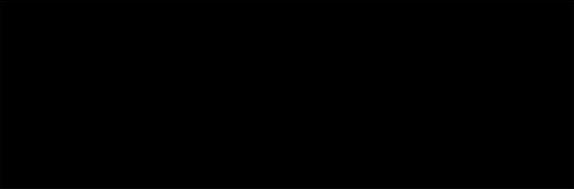




U.S. Citizenship
and Immigration
Services

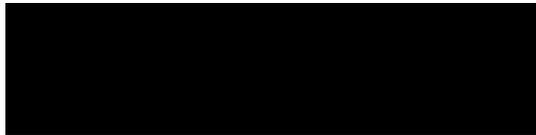
B-4



FILE: WAC-03-004-54262 Office: CALIFORNIA SERVICE CENTER Date:

AUG 03 2004

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, Director
Administrative Appeals Office

PUBLIC COPY

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

The petitioner is an investment firm. It seeks to employ the beneficiary permanently in the United States as a financial and credit analyst. 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 additional evidence.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 1, 2001. The proffered wage as stated on the Form ETA 750 is \$47,500 per year.

The petitioner is structured as a sole proprietor. With the petition, the petitioner submitted Schedule C of its sole proprietor's Form 1040, U.S. individual income tax return for the year 2000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 29, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence of the petitioner's quarterly wage reports and W-2 forms.

In response, the petitioner submitted its sole proprietor's Form 1040 U.S. individual income tax returns for the years 2001 and 2000.¹ The tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2000</u> |
|--|-------------|-------------|
| Proprietor's adjusted gross income (Form 1040) | \$159,145 | \$98,984 |
| Petitioner's gross receipts or sales (Schedule C) | \$337,812 | \$282,581 |
| Petitioner's wages paid (Schedule C) | \$48,794 | \$34,255 |
| Petitioner's net profit from business (Schedule C) | \$165,200 | \$133,013 |

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the quarters ending December 31, 2002, September 30, 2002, June 30, 2002, and March 31, 2002; IRS computer-generated Forms W-2, Wage and Tax Statements, that the petitioner issued to the beneficiary in 2000² and 2001; and a Form W-2 for 2002. The quarterly wage reports and Forms W-2, Wage and Tax Statements, reflect wages of only \$29,230 paid in 2001, \$18,270 less than the proffered wage. The quarterly wage reports and Forms W-2, Wage and Tax Statements, reflect wages of only \$27,403 paid in 2002, \$20,097 less than the proffered wage.

The petitioner also submitted a letter in response to the director's request for evidence, in which it stated, in pertinent part, the following:

[The petitioner] is a full service investment firm offering securities through Boston based [REDACTED] which company has been a fixture on "Wall Street" for over 50 years and the clearing firm National Financial Services LLC, a Fidelity Investments Company (NFS) a subsidiary of FMR Corp., the parent company of Fidelity Investments. Due to these associations all of our accounts are fully insured up to \$100,000,000.

...

In our strongest year, we have had as many as 5 full time employees and twelve Licensed Independent Brokers. In spite of the down markets for the past 30 months, we still have five Licensed Brokers, one compensated employee and several interns to facilitate the running of a profitable and productive business.

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 May 21, 2003, denied the petition. The director specifically voiced skepticism concerning the full-time nature of the proffered position based on the petitioner's final paragraph in its letter in which it referenced "down markets for the past 30 months."

¹ Because the 2000 tax return precedes the priority date, it is not relevant for establishing the petitioner's ability to pay.

² Please see footnote 1.

On appeal, counsel makes no assertions, but re-submits the sole proprietor's individual income tax returns. The petitioner also submits a letter addressing the director's concerns about whether or not the position is a full-time position; the petitioner's offer letter to the beneficiary; copies of the beneficiary's visa to evidence travel departures from the U.S.; and an unaudited profit and loss statement for 2002. The petitioner's letter on appeal states, in pertinent part, the following:

[The beneficiary] is in fact and without equivocation a full time and permanent employee under contract dated February 1, 2000 as a Financial/Credit Analyst. . . .

[The beneficiary's] earnings for the first three years of her contract were \$37,019 for year 2000 (\$30,000 base approved by H-1 petition plus bonus), \$29,230 for year 2001 due to unpaid days off and \$27,403 for year 2002 due to one month leave of absence re: family illness (see visa stamps). Her base salary per contract is to be increased to \$47,500 upon achieving Permanent Immigrant Worker status.

While it could be argued our business is venerable³, show me a business that is not. We believe it is significant that in spite of recent down markets that affected [the petitioner] along with most businesses in the US, the World for that matter that our business remained profitable in fact flourished, resulting in increased Net Profits. Yes, we exercised the same good business management strategy that scores of entities did and that was to downsize. It proved to be a wise decision as evidenced by the increase in net profits. Another positive shift was to move certain group members from an Employee status (W-2) to Independent Subcontractor status (1099).

To clarify the above referenced increase in net profits, please note: \$109,989 for year 2000, \$165,200 for year 2001, \$169,760 for year 2002. Looking forward, we have recently been awarded some significant new contracts and had an existing Consulting Agreement renewed. Additionally, the markets are rebounding plus we will benefit from the return of a key Producer/Principal who was out on an extended leave for health reasons.

(Emphasis added in original).

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

³ The director used the word "venerable" in his decision incorrectly. "Venerable" means esteemed or reputable. Presumably the director intended to use the word "vulnerable" in the context of the petitioner's vulnerability to market trends. The petitioner is apparently using the word "venerable" in the same mistaken manner that the director did.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. The petitioner established that it actually paid the beneficiary \$18,270 less than the proffered wage in 2001 and \$20,097 less than the proffered wage in 2002. Thus, the petitioner must establish that it can pay the remaining wages owed, or \$18,270 in 2001 and \$20,097 in 2002 in order to prove its ability to pay the proffered wage.

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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she 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 648, 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of \$159,145 more than covers the remaining proffered wage of \$18,270. Even though the director erred by failing to obtain the petitioner's monthly living expenses, it is likely that the sole proprietor could support himself and his family on \$140,875 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the remaining proffered wage.

The petitioner's tax return for 2002 was unavailable at the time it filed its appeal, as evidenced by a copy of its tax extension. Nonetheless, the petitioner's 2000 tax return shows figures similar to its 2001 tax return showing consistently substantial net income, and its letter on appeal references accurate figures pertaining to past net profits, and thus, there is no derogatory information to doubt the petitioner's assertions in its letter concerning the viability of the petitioner's current financial situation.

The director's concerns about the full-time and permanent nature of the position are unfounded in this instant petition. There is no evidence that the beneficiary is going to be contracted out to another employer or has an arrangement that is less than full-time and permanent with the petitioner. The petitioner's visa petition and supporting documentation illustrate its intention to provide a full-time, permanent position to the beneficiary. The petitioner has issued W-2 forms to the beneficiary. Even if the beneficiary was currently in an independent contractor status with the petitioner, it is irrelevant. The petitioner is only required to actually employ the beneficiary, on a permanent and full-time basis, when the beneficiary has acquired lawful permanent residence based on the petitioner's sponsorship.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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. The petition is approved.