U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 02 195 50836 [redacted] Office: VERMONT SERVICE CENTER Date: JAN 27 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Director
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 appeal will be dismissed.

The petitioner is a head of household who seeks to employ the beneficiary permanently in the United States as a child monitor for his two children. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. On May 5, 2003, the director determined that the petitioner had not established a 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 contends that the petitioner has the financial ability to pay the proffered wage of $17,368 based upon the evidence, which includes records submitted on appeal of wired money transfers to the petitioner from his relatives from outside the United States that appear to have supplemented his household income for about five years.

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) 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 February 18, 2002. The proffered wage as stated on the Form ETA 750 is $8.35 per hour, which amounts to $17,368 annually.

The director found from the petitioner's evidence that his monthly household expenses for 2001 were $1,965, or $23,580 annually. The petitioner's income tax return for 2001 further showed the petitioner's total income for 2001 was $23,664, leaving $84 from which to pay the beneficiary's wages. He thus determined that the record did not establish the petitioner's ability to pay the proffered wage, and accordingly denied the petition.

The petitioner is a head of household who derives income from his carryout restaurant for which he has elected Sub-S corporation status. With the petition, the petitioner filed an application for a labor certification application, Part A of which the Department of Labor certified on March 26, 2002, with a priority date of

February 18, 2001, as well as ability-to-pay documentation, including:

- Proof of a shareholder loan to the petitioner's corporation of some $20,000;
- Joint federal income tax returns, which for 2000 showed an adjusted gross income of $24,739, and for 2001 showed an adjusted gross income of 23,664;
- The petitioner's estimate that his Maryland home had a net worth of $320,000; and
- Proof of about $21,000 in a savings account.

Because the director did not consider the petitioner had proven his continuing ability to pay the proffered wage, on January 17, 2003, he sent a request for evidence seeking annual company reports, federal tax returns, or audited financial statements, individual federal income tax returns for both 2001 and 2002, and a list of the average monthly living expenses for those years. In response, the petitioner submitted a statement that his typical monthly living expenses averaged about $1,965.

On May 5, 2003, the director made the decision that the petitioner had not established his own continuing ability to pay the proffered wage and, accordingly, denied the petition.

Counsel submitted evidence for the first time with the appeal and argues that the petitioner has the financial ability to pay the proffered yearly wage of $17,368. The new evidence consisted of numerous wire transfers to bank accounts, although a transfer of $34,882 – wired the week before the filing date of the application for labor certification – was already part of the record.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) notes that the petitioner has not established that he employed the beneficiary or any other person as a child care monitor prior to his filing the petition

CIS next examines 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).

The petitioner is an individual whose yearly income is considered in evaluating his ability to pay. He must report income and expenses on an individual (Form 1040) federal tax return each year and must show that he can cover the proffered wage out of his adjusted gross income or other available funds. In addition, he must show that he can sustain himself and his 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 petitioner 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 the instant case, the petitioner supports a family of four with average monthly expenses of $1,965, or $23,580 per year. In 2000, the petitioner's adjusted gross income appears to have been enough to cover the proffered wage of $17,368. However, it is improbable that the petitioner could support himself and his family on the remaining income – or $7,371, given his annual expenses of $23,580 – after paying the proffered wage.[1]

The petitioner shows a balance of $21,814 in a joint savings account with his wife on the petition filing date as evidence of the ability to pay the proffered wage. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner on appeal contends he can use cash transfusions from parents and in-laws to cover the beneficiary's wages. The newly submitted documents purport to show the petitioner's and his wife's parents wired significant amounts over a five-year period, particularly the last amounts wired, including $49,864 in all for 2001, $39,882 for 2002 and $19,880 for 2003. The petitioner makes no claim that the relatives are under any legal obligation to continue those payments. More importantly, the AAO will not count these amounts toward the petitioner's ability to pay because there is no evidence in the record, such as evidence the petitioner has accumulated the transfers in a bank account, to show the amounts are available to pay the wage. For instance, the record includes Bank of America bank statements showing a balance in overdraft on January 12, 2001, suggesting that the money transferred did not make its way into that account.

Finally, The petitioner suggests his home has a net worth of more than $300,000. However, it is not reasonable to assume that the petitioner would sell his home in order to pay wages for child-care. Also, should the house be used as collateral for an equity loan, the increased liability would cancel the increase in assets from such a loan, doing nothing to improve the petitioner's financial picture for paying the proffered wage.

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 dismissed. The petition is denied.

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[1] It is worth noting that while the petitioner's federal income tax returns for 2002 are not part of the record, the director issued an RFE seeking them on January 17, 2003, months before the petitioner's tax filing deadline.