

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

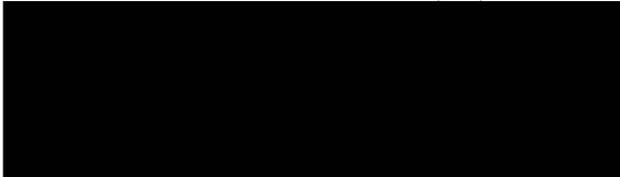
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

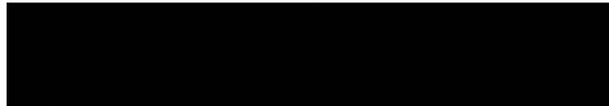
B6



FILE: WAC-05-005-50819 Office: CALIFORNIA SERVICE CENTER

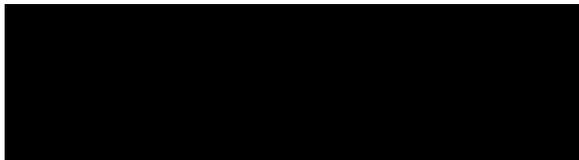
Date: MAR 12 2007

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, Chief
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 dismissed.

The petitioner is a health care facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor (residential care facility manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 11, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 3, 1997. The proffered wage as stated on the Form ETA 750 is \$502.80 per week (\$26,145.60 per year). The Form ETA 750 states that the position requires two (2) years of experience in the proffered position. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$230,000, to have a net annual income of \$150,000, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on June 2, 1997, she did not claim to have worked for the petitioner.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence in the record includes the beneficiary **W-2 forms for 1997 through 2004, the beneficiary's payroll record for January 2005 through July 2005, [REDACTED] Form 1040 U.S. Individual Income Tax Return for 1997 through 2004, bank statements for [REDACTED] various accounts for some periods in 2004 and 2005 and a statement of [REDACTED] personal expenses.** The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 submitted the beneficiary's W-2 forms for 1997 through 2004 and payroll records for a period from January 2005 to July 2005. These documents show that the petitioner paid the beneficiary as follows:

In 1997, \$11,547.00 which is \$14,598.60 less than the proffered wage in that year;
In 1998, \$12,000.00 which is \$14,145.60 less than the proffered wage in that year;
In 1999, \$12,000.00 which is \$14,145.60 less than the proffered wage in that year;
In 2000, \$16,358.00 which is \$9,787.60 less than the proffered wage in that year;
In 2001, \$17,736.00 which is \$8,409.60 less than the proffered wage in that year;
In 2002, \$24,144.00 which is \$2,001.60 less than the proffered wage in that year;
In 2003, \$24,144.00 which is \$2,001.60 less than the proffered wage in that year;
In 2004, \$26,772.00 which is greater than the proffered wage in that year;
In 2005, paying at level of \$2,450 per month which is greater than the proffered wage.

Therefore, the evidence demonstrates that the petitioner has been paying the beneficiary the proffered wage since January 2004, and thus the petitioner established its ability to pay the proffered wage in 2004 and 2005 through wages paid to the beneficiary.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 2004, according to the language in Interoffice Memorandum issued by William R. Yates, Associate Director for Operations, on May 4, 2004 regarding Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2) (Mr. ██████' memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the wage rate paid in 2004 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is November 3, 1997. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004 and 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 1997 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, the petitioner is still obligated to demonstrate that it could pay the difference of \$14,598.60 in 1997, \$14,145.60 in 1998 and 1999, \$9,787.60 in 2000, \$8,409.60 in 2001, and \$2,001.60 in 2002 and 2003 between wages actually paid to the beneficiary and the proffered wage.

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. The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 1997 through 2004. Since the petitioner has established its ability to pay the proffered wage in 2004 and 2005 through wages paid the beneficiary, the AAO reviews the tax returns for 1997 through 2003 in determining the petitioner's ability to pay in this case. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage in 1997 through 2003:

- In 1997, the Form 1040 stated adjusted gross income of \$47,278.
- In 1998, the Form 1040 stated adjusted gross income of \$20,391.
- In 1999, the Form 1040 stated adjusted gross income of \$7,319.
- In 2000, the Form 1040 stated adjusted gross income of \$(53,901).
- In 2001, the Form 1040 stated adjusted gross income of \$24,845.
- In 2002, the Form 1040 stated adjusted gross income of \$37,824.
- In 2003, the Form 1040 stated adjusted gross income of \$8,787.

The record also contains a statement of the sole proprietor's household's monthly expenses for April 2005 totaling \$13,082.40. However, the statement includes business expenses such as salary to staff (\$3,150.00), workers compensation (\$531.44), federal tax Form 941 (\$773.95), EDD DE 88 payroll tax (\$128.50) and activities & entertainment for clients (\$350.00). Since these business expenses are already reflected on the schedule C of the Form 1040 tax return, the sole proprietor's personal expenses should not include these business expenses. Therefore, the AAO will deduct these business expenses from the total amount the petitioner claimed, that is, \$8,148.51 per month or \$97,782.12 per year as the sole proprietor's personal living expenses in determining the petitioner's ability to pay.

In 1997 the sole proprietor's adjusted gross income on Form 1040 was \$47,278, which leaves the sole proprietor \$32,679.40 to cover her personal living expenses after paying the difference of \$14,598.60 between wages actually paid to beneficiary and the proffered wage that year. As discussed above, the sole proprietor's living expenses claim to be \$97,782.12, therefore, the sole proprietor needs additional funds of \$65,102.72 to cover her personal expenses in 1997. Therefore, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage and to cover her personal living expenses in 1997, the year of the priority date.

In 1998 the sole proprietor's adjusted gross income on Form 1040 was \$20,391, which leaves the sole proprietor \$6,245.40 to cover her personal living expenses after paying the difference of \$14,145.60 between wages actually paid to beneficiary and the proffered wage that year. As discussed above, the sole proprietor's living expenses claim to be \$97,782.12, therefore, the sole proprietor needs additional funds of \$91,536.72 to cover her personal expenses in 1998. Therefore, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage and to cover her personal living expenses in 1998.

In 1999 the adjusted gross income was \$7,319, which is \$6,826.60 less than the difference of \$14,145.60 between wages actually paid to the beneficiary and the proffered wage that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage even without considering the sole proprietor's living expenses of \$97,782.12 for 1999. The sole proprietor needs additional funds of \$104,608.72 for 1999 to pay

² The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

the difference between wages actually paid to the beneficiary and the proffered wage and to cover her household living expenses.

In 2000 the adjusted gross income was \$(53,901). Therefore, the petitioner failed to establish its ability to pay the proffered wage even without considering the sole proprietor's living expenses of \$97,782.12. The sole proprietor needs additional funds of \$107,569.72 for 2000 to pay the difference between wages actually paid to the beneficiary and the proffered wage and to cover her household living expenses.

In 2001 the adjusted gross income was \$24,845, which leaves the sole proprietor \$16,435.40 to cover her personal living expenses after paying the difference of \$8,409.60 between wages actually paid to beneficiary and the proffered wage that year. As discussed above, the sole proprietor's living expenses claim to be \$97,782.12, therefore, the sole proprietor needs additional funds of \$81,346.72 to cover her personal expenses in 2001. Therefore, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage and to cover her personal living expenses in 2001.

In 2002 the adjusted gross income was \$37,824, which leaves the sole proprietor \$35,822.40 to cover her personal living expenses after paying the difference of \$2,001.60 between wages actually paid to beneficiary and the proffered wage that year. As discussed above, the sole proprietor's living expenses claim to be \$97,782.12, therefore, the sole proprietor needs additional funds of \$61,959.72 to cover her personal expenses in 2002. Therefore, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage and to cover her personal living expenses in 2002.

In 2003 the adjusted gross income was \$8,787, which leaves the sole proprietor \$6,785.40 to cover her personal living expenses after paying the difference of \$2,001.60 between wages actually paid to beneficiary and the proffered wage that year. As discussed above, the sole proprietor's living expenses claim to be \$97,782.12, therefore, the sole proprietor needs additional funds of \$90,996.72 to cover her personal expenses in 2003. Therefore, the sole proprietor did not have sufficient adjusted gross income to pay the proffered wage and to cover her personal living expenses in 2003.

Therefore, the sole proprietor had sufficient adjusted gross income to pay the difference between wages actually paid to the beneficiary and the proffered wage but did not have sufficient adjusted gross income to cover her personal living expenses in 1997, 1998, 2001, 2002 and 2003, however, in 1999 and 2000 the sole proprietor's adjusted gross income was not sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage even without considering the sole proprietor's living expenses. The petitioner failed to establish its ability to pay the proffered wage as well as her living expenses with the sole proprietor's adjusted gross income in years 1997 through 2003.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains bank statements for the sole proprietor's various accounts for 2004 and 2005. With these statements the petitioner demonstrates that the sole proprietor has sufficient liquefiable assets to pay the beneficiary the proffered wage and to cover the sole proprietor's living expenses as well. However, the petitioner does not explain how the sole proprietor's additional liquefiable assets in 2004 and 2005 could establish the petitioner's ability to pay in 1997 through 2003. The record does not contain any documentary evidence showing that the sole proprietor had additional income or liquefiable assets of \$65,102.72 in 1997, \$91,536.72 in 1998, \$104,608.72 in 1999, \$107,569.72 in 2000, \$81,346.72 in 2001, \$61,959.72 in 2002 and \$90,996.72 in 2003 to demonstrate that the petitioner could pay the proffered wage as well as cover the sole proprietor's living expenses in these years.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that CIS must consider the entire fiscal circumstances of the petitioner in evaluating its ability to pay. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel suggests considering the entire fiscal circumstances of the petitioner in evaluating its ability to pay. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The record shows that the business was established in 1994 and employs two employees. The gross income of the business has never been above \$100,000 (\$93,841 in 2004, \$66,509 in 2003, \$67,869 in 2002, \$77,298 in 2001, \$72,435 in 2000, \$56,644 in 1999, \$48,402 in 1998, \$89,265 in 1997), the business had negative net income for the years except for 1997 and 2001 (\$24,914 in 2004, \$(37,445) in 2003, \$(15,820) in 2002, \$8,711 in 2001, \$(7,063) in 2000, \$(11,415) in 1999, \$(1,352) in 1998, and \$11,023 in 1997) and they have been paying salaries and wages each year of at most \$30,000 for the two employees (\$30,272 in 2004, \$24,144 in 2003, \$25,110 in 2002, \$17,736 in 2001, \$16,358 in 2000, \$9,940 in 1999, \$13,326 in 1998, and \$22,020 in 1997). Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as well as to cover the sole proprietor's living expenses as of the priority date in 1997 to the year of 2003 through an examination of wages paid to the beneficiary, or its adjusted gross income or other liquefiable assets.

Counsel's assertions on appeal cannot overcome the director's decision that the petitioner failed to demonstrate its continuing ability to pay the proffered wage as well as the living expenses from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 not met that burden.

ORDER: The appeal is dismissed.