

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



FILE: [REDACTED]  
WAC 02 275 52517

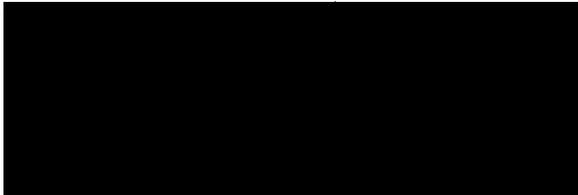
Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 2005

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 dismissed.

The petitioner is an acupuncture clinic. It seeks to employ the beneficiary permanently in the United States as an acupuncturist. 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.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 July 27, 1998. The proffered wage as stated on the Form ETA 750 is \$39,000 per year.

On the petition, the petitioner stated that it was established during 1987. The petitioner declined to state the number of workers it employs. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 1996. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Placentia, California.

In support of the petition, counsel submitted a Schedule C from the 2001 Form 1040 U.S. Individual Income Tax Return of [REDACTED]. That Schedule L shows that [REDACTED] owns the petitioning company as a sole proprietorship and that during 2001 it returned a profit of \$4,514 to him. Counsel also submitted two fiscal year 2001 property tax bills for properties Mr. [REDACTED] owns in Orange County, California.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the California Service Center, on October 22, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested complete copies of any tax returns used to demonstrate the ability to pay the proffered wage.

In response, counsel submitted copies of the joint 1998, 1999, 2000, and 2002 Form 1040 U.S. Individual Income Tax Return [REDACTED] and [REDACTED]. Those returns show that [REDACTED] and [REDACTED] had two dependents during each of those years except 1999, when they had one dependent. The returns also show that [REDACTED] held the petitioning company as a sole proprietorship during all of those years.

The 1998 return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$18,157.97 during that year, including the petitioner's entire profit of \$1,202.

The 1999 return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$23,636.49 during that year, including the petitioner's entire profit of \$3,673.

The 2000 return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$19,678.49 during that year, including the petitioner's entire profit of \$5,108.

Counsel submitted only the Schedule C from the 2001 return, notwithstanding the director's admonition to provide complete copies of tax returns. As was stated above, that Schedule L shows the petitioning company returned a profit of \$4,514.

The 2002 return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$18,607.38 during that year, including the petitioner's entire profit of \$3,926.49.

In addition, counsel provided Form W-2 Wage and Tax Statements showing that the petitioner employed two workers during 2002. Although one of those statements is only partly legible, the beneficiary does not appear to be either of the employees. One of those employees received \$4,000 in wages during that year. Although the amount paid to the other is not entirely legible, it appears to be between \$4,000 and \$5,000. Although the Line 26 of the 2002 Schedule C states that the petitioner paid \$10,000 in wages the petitioner provided no evidence to show to whom the remainder was paid.

Counsel provided copies of the two property tax bills previously submitted. Finally, counsel submitted a photocopy of monthly statement of a mortgage loan in the petitioner's owner's name. A handwritten note on that statement indicates that it pertains to a property at [REDACTED] Placentia, California.

Counsel states that the two tax bills pertain to properties at [REDACTED] San Juan Capistrano, California and [REDACTED] Placentia, California. Counsel states that those

properties have a "net worth" of \$467,766 and \$401,936, respectively. Counsel submits a photocopy of a non-precedent decision of this office in support of the proposition that property valued at more than the amount of the proffered wage demonstrates the ability to pay the proffered wage.

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 September 22, 2003, denied the petition.

On appeal, counsel states, "Service has erroneously stated that proof of ownership of property is not a satisfactory form of proof to indicate ability to pay the proffered wage of [the beneficiary]." Counsel's sole assertion on appeal, therefore, is that the evidence pertinent to the petitioner's owner's real estate holdings is sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel has stated the "net worth" of the two properties. One might suspect that, by net worth, counsel means the value of the petitioner's owner's equity<sup>1</sup> in those properties. In stating the net worth of those properties, however, counsel has merely restated the assessed values shown on the tax bills. To demonstrate the value of the petitioner's owner's equity, counsel would have to demonstrate the properties' market value and subtract the amount of all encumbrances. Counsel did neither. Although the tax bills show assessed values of the land and improvements<sup>2</sup> that is not necessarily identical to the fair market value of those properties. Although counsel submits evidence to demonstrate that one of those properties is encumbered by a mortgage, counsel did not subtract the amount of that encumbrance from his statement of the property's net worth. Further, counsel provided no evidence to show that those properties are otherwise unencumbered.

Further, real estate is not the sort of liquid commodity that may be used readily to pay wages. Finally, the petitioner's owner and the owner's spouse hold those properties in common. They petitioner's owner may not generally use the equity in that property for any purpose absent his spouse's consent, no evidence of which appears. The value of the two real properties will not be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the bank statement in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement somehow reflect additional available funds that were not reflected on its tax returns.

---

<sup>1</sup> The market value of the properties less all encumbrances.

<sup>2</sup> The values counsel cited are the assessed values.

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 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, although the Form ETA 750, Part B states that the petitioner employed the beneficiary since July 1996, the record contains no evidence of any wages paid to the beneficiary. The petitioner did not establish that it employed and paid the beneficiary.

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, 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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of 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 petitioner, however, is a sole proprietorship. Because the owner of a sole proprietorship is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. If the petitioner's profit is less than the proffered wage, the petitioner's owner is obliged to demonstrate that he could have paid the remainder of the proffered wage out of his adjusted gross income and supported himself and his family on the amount remaining.

The proffered wage is \$39,000 per year. The priority date is July 27, 1998.

During 1998 the petitioner's owner's adjusted gross income, including the petitioner's profit, was \$18,157.97. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner's adjusted gross income, including the petitioner's profit, was \$23,636.49. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner's adjusted gross income, including the petitioner's profit, was \$19,678.49. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner's owner's adjusted gross income during 2001 is unknown to this office because counsel did not provide a complete copy of the petitioner's owner's 2001 tax return, despite the October 22, 2002 request that he do so. During that year the petitioner returned a profit of \$4,514. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner's adjusted gross income, including the petitioner's profit, was \$18,607.38. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and 2002. Therefore, the petitioner has not established that it 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 not met that burden.

**ORDER:** The appeal is dismissed.