

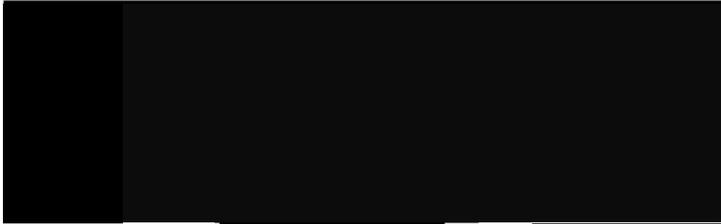


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6



FILE:

SRC-06-138-52529

Office: TEXAS SERVICE CENTER

Date: JAN 31 2008

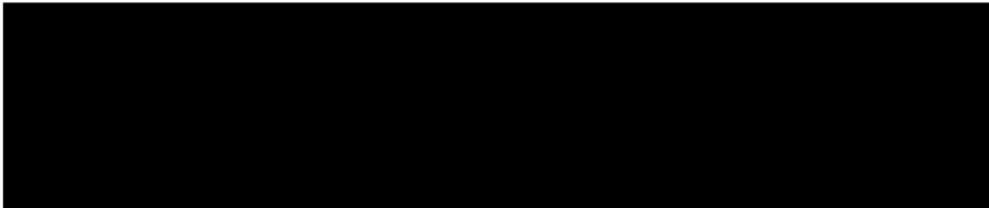
IN RE:

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 Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. Because the petition is not clearly approvable, the appeal will be remanded to the director.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican food cook (Mexican 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 (DOL). 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, 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 August 5, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.42 per hour (\$21,673.60 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief, Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] and [REDACTED] for 2001 and copies of documents submitted previously. Other relevant evidence in the record includes Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] and [REDACTED] for 2002 through 2005, Form 941 Employer's Quarterly Federal Tax Return filed by [REDACTED] for the first three quarters of 2005 and the first two quarters of 2006, the petitioner's profit & loss sheets for periods from January 1, 2005 to November 20, 2005 and from January 1, 2006 to June 30, 2006, the beneficiary's W-2 forms for 2000 through 2005, and the beneficiary's individual tax returns for 1999 through 2005. 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 sole proprietorship. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$218,759, to have a net annual income of \$30,713, and to currently employ four workers.

On appeal, counsel asserts that the director denied the petition because of the petitioner's failure to demonstrate the ability to pay the proffered wage for 2001 despite being able to pay the wage for 2002 through 2005, and that the submitted 2001 tax return of [REDACTED] demonstrates the petitioner's ability to pay the proffered wage for 2001.

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 submitted the beneficiary's W-2 forms for 2000 through 2005. Since the priority date in the instant case is April 30, 2001, the beneficiary's W-2 form for 2000 is irrelevant. The beneficiary's W-2 forms issued by the petitioner in 2001 through 2005 show that the petitioner paid the beneficiary \$10,192 in 2001, \$13,624 in 2002, \$13,860 in 2003, \$13,424 in 2004 and \$13,572 in 2005. The petitioner failed to

¹ 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).

establish that it had the ability to pay the proffered wage in the relevant years through the examination of wages actually paid to the beneficiary although it demonstrated that it paid partial wages. The petitioner is obligated to demonstrate that it could pay the beneficiary the difference of \$11,481.60 in 2001, \$8,049.60 in 2002, \$7,813.60 in 2003, \$8,249.60 in 2004 and \$8,101.60 in 2005 between wages actually paid to the beneficiary and the proffered wage.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2005. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2001, the Form 1040 stated adjusted gross income of \$33,378.
In 2002, the Form 1040 stated adjusted gross income of \$39,657.
In 2003, the Form 1040 stated adjusted gross income of \$44,464.
In 2004, the Form 1040 stated adjusted gross income of \$43,650.
In 2005, the Form 1040 stated adjusted gross income of \$44,835.

The record does not contain any statement of the sole proprietor's household monthly expenses. The petitioner submitted incomplete copies of the sole proprietor's tax returns for 2001 through 2005 without any information about the sole proprietor's living expenses.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the difference of \$11,481.60 between wages actually paid to the beneficiary and the proffered wage. However, without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor could sustain his family of five in 2001 with the balance of \$21,896.40.

In 2002 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the difference of \$8,049.60 between wages actually paid to the beneficiary and the proffered wage. However,

² The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005.

without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor could sustain his family of five in 2002 with the balance of \$31,607.40.

In 2003 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the difference of \$7,813.60 between wages actually paid to the beneficiary and the proffered wage. However, without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor could sustain his family of five in 2003 with the balance of \$36,650.40.

In 2004 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the difference of \$8,249.60 between wages actually paid to the beneficiary and the proffered wage. However, without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor could sustain his family of four in 2004 with the balance of \$35,400.40.

In 2005 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the difference of \$8,101.60 between wages actually paid to the beneficiary and the proffered wage. However, without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor could sustain his family of four in 2005 with the balance of \$36,733.40.

In conclusion, the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage in 2001 through 2005, however, without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor established his ability to pay the proffered wage as well as to sustain his family's living expenses during these relevant years.

The record contains the petitioner's profit & loss sheets for periods from January 1, 2005 to November 20, 2005 and from January 1, 2006 to June 30, 2006. However, they are not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

CIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the sole proprietor's living expenses at the ends of years 2001 through 2005.

Therefore, the portion of the director's decision that the petitioner established its ability to pay in 2002 through 2005 is herewith withdrawn. However, counsel's assertions on appeal and evidence in the record do not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional issues pertinent to ineligibility. The regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

Initial evidence – (i) Labor Certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from DOL, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program.

The record of proceeding for the instant I-140 petition does not contain the original approved labor certification from DOL, but only a copy of the first page of DOL Form ETA 750, Parts A. Counsel did not explain why the original approved labor certification was submitted. Nor did the petitioner petition the director to request a duplicate labor certification from DOL under the regulation at 20 C.F.R. § 656.30.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In the instant case, the Form ETA 750A requires two years of experience in the job offered. The record of proceeding does not contain the Form 750B, nor is there any experience letter from the beneficiary's former or current employer pertinent to the beneficiary's requisite experience.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent, such as a statement of monthly living expenses for the sole proprietor's household in the relevant years, evidence of the sole proprietor's extra liquefiable personal assets and liabilities, a complete copy of the original approved labor certification, and experience letter from the beneficiary's former or current employer. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which is to be certified to the AAO.