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U.S. Citizenship
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FILE: WAC 03 237 53602 Office: CALIFORNIA SERVICE CENTER Date: APR 25 2006

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 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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 18, 2000. The proffered wage as stated on the Form ETA 750 is \$11.26 per hour, which equals \$23,420.80 per year.

On the petition, the petitioner stated that it was established during 1986 and that it employs six workers. The petition states that the petitioner's gross annual income is \$710,321 and that its net annual income is \$41,423.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in San Jose, California.

In support of the petition, counsel submitted the 2002 Form 1040 U.S. Individual Income Tax Return, including a Schedule C, of [REDACTED]. That Schedule C shows that [REDACTED] holds the petitioner as a sole proprietorship and that it returned a net profit of \$41,423 during that year. The personal tax return shows that the petitioner's owner and his spouse had three dependents and that they declared adjusted gross income of

\$39,034 during that year, including the petitioner's entire net profit. In a letter dated August 7, 2003 counsel asserted that the evidence shows that the petitioner is able to pay the proffered wage.

However, 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 May 27, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center acknowledged that the petitioner had provided evidence pertinent to 2002, but noted that the evidence should cover the years 2000 to 2003. The service center also specifically requested a statement of the petitioner's owner's recurring monthly expenses.

In response, counsel submitted (1) the petitioner's owner's 2000, 2001, and 2003 Form 1040 U.S. Individual Income Tax Returns including Schedules C, Profit or Loss from Business, (2) the requested copy of the petitioner's owner's monthly budget, (3) one page of a copy of the deed of trust for the petitioner's owner's house, (4) a Uniform Residential Appraisal Report (URAR) of the petitioner's owner's house, (5) a copy of a monthly mortgage statement pertinent to the petitioner's owner's house, and (6) a letter dated August 16, 2004.

The 2000 Schedule C shows that the petitioner returned a net profit of \$148,016 during that year. The petitioner's owner's tax return shows that he declared adjusted gross income of \$139,905 during that year, including the petitioner's entire profit.

The 2001 Schedule C shows that the petitioner returned a net profit of \$114,483 during that year. The petitioner's owner's tax return shows that he declared adjusted gross income of \$107,980 during that year, including the petitioner's entire profit.

The 2003 Schedule C shows that the petitioner returned a net profit of \$43,529 during that year. The petitioner's owner's tax return shows that he declared adjusted gross income of \$41,034 during that year, including the petitioner's entire profit.

The petitioner's owner's monthly budget states that he pays a monthly mortgage payment of \$1,519, a monthly automobile payment of \$600, \$250 in groceries, \$250 for utilities, and makes a \$130 monthly payment on his credit cards. Those amounts equal total monthly expenses of \$2,749, or \$32,988 annually.

The deed of trust provided shows that the petitioner's owner and the owner's spouse purchased a house in San Jose, California on August 13, 1987 secured by a mortgage of \$205,000.

The URAR states that, in the appraiser's opinion, the house in San Jose belonging to the petitioner's owner and owner's spouse was worth \$680,000 on June 17, 2004.

The mortgage statement provided shows that on June 9, 2004 the San Jose house of the petitioner's owner and owner's spouse¹ had a remaining principal balance on its first mortgage² of \$143,454.44.

¹ Although the statement does not identify the mortgaged property it shows that the petitioner's owner and owner's spouse are the borrowers, and that the original loan amount was \$205,000, as was the original mortgage amount encumbering the San Jose house of the petitioner's owner and owner. This office is sufficiently convinced that this

In his letter of August 16, 2004 counsel stated that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 27, 2004, denied the petition. That decision noted that the petitioner's owner's monthly budget included mortgage, automobile payment, groceries, utilities, and credit card expense, but omitted all other monthly expenses, including clothing and various types of insurance (automobile, homeowner, health, life, etc.). That decision also stated that equity in real estate is not the sort of liquid fund readily available to pay wages.

On appeal, counsel submits copies of monthly statements pertinent to the petitioner's owner's bank account³ and a brief. In the brief counsel urges that the petitioner's account balances and the equity in the petitioner's owner's home are funds available, if necessary, to pay the proffered wage. Counsel notes that, rather than selling their home, the petitioner's owner and owner's spouse could take a second mortgage against the value of their equity. Counsel offers no evidence that they have not already done so.

Counsel failed to provide the amount of the petitioner's monthly expenses that were excluded from the budget presented or to provide any reason why they are inapplicable.

Counsel also misconstrues the decision of denial as indicating that the director found that the beneficiary is not qualified for the proffered position.⁴ The decision of denial contains no such finding. The beneficiary's qualifications will not be further addressed.

Counsel's reliance on the bank statements 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

mortgage statement pertains to the same house as the other documents provided.

² That mortgage statement does not show that the property is otherwise unencumbered.

³ The bank statements submitted are for monthly periods ending from January 2002 to December 2002 and show end-of-period balances ranging from \$1,528.13 to 24,030.19.

⁴ Counsel quotes out of context portions of two paragraphs. The first, the statement in the decision of denial that, "The beneficiary **is not** employed with the petitioner," [Emphasis in the original.] is merely noting that, had the petitioner paid wages to the beneficiary those payments would have demonstrated its ability to pay the proffered wage, at least in part. The second quote, "As the evidence submitted with the petition was insufficient to establish the beneficiary's eligibility for the classification sought . . .," is part of a sentence explaining why the service center issued a request for evidence in this matter.

funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.⁵

The value of the petitioner's home is not expected to be realized in cash or cash equivalent in the near future. Equity in real estate is not the sort of liquid asset generally available to pay wages. For this reason, the petitioner's owner's equity in his home is not considered a fund available, as necessary, to pay additional wages.

Counsel urges, however, that the petitioner is able to borrow against the value of the property, and use the borrowed funds to pay wages as necessary. The evidence presented shows the amount of the first mortgage on the property, but does not, as was noted above, demonstrate that the property is otherwise unencumbered.⁶ The petitioner's owner may or may not have any equity in the property.

Further, even if the petitioner's owner had adequately demonstrated the amount of equity he and his spouse have in their home; an indication of available credit is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

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, 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 a given 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).

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the

⁵ That is; the petitioner's owner's bank account may contain all or some of the petitioner's net profit. To add the petitioner's net profit to the amount in the petitioner's owner's bank account, therefore, might be duplicative, in whole or in part.

⁶ The amount of any encumbrances would typically be determined by a professional title search. No such report was submitted. Further, the URAR provided explicitly states that the report was commissioned during the course of a refinance of the petitioner's owner's home. This office notes that the mortgage statement provided predates that appraisal. Whether a refinance subsequently transpired, and whether the petitioner then borrowed any additional amount, is unknown.

determination of the petitioner's ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$23,420.80 per year. The priority date is April 18, 2000.

During 2000 the petitioner's owner had adjusted gross income of \$139,905. The petitioner's owner claims to have annual expenses of \$32,988 annually.⁷ That leaves a balance of \$106,917 in disposable income. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner had adjusted gross income of \$107,980, which, less the petitioner's owner's annual living expenses of \$32,988 leaves a balance of \$74,992 in disposable income. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner had adjusted gross income of \$39,034, which, less the petitioner's owner's annual living expenses of \$32,988 leaves a balance of \$6,046 in disposable income. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner had adjusted gross income of \$41,034, which, less the petitioner's owner's annual living expenses of \$32,988 leaves a balance of \$8,046 in disposable income. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis.

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.

⁷ As the decision of denial implies, the accuracy of this estimate of the petitioner's monthly expenses is highly questionable. Because the petitioner's owner is unable to show the ability to pay the proffered wage even pursuant to this estimate of his expenses, however, this office need not reach that issue.