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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



Bio

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**MAY 22 2007**

WAC 05 106 54557

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. Wiemans, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accountancy firm. It seeks to employ the beneficiary permanently in the United States as a tax accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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. The director also found that the job offer in the instant case was not *bona fide*, but merely a vehicle for the beneficiary, who does not intend to work for the petitioner, to obtain an immigration benefit. Accordingly, the director revoked approval of the petition.

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

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 205 of the Immigration and Nationality Act (the Act) 8 U.S.C. 1155 provides, in pertinent part,

The attorney general may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750

was accepted for processing on September 19, 1997. The proffered wage as stated on the Form ETA 750 is \$550 per week, which equals \$28,600 per year.

The instant petitioner submitted a previous Form I-140 on June 17, 2002 for the instant beneficiary, based on the same approved Form ETA 750. That visa petition was denied. Today's decision, however, pertains to the denial of the instant Form I-140 petition, which was submitted on February 28, 2005. On the petition, the petitioner stated that it was established during 1994 and that it employs two workers. The petition states that the petitioner's gross annual income is \$245,164 and that its net annual income is \$62,901.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on September 5, 1997, the beneficiary did not claim to have worked for the petitioner.

The Form I-140 petition, signed on February 24, 2005, states that the petitioner would employ the beneficiary in Bakersfield, California. The Form ETA 750, signed on September 12, 1997, originally stated that the petitioner would employ the beneficiary in Bakersfield, California. That petition was amended, on September 5, 2001, to reflect that the petitioner would employ the beneficiary in Taft, California. That apparent discrepancy is not explained in the record.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's owner's 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, (2) a statement of the petitioner's owner's recurring monthly expenses (budget), and (3) a December 2, 2005 letter from the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On the Form ETA 750B, signed by the beneficiary on September 5, 1997, the beneficiary stated that she worked for the Kern County Human Resources Department as an Account Clerk II beginning in February 1994, and became an account clerk for the Kern County Resource Management Agency in April 1996, in which position she continued until the date she signed that form.

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<sup>1</sup> The evidence subsequently submitted does not support the proposition that the petitioner had net income of \$62,901 during any of the salient years. Further, on the previous Form I-140 the petitioner stated that its gross annual income was \$250,000 and its net annual income was \$75,000. That petition was submitted during 2002. The Schedules C submitted show that during 2001 the petitioner had gross receipts of \$114,295 and net income of \$21,606. During 2002 it had gross income of \$125,615 and net income of \$24,421. The provenance of the petitioner's figures is unclear.

<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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record also contains (1) a letter dated March 19, 1997 from an Account Clerk III at the Kern County Resource Management Agency, (2) a letter dated June 25, 2003 from the director of the Kern County Department of Child Support Services, (3) a letter dated July 17, 2003 from the beneficiary, (4) letters dated July 21, 2003, September 8, 2003, and August 6, 2004 from counsel, and (5) Form W-2 Wage and Tax Statements.

The petitioner's owner filed jointly with his wife during each of the salient years. During 1998, 1999, 2000, 2001, and 2002 he and his wife had three dependents. During 2003 and 2004 they had one dependent. Schedules C attached to the petitioner's owner's tax returns show that he holds the petitioner as a sole proprietorship.

During 1998 the petitioner returned a net profit of \$15,588. The petitioner's owner and owner's spouse declared adjusted gross income \$17,880, including the petitioner's profit. The corresponding Schedule C shows, at Part V, that the petitioner paid \$28,500 during that year for "Contract Services."

During 1999 the petitioner returned a net profit of \$23,553. The petitioner's owner and owner's spouse declared adjusted gross income of \$26,211, including the petitioner's profit. The corresponding Schedule C shows, at Part V, that the petitioner paid \$32,457 during that year for "Business Oper Costs/Contract Services."

During 2000 the petitioner returned a net profit of \$21,250. The petitioner's owner and owner's spouse declared adjusted gross income of \$19,749, including the petitioner's profit offset by deductions. The corresponding Schedule C shows, at Part V, that the petitioner paid \$26,550 during that year for "Contract Services."

During 2001 the petitioner returned a net profit of \$21,606. The petitioner's owner and owner's spouse declared adjusted gross income of \$20,079, including the petitioner's profit offset by deductions. The corresponding Schedule C shows, at Part V, that the petitioner paid \$28,525 during that year for "Contract Services."

During 2002 the petitioner returned a net profit of \$25,421. The petitioner's owner and owner's spouse declared adjusted gross income of \$23,625, including the petitioner's profit offset by deductions. The corresponding Schedule C shows, at Part V, that the petitioner paid \$31,500 during that year for "Contract Services."

During 2003 the petitioner returned a net profit of \$45,449. The petitioner's owner and owner's spouse declared adjusted gross income of \$42,238, including the petitioner's profit offset by deductions. The corresponding Schedule C shows, at Part V, that the petitioner paid \$33,500 during that year for "Contract Services."

During 2004 the petitioner returned a net profit of \$62,901. The petitioner's owner and owner's spouse declared adjusted gross income of \$58,457, including the petitioner's profit offset by deductions. The corresponding Schedule C shows, at Part V, that the petitioner paid \$54,164 during that year for "Contract Services."

The petitioner's owner's budget indicates recurring monthly expenses of \$1,104 per month for insurance, phone, utilities, cable, food, and miscellaneous. The budget contains no allowance for rent, mortgage payments, or any other expense related to housing. The budget also contains no allowance pertinent to automobile or other transportation expenses.

The petitioner's owner's December 2, 2005 letter states that the amounts shown on his Schedules C as "contract services" were paid to contractors for working as accounting assistants. The petitioner's owner also makes assertions pertinent to the *bona fides* of the job offer in this case. Those assertions are addressed below.

The March 19, 1997 letter from the Kern County Resource Management Department confirms the beneficiary's employment for Kern County since February 21, 1994.

The June 25, 2003 letter from the Kern County Department of Child Support Services notes that the beneficiary then held the position of Fiscal Support Supervisor with that department, and that the department was then offering her full-time employment at \$20.21 per hour.

The beneficiary's July 17, 2003 letter states that she would prefer to remain in her present position as a Fiscal Support Supervisor with her present employer, the Kern County Department of Child Support Services. The beneficiary asked that she be permitted to change employers pursuant to the portability clause of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21)

Counsel's July 21, 2003 and September 8, 2003 letters confirm that the beneficiary intends to remain in her present position and asks that the instant petition be processed pursuant to the portability clause of AC21.

Counsel's August 6, 2004 letter confirms that he and the beneficiary asked, on July 17, 2003 and September 8, 2003, that the petitioner be permitted to change employers pursuant to AC21.

The petitioner's December 2, 2005 letter states that the petitioner has always intended to employ the beneficiary and does not intend to withdraw the offer of employment. He also stated that the beneficiary has told him the reasons she would prefer to continue to work for her present employer, and although he would still like to employ her he understands her preference.

The W-2 forms provided show that the petitioner paid the beneficiary gross pay of \$44,067.63 during 2003 and gross pay of \$41,635.75 during 2004. This office notes that those amounts are considerably in excess of the \$28,600 per year wage proffered in this case.

On June 9, 2005 the instant visa petition was approved. After issuing a notice of intent to revoke the director ultimately revoked approval of the petition on January 12, 2006.

On appeal, counsel asserted that the evidence submitted, especially pertinent to the petitioner's contract services expense, demonstrates that the beneficiary intends to work for the petitioner and the petitioner is able to pay the proffered wage.

The beneficiary has worked for Kern County since 1994. The petitioner first filed for the beneficiary on June 17, 2002. On July 17, 2003 the beneficiary stated that she preferred to continue to work for Kern County, rather than to go to work for the petitioner. Counsel's letters of July 21, 2003 and September 8, 2003 confirm that the beneficiary intends to remain in her present position, at a salary considerably in excess of the wage proffered in this case. The first petition was denied on August 6, 2004. On February 28, 2005 the petitioner filed the instant petition, indicating that he intends to employ the beneficiary.

Whether the petitioner ever actually expected or intended to employ the beneficiary is unclear. Whether the beneficiary ever intended to work for the petitioner is unclear. What is clear is that the beneficiary had decided, by July 17, 2003, to continue to work for Kern County, her present employer, and that when the instant petition was filed on February 28, 2005 the beneficiary had no intention of working for the petitioner pursuant to the terms of the approved labor certification. Approval of the petition was therefore correctly revoked for good and sufficient cause, and the petitioner has not overcome that basis for revocation on appeal.

The remaining issue is whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner, however, is a sole proprietorship. 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 income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the

petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$28,600 per year. The priority date is September 19, 1997. The budget submitted indicates that the petitioner's owner has recurring monthly expenses of \$1,104 per month, which equals \$13,248 annually. That the budget made no allowance for housing or transportation expense, and that no explanation for that omission was offered, renders that budget less convincing.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). This office does not accept the petitioner's owner's budget figures as reliable, and therefore declines to rely on them.

Each of the petitioner's Schedules C includes an expense labeled "Contract Services."<sup>3</sup> The petitioner's owner asserts that this amount was paid to accounting assistants and that hiring the beneficiary would have obviated some unstated portion of those amounts.

In order to show that the petitioner's contract services expenses were a fund available to pay the proffered wage the petitioner must show that they were paid for the performance of the duties of the proffered position and that, if the petitioner had been able to employ the beneficiary, it could have paid those amounts to the beneficiary rather than to the contract workers. To whom<sup>4</sup> and for what those payments were made has not been established, and they will not be included in the calculation of the funds at the petitioner's disposal during the salient years with which it could have paid the proffered wage.

The petitioner submitted no evidence of its ability to pay the proffered wage during 1997. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 1997.

During 1998 the petitioner's owner and owner's spouse declared adjusted gross income of \$17,880. Even without subtracting any amount that the petitioner's owner would have required to support his family, that amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

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<sup>3</sup> During 1999 that line item was labeled "Business Oper Costs/Contract Services," implying that it may have included expenses other than payments to contract workers.

<sup>4</sup> If any portion of those contract service payments were made to the petitioner's owner's spouse, for instance, then diverting them to the beneficiary would have decreased the petitioner's owner's adjusted gross income. In that event, considering them to be an additional amount available to pay the proffered wage would be inappropriate.

During 1999 the petitioner's owner and owner's spouse declared adjusted gross income of \$26,211. Even without subtracting any amount that the petitioner's owner would have required to support his family, that amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner and owner's spouse declared adjusted gross income of \$19,749. Even without subtracting any amount that the petitioner's owner would have required to support his family, that amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner and owner's spouse declared adjusted gross income of \$20,079. Even without subtracting any amount that the petitioner's owner would have required to support his family, that amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$20,079. Even without subtracting any amount that the petitioner's owner would have required to support his family, that amount is insufficient to pay the proffered wage. The petitioner 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 demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner and owner's spouse declared adjusted gross income of \$42,238. If the petitioner's owner had been obliged to pay the proffered wage out of that amount he would have been left with \$13,638 with which to support his household of three during that year. This office finds the proposition that the petitioner's owner could have supported his household for a year with \$13,638 as unreasonable. The petitioner 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 demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner and owner's spouse declared adjusted gross income of \$58,457. If the petitioner's owner had been obliged to pay the proffered wage out of that amount he would have been left with \$29,857 with which to support his household of three during that year. This office finds that the petitioner's owner may have been able to support his household of three for a year on \$29,857. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on February 28, 2005. On that date the petitioner's 2005 tax return was unavailable. On November 3, 2005 the service center issued a notice of intent to revoke approval of the instant petition. One basis of the notice was the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. On that date, however, the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years at this point in the proceedings.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, 2001, 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. Approval of the petition was revoked on this additional basis for good and sufficient cause, and that basis also has not been overcome on appeal.

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.