- The petitioner's unaudited accountant's compilation report as of April 30, 2003.

On May 5, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested, among other things, the petitioner's federal income tax returns for the years 1998, 1999 and 2003; and the petitioner's owner's monthly living expenses.

In response, counsel submitted:

- The petitioner's monthly expenses as of July 25, 2004, which totaled \$7,708;
- The beneficiary's W-2 (Wage and Tax Statements) for 1999–2003; and,
- The petitioner's Form 1040 for the years 1998, 1999 and 2003.

The petitioner was provided 84 days (twelve weeks) to provide a response to the director's Request For Evidence (RFE). Three additional days were provided because the request for evidence was sent to the petitioner by mail. The request for evidence was issued on May 5, 2004. The response was due on July 27, 2004,¹ including the additional three days. The petitioner's response was dated July 27, 2004, and was received by the service center on August 10, 2004, nine days after the deadline established by regulations.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied. Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence. Denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15). Nevertheless, as the director's decision was based on the merits of the evidence, we will similarly adjudicate the appeal.

The director denied the petition on October 6, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date except for the years 1998 and 2003.

On appeal, counsel submits:

- A brief;

¹ From the issue date of the RFE, the 84th day would occur on July 28, 2004. Three more days puts the due date at August 1, 2004.

- A CPA's November 4, 2004 letter modifying the petitioner's yearly adjusted gross income for the years 2000–2003 after removing deductions for depreciation and amortization, net operating loss and for “rental suspended loss c/o.”

Counsel asserts that the petitioner had the ability to pay the proffered wage for 1999–2002 based upon its CPA's recalculating its net income by adding back the petitioner's non-cash expenses for depreciation, net income loss and “rental suspended loss c/o.”²

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).

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 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 paid partial wages in the amounts of \$15,430.51 in 1999; \$16,224 in 2000; \$16,540 in 2001; \$16,484 in 2002; and \$154,712 in 2003, which is at least \$18,000 less than the \$35,235 proffered wage for each of the years 1999–2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

² On the Form 8582 attached to his Form 1040 for years 2000–2002, the petitioner took rental real estate passive activity loss deductions, which are figured into the petitioner's adjusted gross incomes amounts for those years. Because the petitioner's ability to pay the proffered wage is based upon its adjusted gross income, these passive activity loss deductions have been properly considered in our determination.

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 rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the difference between the actual wages paid and the proffered wage of \$35,235 per year for each of the pertinent years from the priority date.

In 2003, the Form 1040 stated adjusted gross income³ of \$107,336
In 2002, the Form 1040 stated adjusted gross income of \$(3,181).
In 2001, the Form 1040 stated adjusted gross income of \$(11,289).
In 2000, the Form 1040 stated adjusted gross income of \$43,063.
In 1999, the Form 1040 stated adjusted gross income of \$2,726.
In 1998, the Form 1040 stated adjusted gross income of \$201,999.

The petitioner's annualized expenses are: \$92,496. From this it can be seen that the petitioner's adjusted gross income for the pertinent years is insufficient to pay the difference between the wage paid and the proffered wage and the petitioner's personal expenses.

Therefore, for the years 1999 through 2002, the petitioner did not have sufficient income to pay both the proffered wage and petitioner's living expenses.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, does not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

We note that the record contains an unaudited compilation report estimating the value of the petitioner's

³ IRS Form 1040, Line 33.

assets. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 its wages paid, adjusted gross income, or its other liquid assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had 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.