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**U.S. Citizenship
and Immigration
Services**

B6



FILE: WAC 02 170 53343 OFFICE: CALIFORNIA SERVICE CENTER Date: **MAR 04 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: SELF-REPRESENTED

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

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a leather products manufacturer. It seeks to employ the beneficiary permanently in the United States as a maintenance supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information in support of its ability to pay the beneficiary's proffered wage.¹

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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

(2) 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is February 19, 1998. The beneficiary's salary as stated on the labor certification is \$21.20 per hour or \$44,096 per year based on a 40-hour week. The record reflects that the petitioner is organized as a sole proprietorship.

The petitioner initially submitted no evidence of its ability to pay the proffered salary. On July 24, 2002, the director requested additional information in support of the petitioner's ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5 (g)(2). The director requested evidence covering the years 1998 through 2001.

¹The petitioner filed the appeal although the record contains a Form G-28, Notice of Entry of Appearance of Attorney/Representative. This decision will only be provided to the petitioner as the as the party submitting the G-28 is neither an attorney nor a recognized representative of an accredited agency by CIS.

The petitioner responded by sending copies of Schedule C (Profit or Loss from Business) from the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the years 1998 through 2001. Schedule C from these tax returns indicates that the sole proprietor declared a business income of \$22,640 in 1998; \$23,198 in 1999; \$51,812 in 2000; and \$7,531 in 2001.

In denying the petition, the director found that copies of Schedule C from the sole proprietor's individual tax returns were not sufficient to establish the petitioner's continuing ability to pay the beneficiary's wage offer.

On appeal, the petitioner offers no further assertions, but submits complete copies of the sole proprietor's individual tax returns for the years 1998 through 2001. It is noted that a sole proprietorship is not legally separate from its owner. Therefore, CIS will consider the sole proprietor's income, assets and liabilities when examining the petitioner's ability to pay the beneficiary's proposed salary. All of the income and expenses generated by a sole proprietor and his dependents may be considered. The sole proprietor must show that he or she can meet the beneficiary's proffered wage as well as sustain themselves and their dependents.

In this case, the beneficiary's proposed annual salary of \$44,096 exceeded the sole proprietor's annual income in 1999 by \$10,887. In 2001, the proffered wage exceeded the owner's income by \$33,679. Moreover, the beneficiary's proposed salary represented 98% of the sole proprietor's adjusted gross income in 1998, and represented 95% of his adjusted gross income in the year 2000. 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 petitioner 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 about 30% of the petitioner's gross income. Similarly, the AAO cannot conclude that it is plausible that the sole proprietor could pay reasonable living expenses for himself, a spouse, and two dependents out the remaining funds after paying the proffered wage in 1998 and 2000. Thus, the sole proprietor's federal tax returns fail to establish the petitioner's ability to pay the beneficiary's proffered wage of \$44,096 during any of the relevant years.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the visa petition.

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.