



U.S. Citizenship
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Services

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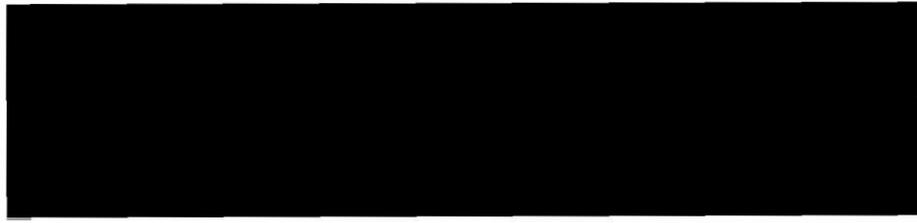


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 30 2006**
WAC 03 179 53153

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 Director, California 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 married couple seeking to employ the beneficiary permanently in the United States as a household manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The director found that the petitioning couple had not established that they 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 brief and additional evidence.

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 granting 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.

A 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 May 10, 2000. The proffered wage as stated on the Form ETA 750 is \$502 per week, which equals \$26,104 per year.

On the petition, the petitioning couple stated that their annual income is "\$110,000 +." On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioning couple since April 1997. Both the petition and the Form ETA 750 indicate that the petitioning couple will employ the beneficiary in Santa Monica, California.

In support of the petition counsel submitted the petitioning couple's joint 2000 and 2001 Form 1040 U.S. Individual Income Tax Returns.

The petitioning couple's 2000 tax return shows that the couple declared adjusted gross income of \$359,742 during that year, and that they had three dependents. During that year the petitioning couple declared interest income of \$1,014,378.

The petitioning couple's 2001 tax return shows that the couple declared adjusted gross income of \$110,856 and that they had three dependents during that year. During that year the petitioning couple declared interest income of \$979,946.

On April 8, 2004 the California Service Center requested, *inter alia*, additional evidence pertinent to the petitioning couple's continuing ability to pay the proffered wage beginning on the priority date. The request specified that the evidence should be either copies of annual reports, federal tax returns, or audited financial statements. The service center also specifically requested that the petitioning couple provide a budget of their monthly expenses. Finally, the service center requested that, if the petitioning couple intended to rely on their assets to pay the proffered wage, they provide evidence pertinent to those assets.

In response, counsel submitted (1) the petitioning couple's joint 2002 Form 1040 U.S. Individual Income Tax Return, (2) the petitioning couple's 2003 Form 4868 Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, (3) the petitioning couple's budget and actual expenses for the period from January 1, through April 28, 2004, (4) the petitioning couple's budget for the entire 2004 calendar year, (5) confirmations of trades the petitioning couple placed with their broker, and (6) a letter dated June 29, 2004.

The petitioning couple's 2002 tax return shows that the petitioning couple declared a loss of \$317,593 as their adjusted gross income during that year. During that year the petitioning couple had three dependents and declared interest income of \$268,981.

The 2003 Form 4868 shows that the petitioning couple applied for an extension of time during which to file that year's taxes.

The January 1, through April 28, 2004 budget shows that during that period the petitioning couple budgeted \$214,618.96 for total expenses and actually paid \$145,393.68.

The budget for the entire 2004 calendar year shows that during that year the petitioning couple spent \$626,493.22 on household expenses.

In the June 29, 2004 letter counsel states that the petitioning couple's loss during 2002 was occasioned by long-term carryover loss. Counsel also notes that the petitioning couple "earned \$268,000 in taxable interest [during that year], which evidences a substantial level of assets."

The director found that the evidence submitted did not establish that the petitioning couple had the continuing ability to pay the proffered wage beginning on the priority date and, on September 20, 2004, denied the petition.

In a collateral matter, submission of the beneficiary's Form I-485 Application to Adjust Status, the beneficiary's 1999, 2000, and 2001 personal tax returns were submitted with the corresponding Form W-2 Wage and Tax Statements appended. Those W-2 forms show that the petitioning couple paid the beneficiary \$15,500, \$13,000, and \$13,000 during 1999, 2000, and 2001, respectively.

On appeal, counsel reiterates the argument that the petitioning couple's 2002 loss sprang from carryover losses and that the petitioning couple's interest income evinces a large amount of principal at the petitioning couple's disposal. Counsel further argues that the petitioning couple's net current assets exceed the amount of the proffered wage and that the W-2 forms submitted show that they paid wages to the beneficiary.

Counsel does not demonstrate that the petitioning couple has any net current assets. End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets and current liabilities are shown on its Schedule L. The term is not generally applicable to an individual or couple.

In determining the petitioning couple's ability to pay the proffered wage during a given period, CIS will examine whether the petitioning couple employed the beneficiary during that period. If the petitioning couple establishes by documentary evidence that they employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioning couple's ability to pay the proffered wage. In the instant case, the petitioning couple established that they employed the beneficiary during 1999, 2000, and 2001 and paid her \$15,500, \$13,000, and \$13,000 during those years, respectively.

If the petitioning couple does not establish that they 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 petitioning couple'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 the petitioning couple'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 petitioning couple 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 petitioner, however, is a married couple. Analysis of an individual's or married couple's ability to pay the proffered wage is different from that pertinent to a corporation or other limited liability business entity. Because the petitioning couple is obliged to satisfy debts and obligations out of their own income and assets, the petitioning couple's income and assets are properly considered in the determination of the petitioning couple's ability to pay the proffered wage. The petitioning couple is obliged to demonstrate that they could have paid the proffered wage and still sustained themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$26,104 per year. The priority date is May 10, 2000.

During 2000 the petitioning couple paid the beneficiary \$15,500. The petitioning couple is only obliged to demonstrate the ability to pay the \$10,604 balance of the proffered wage during that year. During that year the petitioning couple declared adjusted gross income of \$359,742. That amount is sufficient to pay the balance of the proffered wage. The petitioning couple has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioning couple paid the beneficiary \$13,000. The petitioning couple is only obliged to demonstrate the ability to pay the \$13,104 balance of the proffered wage during that year. During that year the petitioning couple declared adjusted gross income of \$110,856. That amount is sufficient to pay the balance of the proffered wage. The petitioning couple has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioning couple declared a loss of \$317,593. The petitioning couple is unable to show the ability to pay any portion of the proffered wage out of their income during that year.¹

Despite the petitioning couple's loss during 2002 counsel argues that the instant petition is approvable. He states that the petitioning couple's loss during that year was the result of carryover losses and that the amount of the petitioning couple's interest income during the salient years evinces considerable principal. During 2000, 2001, and 2002 the petitioning couple declared interest income of \$1,014,378, \$979,946, and \$268,981, respectively.

Counsel argues that the petitioning couple's 2001 interest income, if the result of an interest rate of 5%, indicates principal of approximately \$15 to \$20 million.² The petitioning couple may, of course, be earning a better return on their principal. If so, the amount of principle required to produce that annual interest income would be less. Even during 2002, however, when the petitioning couple had the least interest income, and even if they earned 15% on their principal the petitioning couple still had almost \$1.8 million earning interest.

Although the petitioning couple's adjusted gross income during 2002 does not, in itself, evince funds sufficient to pay the proffered wage of \$26,104 annually, every other aspect of the tax returns and the other evidence submitted demonstrates that they can afford that amount. Pursuant to the principles enunciated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) the petitioning couple has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and the petition will be approved. Under these circumstances this office need not address whether counsel has sufficiently proven the assertion that the petitioning couple's losses during 2002 were the result of carryover losses from previous years or whether, in a different case, that would render the petition approvable.

¹ Because counsel demonstrated that the petitioning couple's 2003 tax return was unavailable on the date of the request for evidence the petitioning couple is excused from providing evidence pertinent to that year or subsequent years.

² The principal required to produce that annual income at 5% would be almost \$19.5 million.

The petitioning couple has demonstrated their 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.