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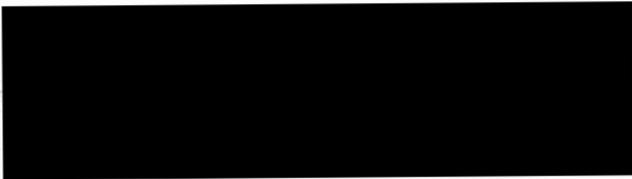


FILE: WAC 04 162 53053 Office: CALIFORNIA SERVICE CENTER Date: JUN 21 2006

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, 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director 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 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 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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 December 21, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner neglected to state the date it was established in the space provided for that purpose. The petitioner stated that it employs 21 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked as a cook for Super Antojitos, a restaurant in Tijuana, Mexico, from January 1986 to March 1989; as a construction worker and handyman for various employers from March 1989 to May 1989; and as a cook for the petitioner from May 1989 until at least December 9, 2001, when he signed that form. The Form ETA 750 indicates that the petitioner will employ the beneficiary in Mission Viejo, California.

On the Form ETA 750 at item 14, where the petitioner is required to list the documents it is providing to demonstrate that the beneficiary is qualified for the proffered position the petitioner entered, "On request." This office notes that, pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(B) the petitioner is required to present that evidence with the petition. No evidence pertinent to the beneficiary's qualifications was provided with the petition.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, counsel submitted (1) the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (2) the petitioner's California Form DE-6 Quarterly Wage Reports for the last quarter of 2003 and the first three quarters of 2004, and (3) the beneficiary's 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Return income tax returns.

The petitioner's owner's tax returns show that she was single and had no dependents during 2001 and 2002. Schedules C that accompany both returns show that the petitioner's owner held the petitioner as a sole proprietorship.

The 2001 Schedule C shows that during that year the petitioner suffered a loss of \$8,368. During that year the petitioner's owner declared adjusted gross income of \$97,760, including the petitioner's net loss.

The 2002 Schedule C shows that during that year the petitioner declared a net profit of \$16,968. During that year the petitioner's owner declared adjusted gross income of \$37,980, including the petitioner's net profit.

The wage reports submitted show that the petitioner employed between 22 and 26 workers, including the beneficiary, during each of those quarters. The petitioner paid the beneficiary \$4,322.50, \$4,317.50, \$3,990, and \$3,990 during the last quarter of 2003 and the first three quarters of 2004, respectively.

Although the beneficiary's tax returns are not directly relevant to the petitioner's ability to pay the proffered wage they were accompanied by 2001, 2002 and 2003 W-2 forms showing that the petitioner paid \$5,005, \$12,538.75, and \$16,528.75 to the beneficiary during those years, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite two years of qualifying employment experience, the California Service Center, on July 26, 2004, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and that the evidence demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The Service Center also specifically requested employment letters from the beneficiary's present and past employers and a statement of the petitioner's owner's monthly living expenses.

In response, counsel submitted (1) a letter, dated October 12, 2004 from the owner of Super Antojitos, the restaurant at which the beneficiary claimed, on the Form ETA 750, to have worked from January 1986 to March 1989, (2) the petitioner's owner's 2003 Form 1040 U.S. Individual Income Tax Return, and (3) monthly budget.

A Schedule C attached to the petitioner's owner's 2003 return shows that the petitioner declared net income of \$9,930 during that year. The tax return shows that the petitioner declared adjusted gross income of \$17,218 during that year.

The October 12, 2004 employment verification letter states that the beneficiary worked for Super Antojitos, in Tijuana, Mexico, from January 15, 1996 to March 17, 1998. That evidence conflicts with the beneficiary's assertion on the Form ETA 750 that he worked for that restaurant from January 1986 to March 1989.

The petitioner's owner's monthly budget shows that the petitioner's owner has recurring expenses of \$2,531 per month, or \$30,372 per year.

The director denied the petition on December 8, 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 and that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel submits (1) copies of monthly statements of the petitioner's bank account for May 2002, June 2002, August 21, 2002, September 2002, October 2002, March 2003, April 2002, December 2002, August 2003, July 2004, August 2004, and November 30, 2004; (2) a letter in Spanish dated December 25, 2004 from the owner of Super Antojitos restaurant in Tijuana; and (3) a statement from counsel.

The English translation of the December 25, 2004 letter shows that it is a revised employment verification letter. In it, the owner of Antojitos Restaurant states that he incorrectly stated the dates of the beneficiary's employment with him, and that he actually employed the beneficiary from January 15, 1986 to March 17, 1989.

In his statement counsel asserts that the bank statements submitted show that the petitioner "continually maintains a balance of more than \$10,000 cash in its bank account" which funds counsel asserts are available to pay the proffered wage.

Counsel further states,

In addition, as prove [sic] *a priori* [sic] that the petition [sic] has the ability to pay this wage and support himself [sic] and his [sic] dependents, the director should consider that for the past *fifteen years* [Emphasis in the original.] the petitioner has paid the beneficiary his salary and has managed to keep the business running and support his [sic] dependents.

Finally, counsel urges, citing the December 25, 2004 letter from the owner of Antojitos that the information in the previous employment verification letter was inaccurate, and that the beneficiary worked for that restaurant from January 15, 1986 to March 17, 1989.¹

Initially, this office notes that it finds convincing the assertion that the beneficiary's employment history was misstated on the original employment verification letter. The petitioner has sufficiently demonstrated that the beneficiary worked for Antojitos Restaurant from January 15, 1986 to March 17, 1989. The petitioner has demonstrated, therefore, that the beneficiary has the requisite two years of experience in the job offered and is qualified for the proffered position.

The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

This office notes that, as the bank statements are not all for consecutive months, they cannot be accurately said to demonstrate that the petitioner "continually maintains a balance of more than \$10,000" as counsel asserts, or that it maintained such a balance during any period. In fact, the December 2002, and August 2003 show beginning balances of below \$10,000, and the August, September and October 2002 statements show both beginning and ending balances of less than \$10,000. The statements therefore demonstrate conclusively that, contrary to counsel's assertion, the petitioner did not continuously maintain a balance of more than \$10,000 during the salient period.

In any event, 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

¹ Counsel headed that portion of his statement "Requirements for Schedule A Designation" [Emphasis in the original.], although schedule A designation is unrelated to any issue in this case.

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.² Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel asserts, but provides no evidence to demonstrate, that the petitioner has employed the beneficiary and paid his wages for the past 15 years. The assertions of counsel 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); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Further, this office is concerned with the petitioner demonstrating its continuing ability to pay the proffered wage beginning on the priority date. The petitioner's ability to pay the proffered wage before the priority date is not directly relevant to any issue in this case. This office will consider amounts the petitioner paid to the beneficiary for performing the duties of the proffered position since the priority date in determining the petitioner's ability to pay the proffered wage. If, during a given period, 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 during that period. In the instant case, the petitioner established that it paid the beneficiary \$5,005 during 2001, \$12,538.75 during 2002, and \$16,528.75 during 2003.

The petitioner is a sole proprietorship. A sole proprietorship, unlike a corporation, is not legally separate from its owner. Therefore the sole proprietor's income and assets are included in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents on the amount remaining. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982, *aff'd* 703 F2d 571 (7th Cir. 1983).

The proffered wage is \$20,800 per year. The priority date is December 21, 2001

Because only ten days of 2001 remained on the priority date this office would not have required the petitioner to demonstrate its ability to pay the proffered wage during that year. This office notes, however, that the petitioner paid the beneficiary \$5,005 during that year, an amount \$15,795 less than the annual amount of the proffered wage. That difference, added to the petitioner's owner's annual expenses of \$30,372 equals \$46,167, which is the amount the petitioner would be obliged to show the ability to pay. During that year the petitioner's owner had adjusted gross income of \$97,760, an amount easily sufficient to pay the proffered

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

wage and the petitioner's owner's living expenses. The petitioner was able to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$12,538.75 during 2002 and must demonstrate the ability to pay the \$8,621.25 balance of the proffered wage. The petitioner's owner's personal expenses, however, total \$30,372. The petitioner must show that the petitioner's owner was able to pay \$38,633.25, the total of the petitioner's owner's living expenses and the unpaid balance of the proffered wage, during that year. During that year the petitioner's owner declared adjusted gross income of \$37,980. That amount is insufficient to meet the petitioner's owner's personal expenses and pay the balance of the proffered wage. The petitioner has provided no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$16,528.75 during 2003 and must demonstrate the ability to pay the \$4,271.25 balance of the proffered wage. The petitioner's owner's personal expenses, however, total \$30,372. The petitioner must show that the petitioner's owner was able to pay \$34,643.25, the total of the petitioner's owner's living expenses and the unpaid balance of the proffered wage, during that year. During that year the petitioner's owner declared adjusted gross income of \$17,218. That amount is insufficient to meet the petitioner's owner's personal expenses and pay the balance of the proffered wage. The petitioner has provided no reliable evidence of any other funds available to the petitioner during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

The petition in this matter was submitted on May 17, 2004. On that date the petitioner's 2004 tax return was unavailable. The request for evidence in this matter was issued on July 26, 2004. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is excused, therefore, from demonstrating its ability to pay the proffered wage during 2004.

The evidence submitted does not establish that the petitioner was able to pay the proffered wage during 2002 or 2003. Therefore, the evidence does not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petition may not be approved.

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.