

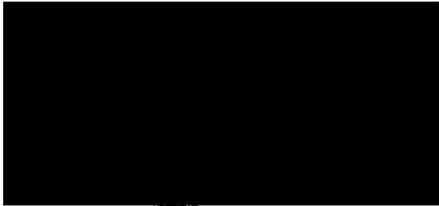
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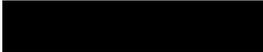


U.S. Citizenship
and Immigration
Services

B6



FILE:



WAC 03 174 53348

Office: CALIFORNIA SERVICE CENTER

Date: NOV 18 2000

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a farm. It seeks to employ the beneficiary permanently in the United States as a harrowbed operator. As required by statute, the petition is not accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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.

On appeal, the counsel submits a brief 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 unavailable.

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, 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. The petitioner must also demonstrate that 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 as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$9.61 per hour (\$19,968.00 per year). The Form ETA 750 states that the position did not require experience.

With the petition, counsel submitted copies of the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor, U.S. Internal Revenue Service Form tax return for 2002; a statement from petitioner; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), on March 27, 2004, the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested signed and dated copies of the petitioner's 2001 and 2003 U.S. federal tax returns; copies of audited financial statements and annual reports for

those same years; the beneficiary's W-2 Wage and Tax Statements (W-2) for the years 1999 to 2003; and a statement of monthly expenses for the petitioner and her family as well as other documents.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's 2001 and 2003 U.S. federal tax returns; evidence of a "business line" loan; a statement that the beneficiary's W-2 statements were not available; and, a statement of monthly personal expenses; as well as other documents.

The director denied the petition on July 21, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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 of that beneficiary. Evidence was submitted to show that the petitioner employed the beneficiary since 1991 according to the "Petitioner's Statement in Support of Appeal," and the petitioner's affidavit dated August 3, 2004. The amount of wage including "housing, food, and all necessary items for the maintenance" was not disclosed. The director in his decision pointed out that according to Schedule "C" of petitioner's tax returns, wages were paid every year for which returns were submitted, but no information was produced to distinguish the wages or compensation paid to the beneficiary.¹

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its W-2 statements or evidence of amount of wage including "housing, food, and all necessary items for the maintenance" provided to and paid to the beneficiary. That information together with the taxable income would have further revealed her ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner is a sole proprietorship. 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 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 or approximately thirty percent (30%) of the petitioner's gross income.

¹ Apparently, this is because, as petitioner admits, the beneficiary had no work authorization.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the adjusted gross 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Examining the adjusted gross income reported by the petitioner with his stated yearly personal living expenses, indicates the following:

- In 2001, the Form 1040 stated adjusted gross income of <\$64,900.00>. The petitioner's yearly personal expenses were \$20,092.00.² The proffered wage is \$19,968.00 per year. There is insufficient adjusted gross income to pay the petitioner's personal living expenses and the proffered wage.
- In 2002, the Form 1040 stated adjusted gross income of \$14,410.00. The petitioner's yearly personal expenses were \$20,092.00. The proffered wage is \$19,968.00 per year. There is insufficient adjusted gross income to pay the petitioner's personal living expenses and the proffered wage.
- In 2003, the Form 1040 stated adjusted gross income of <\$1,472.00>. The petitioner's yearly personal expenses were \$20,092.00. The proffered wage is \$19,968.00 per year. There is insufficient adjusted gross income to pay the petitioner's personal living expenses and the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

On appeal, counsel asserts that the Director reached its decision because he found the petitioner's adjusted gross income for the years examined insufficient to pay the proffered wage. Also, the director disallowed the "business line" financing arrangement. Further, counsel asserts that since no W-2 evidence was submitted to show the beneficiary's wages, the director concluded that no wages were paid.

With the appeal counsel submitted a statement from the petitioner that stated in pertinent part that the farm was family owned, (operated since 1959), and that the beneficiary had worked there without work authorization for six years. According to petitioner, it is necessary to maintain a line of credit to provide for income shortfalls resulting from market prices and economic conditions. Counsel states the U.S. Internal

² The personal expenses were submitted for year 2003. According to petitioner, there are usual and ordinary expenses such as utilities that are paid as business expenses, and, therefore not included.

³ 8 C.F.R. § 204.5(g)(2).

Revenue Service Form 941 and 943 submitted are evidence of its payroll as well as the petitioner's affidavit. Counsel asserts that the petitioner has always made payroll and paid the beneficiary, although its taxable income has fluctuated widely during its operational history.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner's stated that besides the monthly wage paid to beneficiary (the amount was not stated) that the petitioner provided "housing, food, and all necessary items for the maintenance thereof including such items as electricity, water, and heat." The affidavit provided by the petitioner that she paid the beneficiary an unspecified wage and living costs is insufficient to determine the ability to pay. The petitioner has the burden of coming forward with evidence to demonstrate the ability to pay the proffered wage.

The Director found that the petitioner's adjusted gross incomes for the years examined were insufficient to pay the proffered wage based upon the evidence submitted by petitioner including her personal living expenses. Petitioner chose to withhold information concerning the monthly wage paid to beneficiary from 1991 and the cash value of "housing, food, and all necessary items for the maintenance thereof including such items as electricity, water, and heat" that were provided to the beneficiary. If the petitioner had provided this requested information, the director could have added wages paid and value received by the beneficiary to the adjusted gross income for the years examined to determine if the petitioner had the ability to pay the proffered wage. Also, had wages paid beneficiary including the value of his living expenses paid exceeded the proffered wage of \$19,968.00 per year, then in that case, this would have been *prima facie* evidence of the ability to pay the proffered wage.

The director disallowed the "business line" financing arrangement. As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it had an established line of credit that was essential in its operations. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the petitioner's business line, credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage in years 2001, 2002 and 2003.

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.