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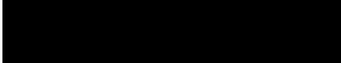
U.S. Citizenship
and Immigration
Services

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FILE: WAC-03-106-51062 Office: CALIFORNIA SERVICE CENTER Date: **MAY 10 2005**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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: SELF-REPRESENTED

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a package delivery service. It seeks to employ the beneficiary permanently in the United States as an operations 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 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, the petitioner states that the petitioner's business income as shown on its tax returns is sufficient to establish the petitioner's ability to pay the proffered wage.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$3,161.60 per month, which amounts to \$37,939.20 annually. On the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary claimed to have worked for the petitioner from August 1995 to the date of the ETA 750B.

The I-140 petition was submitted on February 19, 2003. On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$300,000.00, to have a net annual income of \$35,000.00, and to currently have eight employees.

In support of the petition, the petitioner submitted copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2000 and 2001.

In a request for evidence (RFE) dated June 25, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and relevant to the beneficiary's qualifications.

In response to the RFE, the petitioner submitted copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 1998, 1999, 2000, 2001 and 2002, copies of Form 540 California Resident Income Tax Returns of the petitioner's owner and his wife for 2000, 2001 and 2002; a copy of a letter dated October 4, 1995 from the chief manager of a bank in Manipal, India stating the beneficiary's experience with that bank as a supervisor beginning in February 1982; a letter dated August 29, 2003 from the petitioner's owner stating the beneficiary's employment with the petitioner from December 1996 until February 1998, from May 1998 until September 1999, and from early 2001 until the date of the letter; a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2002; copies of the beneficiary's Form W-2 Wage and Tax Statements showing compensation received from the petitioner for 1998, 1999 and 2001; copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for all four quarters of 2001 and all four quarters of 2002; a copy of a Bachelor of Commerce degree granted to the beneficiary, with a partially illegible date, by the Guru Narak University; a copy of the beneficiary's examination certificate issued by the Central Board of Secondary Education of India, with a partially illegible date; and a copy of an Associate Examination certificate issued to the beneficiary on September 5, 1990 by the Indian Institute of Bankers.

In a decision dated October 24, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits no brief and no additional evidence.

In the proceedings before the director, the petitioner was represented by counsel. On appeal, however, the petitioner is self-represented.

The petitioner states on appeal that the director erred in utilizing the adjusted gross income of the petitioner's owner to determine the petitioner's ability to pay the proffered wage. The petitioner states that the correct analysis of the petitioner's ability to pay the proffered wage should be based on the net profit from the petitioning business as found on Schedule C of the owner's tax returns under profit or loss from a business.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary claimed to have worked for the petitioner from August 1995 to the date of the ETA 750B. Form W-2 Wage and Tax Statements of the beneficiary show the following amounts of compensation received from the petitioner: \$19,000.00 in 1998; \$12,000.00 in 1999; and \$22,000.00 in 2001. Each of the figures on the beneficiary's W-2 forms is less than the proffered wage of \$37,939.20.

The record also contains copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for all four quarters of 2001 and all four quarters of 2002. Each of those reports states total quarterly compensation paid to the beneficiary to be \$5,500.00, for annual totals of \$22,000.00 in 2001 and \$22,000.00 in 2002. The total for 2001 matches the figure on the beneficiary's Form W-2 Wage and Tax Statement for 2001, which is discussed above. For 2002, no Form W-2 was submitted, but a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements was submitted which shows a total of \$22,000.00 paid that year by the petitioner, and which states the number of the petitioner's employees to be one employee. The petitioner's quarterly reports for 2002 and the petitioner's Form W-3 for 2002 are sufficient to establish that \$22,000.00 was paid to the beneficiary in 2002. That figure, however, is less than the proffered wage of \$37,939.20.

The evidence pertaining to the beneficiary's employment therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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 corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates 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 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. In the instant petition, the Form 1040 tax returns of the petitioner's owner and his wife show the following amounts for adjusted gross income: \$28,904.00 for 1998; \$34,536.00 for 1999; \$36,616.00 for 2000; \$21,562.00 for 2001; and \$55,648.00 for 2002. Amounts paid to the beneficiary as shown on the beneficiary's W-2 forms for 1998, 1999 and 2001

and on the quarter reports and W-3 form for 2002 as discussed above will be credited to the petitioner, so that the amounts needed to raise the beneficiary's salary to the proffered wage are \$18,939.20 for 1998; \$25,939.20 for 1999; \$37,939.20 (the entire proffered wage) for 2000; \$15,939.20 for 2001; and \$15,939.20 for 2002.

After subtracting the foregoing amounts from the adjusted gross income figures shown above, the amounts remaining for the personal household expenses of the petitioner's owner and his wife would be as follows: \$9,964.80 for 1998; \$8,596.80 for 1999; -\$1,323.20 for 2000; \$5,622.80 for 2001; and \$39,708.80 for 2002.

The number of dependents shown on the Form 1040 tax returns of the petitioner's owner and his wife is three for 1998 and 1999, and four for 2000, 2001 and 2002. Therefore the owner's household size was five persons in 1998 and 1999 and six persons in 2000, 2001 and 2002. After paying the proffered wage to the beneficiary, the amounts remaining would be insufficient for the reasonable personal household expenses of the petitioner's owner and his wife for each year from 1998 through 2001. In the year 2000 the amount remaining for household expenses in fact would have been a negative figure. Only in the year 2002, where the amount of \$39,708.80 would have remained after paying the proffered wage to the beneficiary, was the adjusted gross income of the petitioner's owner and his wife sufficient to pay the proffered wage and also to pay the reasonable household expenses of the petitioner's owner.

The petitioner submitted no other financial evidence beyond the evidence discussed above.

In his decision, the director correctly stated the figures for the adjusted gross income of the petitioner's owner and his wife each year, and correctly found that those figures were insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period, even after crediting the petitioner with amounts paid in compensation to the beneficiary. The director's decision to deny the petition was therefore correct.

The assertions of the petitioner on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The Form ETA 750 states that the position of operations manager requires a bachelors degree in the major field of study of "Business or equivalent." (Form ETA 750, block 14).

The evidence pertaining to the beneficiary's qualifications includes a copy of a Bachelor of Commerce degree granted to the beneficiary, with a partially illegible date, by the Guru Narak University. The location of that university is not legible on the copy of the degree submitted for the record, but on the ETA 750B, its location is stated to be New Delhi, India, and the last year of the beneficiary's studies there is stated to be 1971. The record also includes a copy of an Associate Examination certificate issued to the beneficiary on September 5, 1990 by the Indian Institute of Bankers. The record lacks any evaluation of whether either the beneficiary's Bachelor of Commerce degree or his Association Examination certificate is equivalent to a United States bachelor's degree. *See* 8 C.F.R. § 204.5(1)(2). Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The

petitioner has not established that the beneficiary had a bachelor's degree on January 14, 1998 or a foreign equivalent degree.

For the foregoing reasons, even if the petitioner's evidence established its ability to pay the proffered wage during the relevant period, the evidence fails to establish that the beneficiary met the minimum educational requirements for the position as of the priority date.

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.