



U.S. Citizenship
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Services

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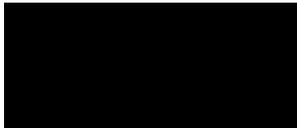
FILE: WAC 02 216 55175 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2005

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, Director
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 sustained. The petition will be approved.

The petitioner is an individual householder. She seeks to employ the beneficiary permanently in the United States as a home butler. 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 she 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, counsel asserts that the financial documentation was improperly analyzed and that the petitioner has established that she has the ability to pay the proffered wage.

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, 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, 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 accepted for processing on September 3, 1998. The proffered wage as stated on the Form ETA 750 is \$13.20 per hour, which amounts to \$27,456 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since July 1996.

With the petition, as evidence of his ability to pay the petitioner submitted a copy of her Form 1040, U.S. Individual Income Tax Return for 2001. It shows that she files jointly with her spouse and declares no dependents. The tax return reflects that she declared adjusted gross income of \$39,042 in 2001, which included \$10,122 in taxable Social Security income out of a total of \$24,441 received.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on October 10, 2002, the director requested additional evidence pertinent to that ability. The director requested evidence in the form of annual reports, federal tax returns, or audited financial statements covering the period from 1998 through the present. The director also requested copies of the beneficiary's Wage and Tax Statements (W-2s) from 1998 to the present.

In response, the petitioner states that the beneficiary was not issued any W-2 because she was paid in cash and did not have a social security number. The petitioner, however, provided copies of her individual tax returns for 1998 through 2000, as well as an additional copy of her 2001 tax return.

The tax returns reflect the following information for the following years:

	1998	1999	2000
Petitioner's adjusted gross income:	\$37,589	\$34,405	\$35,418
Taxable Social Security Income:	7,089	5,696	6,127
Total Social Security Income:	22,423	22,716	23,268
Taxable Interest	60	57	52
Tax-exempt interest	3,569	3,325	3,225

On March 11, 2003, the director requested additional evidence from the petitioner relevant to her continuing ability to pay the proffered wage. The director instructed the petitioner to submit a summary of her monthly household living expenses.

In response, the petitioner submitted a summary of her monthly household living expenses showing that the petitioner spends approximately \$2,100 per month, which amounts to \$25,200 per year.

The director denied the petition on June 11, 2003. The director reviewed the petitioner's adjusted gross income and itemization of monthly household expenses and concluded that the petitioner had failed to demonstrate her continuing ability to pay the proffered wage.

On appeal, counsel submits a letter from the petitioner's husband, as well as the petitioner's analysis of her available resources out of which the proffered annual wage of \$27,456 may be paid. Counsel and the petitioner contend that the additional non-taxable resources, as shown on the petitioner's tax return, were also available to pay the proffered wage. The petitioner's letter notes that "between the tax sheltered annuities and our brokerage account we have over \$500,000 in liquid assets, as none of our TSA's are annuitized and are available in full or part within days."

It is noted that an individual petitioner, like a sole proprietorship, does not maintain a separate legal entity. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore individual petitioners must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals or 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 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. In the instant case, the petitioner could not provide any corroborating evidence of wages paid to the beneficiary.

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).

In this particular case, where a retired person's individual tax return may not necessarily reflect all of her available cash resources as one discrete total, it is appropriate to consider the petitioner's remaining non-taxable social security income, as well as other cash assets such as tax-exempt interest, as part of her continuing ability to pay the proffered wage. In this case, the AAO finds the evidence sufficiently credible to conclude that the petitioner had sufficient additional liquid assets to pay the proffered wage of \$27,456.

The evidence submitted shows that the petitioner needed to cover her living expenses of \$25,200 per year as well as pay the proffered wage of \$27,456. This amounts to \$52,656 per year. In 1998, her adjusted gross income combined with the non-taxable Social Security income was \$52,923, and could cover the proffered wage and household expenses.

In 1999, a combination of the non-taxable Social Security income and the adjusted gross income was \$51,425, or \$1,231 short of the amount needed. The petitioner's tax-exempt interest of \$3,325, however, represented an additional liquid asset out of which the shortfall could be covered.

The petitioner's 2000 non-taxable Social Security income of \$17,141 and the adjusted gross income of \$35,418 totaled \$52,559, or \$97 less than the amount needed to cover the proffered wage and household expenses. The petitioner's tax-exempt interest of \$3,225 was sufficient to pay the difference.

In 2001, the combined total of the petitioner's non-taxable Social Security income of \$14,022 and her adjusted gross income of \$39,042 was \$53,064. This was sufficient to pay the \$52,656 needed to cover the certified wage and the household expenses.

Based on a review of the underlying record, as well as the evidence presented on appeal, the AAO concludes that the petitioner has demonstrated her continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.