



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 03 233 52810

Office: VERMONT SERVICE CENTER

Date: **MAR 24 2006**

IN RE: Petitioner:
Beneficiary:



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:



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 remanded for further consideration.

The petitioner is a private residence. It seeks to employ the beneficiary permanently in the United States as a live-in home attendant. 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 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, counsel submits a statement 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 the granting of 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 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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$492.20 per week or \$25,594.40 annually.

The petitioner is a private household, which is analyzed similarly to sole proprietorships. With the petition, the petitioner, through counsel, submitted copies of the petitioner's and her husband's 2001 Forms W-2, Wage and Tax Statements. The petitioner's 2001 Form W-2 reflected wages earned of \$41,422.66, and the petitioner's husband's Forms W-2 reflected wages earned of \$40,213.77 from [REDACTED], \$11,587.12 from [REDACTED] c., and \$991.80 from [REDACTED] for a total of \$52,792.90. The petitioner and her husband earned a total of \$94,215.35 in 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 13, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested a copy of the petitioner's 2001 U.S.

individual income tax return with all schedules and attachments and an itemized list of the petitioner's 2001 monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc.

In response, counsel submitted a copy of petitioner's 2001 Form 1040X, Amended U.S. Individual Income Tax Return, an itemized list of the petitioner's 2001 monthly expenses, and additional copies of the previously submitted Forms W-2. The amended tax return reflected an adjusted gross income of \$95,469, and the correction to the original Form 1040 was from filing single to filing married, joint return. The petitioner's 2001 monthly expenses reflected expenses of \$5,650.00 per month or \$67,800 per year.

The 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 October 4, 2004, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation; a new statement of the petitioner's 2001 monthly expenses, and a copy of the first two pages of the petitioner's 2003 Form 1040, U.S. Individual Income Tax Returns. The new statement of the petitioner's 2001 monthly expenses reflects expenses of \$1,568.00 per month or \$18,816 per year. The petitioner's 2003 Form 1040 reflects an adjusted gross income of \$116,794.

Counsel states:

[Citizenship and Immigration Services (CIS)] claims the petitioner does not have sufficient means to pay the beneficiary the offered wages of \$25,594.40 per annum. However, the petitioner, [REDACTED] together with her husband's combined income does have the means to pay the beneficiary's salary. In addition, an error was made on the sheet listing the petitioner's monthly expenses.

Request is made for the opportunity to present a corrected monthly expense sheet, and for your reconsideration in reviewing the petitioner's annual income.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 did not establish that it had employed or paid the beneficiary a salary equal to or greater than the proffered wage in 2001 and 2003.

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).

A sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner supported a family of two. In 2001 and 2003 after paying the beneficiary's salary (\$25,594.40) the petitioner would have had \$68,620.95, and \$91,199.60, respectively, remaining to support a family of two. These amounts are more than enough to pay the proffered wage and pay the monthly expenses of the petitioner (either the \$5,650 per month figure or the amended \$1,568 per month figure).

The petitioner has established that it had the ability to pay the proffered wage at the priority date of April 23, 2001 and in 2003. However, the record of proceeding does not contain any evidence of the petitioner's ability to pay the proffered wage for 2002.

The director must afford the petitioner reasonable time to provide evidence pertinent to the petitioner's ability to pay the proffered wage in 2002. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 4, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.