



U.S. Citizenship
and Immigration
Services

B6



JUL 9 2004

FILE: WAC-02-168-55168 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

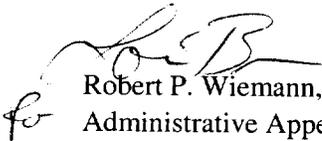
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

Administrative Appeals Office
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

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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 dismissed.

The petitioner trims trees and clears lines. It seeks to employ the beneficiary permanently in the United States as an industrial truck mechanic. 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 a brief.

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 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 July 14, 1997. The proffered wage as stated on the Form ETA 750 is \$17.24 per hour, which amounts to \$35,859.20 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 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 July 12, 2002, 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. Additionally, the petitioner was requested to submit copies of its Form DE-6 Quarterly Wage Report for the last 4 quarters.

In response, the petitioner submitted the sole proprietor's Form 1040 U.S. individual income tax returns, with accompanying Schedule C Profit and Loss from Business statements for the years 1996 through 2001. Since the

priority date was established in 1997, the financial situation of the petitioner must be assessed from 1997 through 2001. Thus, the 1996 tax return will not be considered in this proceeding.

The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>
Proprietor's adjusted gross income (Form 1040)	\$14,110	\$22,231
Petitioner's gross receipts or sales (Schedule C)	\$304,090	\$457,074
Petitioner's wages paid (Schedule C)	\$n/a	\$n/a
Petitioner's net profit from business (Schedule C)	\$18,653	\$23,921
	<u>1999</u>	<u>2000</u>
Proprietor's adjusted gross income (Form 1040)	\$-36,605	\$4,675
Petitioner's gross receipts or sales (Schedule C)	\$144,920	\$256,094
Petitioner's wages paid (Schedule C)	\$n/a	\$n/a
Petitioner's net profit from business (Schedule C)	\$-36,728	\$46,443
	<u>2001</u>	
Proprietor's adjusted gross income (Form 1040)	\$62,478	
Petitioner's gross receipts or sales (Schedule C)	\$800,146	
Petitioner's wages paid (Schedule C)	\$n/a	
Petitioner's net profit from business (Schedule C)	\$71,621	

In addition, counsel submitted copies of the petitioner's quarterly wage reports which show that the petitioner paid wages to the beneficiary during the various quarters covered by the reports in the aggregate of \$15,405 and \$15,270 in 2002 and 2001, respectively, amounts which are less than the proffered wage of \$35,859.20.

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 6, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's gross income and wages already paid to the beneficiary evidence its ability to pay the proffered wage.

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 any of the relevant years, 1997 through 2001. The petitioner showed partial wages paid in 2001 and 2002¹.

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). Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

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.

In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a proprietor of 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 director never requested evidence of the petitioner's expenses. The sole proprietor supports a family of two.

In 2000, the sole proprietorship's adjusted gross income is only \$4,675, which is too low to pay the proffered wage from and support herself and her dependent. However, she did evidence net profits from her business in the amount of \$46,443 that year, which would have been considered in the totality of circumstances if she had shown better figures in 1997 through 1999. As the record stands, however, the petitioner's ability to pay the proffered wage in 2000 is inconclusive. In 2001, the sole proprietorship's adjusted gross income is \$62,478 and her net profits are \$71,621. She also showed payments of actual wages to the beneficiary. Thus, it is reasonable to conclude that the petitioner could provide for herself and her family in addition to paying the proffered wage in 2001 and has established the ability to pay for that year.

¹ The petitioner's owner did not provide her individual income tax return for the year 2002, presumably because it was unavailable at the time the director requested additional evidence. Thus, CIS may only examine the petitioner's financial situation up until 2001.

The sole proprietorship's overall situation, however, does not result in a favorable determination concerning the petitioner's demonstrated ongoing ability to pay the proffered wage. From 1997 through 1999, the sole proprietorship shows adjusted gross income and net profit from business that is either negative or lower than the proffered wage. It would be impossible for her to pay an additional wage above what she would have to take home to support herself and her dependent. Thus, the director did not comment prejudicial error in failing to request evidence of expenses since the petition will fail anyway.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997 through 2000, or that it paid the full proffered wage in 2001 and 2002. Its net income is too low to evidence an ability to pay the proffered wage from 1997 through 1999. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.² The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997 through 1999.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997 through 1999. Therefore, the petitioner has not established that it had 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 not met that burden.

ORDER: The appeal is dismissed.

² The AAO notes that the sole proprietor never reports wages paid by the petitioner on its Schedule C although it submitted quarterly wage reports for two years.