



U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: JUL 25 2007

EAC 04 185 53753

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 preference visa petition was denied by the acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a private household.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a live-in cook. As required by statute, the petition is 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 31, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage and cover his household expenses as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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. See 8 C.F.R. § 204.5(d). 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).

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<sup>1</sup> On the Form ETA 750, the petitioner is identified as [REDACTED] while the I-140 identifies both spouses of a private household as the petitioner. In these proceedings, the AAO will consider the petitioner as a private household.

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$450 per week, or \$23,400 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. On appeal counsel submits a letter from Ameriprise Financial Services, Inc. dated November 23, 2005 written by [REDACTED] Mutual Fund and Certificate Service and Transactions, Ameriprise Financial Services, Inc. that lists the petitioner's assets in six mutual funds as of December 31, 2001. Counsel also submits a statement from Fidelity Investments dated November 2, 2005 that lists accounts held by [REDACTED] with dates in which the accounts were opened beginning in October 6, 1993 and ending with a new account opened on September 26, 2005. Counsel also submits a statement from SmithBarney Citigroup for October 2005 that lists the two spouses' cash, money fund, and bank deposits indicating an ending total value of \$57,305.48. Counsel also submits copies of the petitioner's Forms 2555, Foreign Earned Income, for the priority year 2001, 2002, and 2004,<sup>3</sup> along with an IRS information sheet on Form 2555 for tax year 2005.

In a subsequent submission to the record dated February 16, 2006, counsel reviews the Ameriprise and Fidelity documents noting that the petitioner's total assets for Ameriprise Financial Services, Inc., as of December 31, 2001 were \$127,806.00. Counsel also notes that the Fidelity Account and the Ameriprise account have a combined value of \$402,587.92 which is in excess of the proffered salary of \$23,400. Counsel then adds that even if the petitioner's assets were limited to those financial accounts acquired prior to 2002, the petitioner would still have \$392,864.29 in funds available to pay the proffered wage. In a final submission to the record, counsel on June 21, 2007, submits the petitioner's tax return for 2005 that indicates an adjusted gross income of \$101,351. The Schedule C of the 2005 tax return indicates gross receipts or sales of \$188,000, no funds expended in wages, and a net profit of \$133,516.

With regard to the [REDACTED] statement submitted to the record, counsel notes that it lists assets valued at \$57,305.48 for both spouses, and that the Forms 2555 submitted on appeal for tax year 2001, 2002, 2003, and 2004 explain the large exclusions they claimed from their taxable incomes, in accordance with the U.S. tax code, due to the petitioner's significant time spent abroad as expatriates. Counsel states that based on the IRS website regarding Form 2555, U.S. citizens living abroad may exclude up to \$80,000 from their foreign-earned income. Counsel states that the petitioner took advantage of this legal provision and was able to lawfully exclude from the petitioner's taxable income amounts ranging from \$39,680 to \$78,000. Counsel states that the large amounts appearing on line 21 of the petitioner's tax forms did not actually disappear but like paper losses or IRA deductions from employed taxpayers are deductible from their taxable income as a "break" on their tax liabilities. Counsel asserts that the money remains with the petitioner to spend as they wish and could have been actually used to pay the beneficiary's wages. Other evidence in the record includes statements from the petitioner's jointly owned Fidelity Investment account for the months July of 2003, January, July and December of 2004, and January and April of 2005; the petitioner's Forms 1040 for years

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> Although counsel states that he submits the petitioner's Form 2555 for tax year 2003, this form is not found in the materials submitted on appeal.

2001, 2002, and 2003; and the petitioner's itemized lists of monthly expenses for the years 2000 to 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a private household, similar in structure to a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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, CIS will next examine the net 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).

A private household is analytically similar to a sole proprietorship, which is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the petitioner's sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors 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 (7<sup>th</sup> Cir. 1983). Thus, the AAO will consider the personal assets of the petitioner in this case.

In the instant case, the petitioner is a family of three. In 2001, the petitioner's adjusted gross income was \$35,447, with annual household expenses of \$48,432. In 2002, the petitioner's adjusted gross income was \$1,979, with annual household expenses of \$48,432. In tax year 2003, the petitioner's adjusted gross income

was \$109,469, with the household expenses of \$70,668. Although the petitioner submitted an itemized list of its household monthly expenses for 2004 that totaled \$110,268.84, the record does not contain the petitioner's 2004 Form 1040. Therefore the AAO cannot determine the petitioner's 2004 adjusted gross income or excluded income.<sup>4</sup> As previously stated, in tax year 2005, the petitioner had adjusted gross income of \$101,351, and based on the petitioner's yearly expenses in tax year 2004, yearly expenses of \$110,268.84.

While the record indicates that the petitioner had sufficient adjusted gross income in tax year 2003 to pay both household expenses and the proffered wage of \$23,400, the petitioner has not established that it has sufficient adjusted gross income to pay both its household expenses and the proffered wage in either 2001, 2002, 2004, or 2005. In none of these years was the petitioner's adjusted gross income sufficient to pay the proffered wage of \$23,800 and the petitioner's household expenses. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the April 2001 priority date, based on its net income.

On appeal, counsel states that the petitioner's investment accounts and excluded income can be considered in establishing the petitioner's ability to pay the proffered wage in tax years 2001 and 2002. Counsel submits on appeal a letter from ██████████ Ameriprise Financial Services, Inc.; however, counsel does not provide the December 2001 statement from Ameriprise to more fully substantiate the petitioner's brokerage assets in 2001. Thus, ██████████'s letter is given only limited evidentiary weight in these proceedings. Further, the Fidelity customer service specialty department statement dated November 2, 2005 does not indicate any specific information as to the actual assets held by the petitioner as of December 2001 or December 2002, but rather it indicates the assets of ██████████ as of November 2, 2005. The AAO notes that the petitioner has not submitted any correspondence to the effect that ██████████ is willing to use her financial assets to pay the proffered wage, which diminishes the weight to be given to the use of the assets to pay the proffered wage.

The Smith Barney/Citigroup document submitted by counsel on appeal that examines joint brokerage assets held by both spouses as of October 31, 2005 does not establish the additional financial assets of the petitioner as of December 31, 2001 or December 31, 2002. Thus, while the record reflects substantial additional financial assets in brokerage accounts as of 2005, these documents do not identify the petitioner's brokerage assets as of the relevant periods of time in question, namely, 2001 and 2002. Of much more probative weight would be copies of the petitioner's brokerage accounts for December 2002 and 2003 to further establish that the monthly balances were sufficient to cover the entire proffered wage. Thus the correspondence and brokerage documentation submitted on appeal is not sufficient to establish the petitioner's ability to pay both household expenses and the proffered wage as of the 2001 priority year and continuing through 2002.

With regard to the use of the petitioner's excluded income for tax years 2001, 2002, 2003, and 2004 to establish the petitioner's ability to both pay the proffered wage and pay its household expenses, the AAO concurs with counsel that the petitioner's excluded income as documented in the petitioner's tax returns for the priority year 2001 and 2002 can be viewed as additional funds available to pay the proffered wage. The petitioner's 2001 tax return indicates the petitioner excluded \$78,000 from his income based on his foreign earned income. The petitioner previously indicated his monthly expenses in 2001 and 2002 were \$48,432 per year. In 2001, the petitioner's adjusted gross income of \$35,447 and his excluded income of \$78,000 are sufficient to both cover his expenses of \$48,432 and pay the proffered wage of \$24,300. Likewise, in tax year 2002, the petitioner's adjusted gross income of \$1,979 and his excluded income of \$69,927 total \$71,906. This sum is sufficient to cover both the petitioner's annual household expenses of \$48,432 and the proffered

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<sup>4</sup> The AAO will discuss the petitioner's excluded income more fully further in these proceedings.

wage of \$23,400, namely, \$71,832. Thus the petitioner has established its ability to pay the proffered wage as of the 2001 priority year and through tax year 2003.

With regard to tax year 2004, as previously stated, the petitioner did not submit its 2004 tax return to the record, although the record closed on June 3, 2005 with the receipt of the petitioner's materials sent in response to the director's request for further evidence dated March 9, 2005. Although the petitioner's 2004 tax return may have been available by June 2005, the petitioner did not submit it or an explanation for why the return was not submitted. Nevertheless, the AAO notes the petitioner's Fidelity Investments balance statements for January, July and December 2004 submitted to the record with the initial petition indicate the petitioner had sufficient additional financial resources in 2004 to both pay annual household expenses and the proffered wage of \$23,400.<sup>5</sup> Thus, the petitioner has established its ability to pay the proffered wage as of the 2001 priority date and through tax year 2004.

With regard to tax year 2005, as previously stated, the petitioner had an adjusted gross income of \$101,351. While the petitioner's adjusted gross income in tax year 2005 is not sufficient to both pay the petitioner's presumed yearly expenses of \$110,269.84 and the proffered wage of \$23,400, the record reflects significant amounts of additional funds available in the petitioner's Fidelity Brokerage account as of April 30, 2005 and the petitioner's [REDACTED] brokerage fund as of October 31, 2005 to pay this deficit as well as the proffered wage. As stated previously, in April 2005, the petitioner had joint assets of \$186,169.12 in the Fidelity brokerage account, while in October 2005, the petitioner had joint assets of \$57,305.48 in the Smith Barney account. Furthermore considering the totality of the petitioner's circumstances, the petitioner appears to have sufficient financial resources to pay the proffered wage for the period of time in question. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Thus, the petitioner has established its ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

**ORDER:** The appeal is sustained.

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<sup>5</sup> The ending balances in the Fidelity brokerage account for January, July and December 2004 were \$192,076.35, \$166,998.98, and \$198,588.54, respectively.