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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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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 08 2006

EAC 04 131 52672

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other 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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a private individual seeking to employ the beneficiary permanently in the United States as a domestic cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting director determined that the petitioner had not established that he 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 petitioner submits a brief and additional evidence.

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 granting preference classification to 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 unavailable.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $10 per hour, which equals $20,800 per year.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Framingham, Massachusetts. On the petition, the petitioner did not state his gross or net annual income.

The petition in this matter was submitted on March 18, 2004. In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the Vermont Service Center, on April 27, 2004, requested, *inter alia*, evidence pertinent to that ability. The service center also specifically requested the petitioner's 2001, 2002, and 2003 tax returns[1]

[1] Actually the service center requested copies of the tax returns of the petitioner's business, rather than the petitioner's own tax returns, apparently based on the misapprehension that the petitioner in this case is a business entity, rather than an individual. As the petitioner subsequently submitted his own personal tax returns, however, the misstatement of the service center was harmless error.

and the 2001, 2002, and 2003 Form W-2 Wage and Tax Statements showing payments the petitioner made to the beneficiary, if the petitioner employed the beneficiary during that year.

In response, the petitioner submitted the 2001 and 2002 income tax returns of himself and his spouse, and a 2003 Form 4868 Application for Automatic Extension of Time to File U.S. Individual Income Tax Return. Counsel provided no W-2 forms.

The joint 2001 income tax return of the petitioner and the petitioner's spouse shows that they declared adjusted gross income of $176,523 during that year. The 2002 return shows that they declared a loss of $33,220 as his adjusted gross income during that year. The petitioner and his spouse claimed no dependents during either year.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 21, 2004, denied the petition.

On appeal, the petitioner stated that he would subsequently submit the 2001, 2002, and 2003 tax forms of himself and his wife. Although the petitioner did not submit any additional tax returns, he did subsequently submit a letter dated November 17, 2004 from his accountant and an affidavit from his wife, also dated November 17, 2004.

The petitioner's wife's affidavit states that she contributes at least $30,000 a year to support the petitioner and that she guarantees payment of the wage proffered to the beneficiary.

The accountant's letter states that the petitioner has additional income not manifested on his tax returns. The accountant stated that during 2001 the petitioner had personal gross taxable income of $14,084 and untaxed social security income of $945. The accountant also states that the petitioner's wife contributed approximately $30,000 to his support.

The accountant states that during 2002 the petitioner had personal gross taxable income of $17,706, plus untaxed social security income of $6,456 and $30,000 contributed to his support by his wife. The accountant acknowledges that the petitioner's wife reported a net loss during that year, but states that the loss resulted from paying expenses related to income received during 2001 and failure to collect funds owed for work done during 2002. The accountant states that notwithstanding the reported net loss the petitioner's wife retained funds from 2001 sufficient to cover her expenses and contribution of $30,000 in support for her husband.

Typically, only funds at the disposal of the petitioner may be included in the calculations of a petitioner's ability to pay the proffered wage. Corporations, for instance, may not rely upon the income and assets of their shareholders, as the shareholders are not obliged to pay the debts and expenses of the corporation out of their own funds. As the funds are not, in that case, at the petitioner's disposition as a matter of law, they are not included in the determination of the petitioner's ability to pay wages. Similarly, a partnership's limited partners, the founders of a not-for-profit entity, and the owners of a limited liability company are not obliged to make their personal funds available to the business entity as necessary to prevent default. Those funds are

not, therefore, included in the calculations pertinent to the ability of those business entities' ability to pay wages.

The owner of a sole proprietorship is required to pay the debts and obligations of his company out of his own funds, if necessary, as is a partnerships general partner or partners. The personal income and assets of those individuals is correctly included in the calculations pertinent to those entities' ability to pay additional wages.

Generally only funds to which the petitioner is legally entitled are considered in the determination of a petitioner's ability to pay the proffered wage. The situation of an individual petitioner and his or her spouse, however, is not a business relationship, and this office declines to extend the rules pertinent to business relationships to married couples. Although one spouse may not be, under some circumstances, obliged to pay the debts and obligations of the other, the spousal relationship typically involves undifferentiated commingled funds. Further, the evidence in the instant case supports the proposition that the petitioner's spouse has, in fact, been contributing substantially to his support. Under these circumstances the income and assets of both the nominal petitioner and his spouse shall be considered in determining the ability of the petitioner to pay the proffered wage.

The petitioner and his spouse are obliged to demonstrate that they could have paid the proffered wage and still sustained themselves.[2] *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, CIS will examine whether the petitioner employed the beneficiary during that period. If a 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 did not establish that he employed and paid the beneficiary.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that a petitioner's gross receipts exceeded the proffered wage is insufficient. 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The proffered wage is $20,800 per year. The priority date is April 30, 2001.

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[2] The petitioner and the petitioner's spouse would also be obliged to show the ability to support their dependents after paying the proffered wage, if the record indicated that they had dependents.

The petitioner and his spouse declared adjusted gross income of $176,523 during 2001. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner and his wife declared a loss as their adjusted gross income. The petitioner would have been unable to pay the proffered wage out of his adjusted gross income during that year. The accountant states, however, in his letter of November 17, 2004, that exigent circumstances led to the loss declared during 2002, and describes those circumstances. Further, the 2001 net income of the petitioner and petitioner's spouse was likely sufficient to support them during both 2001 and 2002. Under these circumstances, this office finds that the petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petition in this matter was submitted on March 18, 2004. On that date the petitioner's 2003 income tax return was unavailable. The request for evidence was issued on April 27, 2004. Evidence then submitted demonstrated that the petitioner's 2003 tax return was still unavailable because it was incomplete. Under these circumstances the petitioner is excused from providing his tax returns for 2003 and subsequent years.

The petitioner has demonstrated the ability to pay the proffered wage during both of the salient years. Therefore, the petitioner has established that he had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon 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 is approved.