



U.S. Citizenship
and Immigration
Services

B4



FILE: WAC-02-283-52371 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2004

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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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 is an electrical contractor. It seeks to employ the beneficiary permanently in the United States as a cost estimator. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish its ability to pay the proffered wage and denied the petition.

On, appeal counsel submits a brief and additional evidence.

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 or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is July 2, 1999. The beneficiary's salary as stated on the labor certification is \$28.00 per hour or \$58,240 per year.

With the initial petition, counsel submitted 1999, 2000, and 2001 Form 1120S U.S. Income Tax Return for an S Corporation. These returns reflect the petitioner's name and address but a different EIN number than the one listed on the Form I-140 petition. The 1999 Form 1120S reflected an ordinary income of -\$553. The Form 1120 S for 2000 reflected an ordinary income of -\$10,389. The Form 1120 S for the year 2001 reflected an ordinary income of -\$2,076.

Counsel also submitted the petitioner's Form 1040 U.S. Individual Income Tax Return for the years 1999, 2000, and 2001. These returns include Schedule C identifying the petitioner as a sole proprietorship of Farshad Feizbakhsh with the same EIN number listed on the Form I-140 petition. The 1999 Form 1040 U.S. Individual Income Tax Return reflected an adjusted gross income of \$39,660. Schedule C of the return reflected a net profit from business of \$42,944. The 2000 Form 1040 U.S. Individual Income Tax Return reflected an adjusted gross income of \$70,530. Schedule C of the return reflected a net profit from business of \$80,205. The 2001 Form 1040 U.S. Individual Income Tax Return reflected an adjusted gross income of \$75,100. Schedule C of the return reflected a net profit from business of \$83,725.

In a request for evidence (RFE), dated December 19, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's 1999 through 2002 federal income tax return and evidence of wage payments to the beneficiary from May 1999 to the present.

In response to the RFE, counsel submitted the petitioner's line item breakdown of Mr. [REDACTED] Form 1040 1999 through 2001 tax returns. Counsel also submitted Form W-2 Wage and Tax Statements for the years 1999 through 2001 issued to the beneficiary. The W-2s are from the corporation that filed the Form 1120S tax returns. Specifically, they include "Inc." and the EIN on the Form 1120S returns. The W-2s indicated that the beneficiary was paid \$1,036 during 1999, \$2,443 during 2000 and \$6,517 during 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel asserts that *Matter of Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), does not apply to the instant case. Counsel states that the net income for the company is \$83,725 and \$80,205 for 2000 and 2001, respectively. Counsel further asserts that the adjusted gross income for 2000 and 2001 is \$70,530 and \$75,100, respectively. Counsel states that the monthly expenses of the petitioner and his family is derived from the petitioner's bank accounts leaving the adjusted gross income to pay the proffered wage. Counsel further states that the petitioner's bank balances are more than sufficient to pay the proffered wage. Counsel submits bank statements relating to the petitioner, the corporation of the same name, and ambiguous statements that might relate to either one.

It is noted that, on appeal, counsel erroneously quotes 8 C.F.R. § 204.5(g)(2) as accepting "personal" records as proof of the ability to pay. Appellate Brief at 9. However, the regulations state that CIS may accept "personnel" records as evidence of a petitioner's ability to pay the proffered wage, a word with significantly different meaning.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner has not demonstrated that it paid the beneficiary any wages. Even if we were to accept the wages paid by the corporation with the same name but different EIN, those wages are below the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the instant case, counsel has submitted the petitioner's U.S. Individual Income Tax Returns as demonstrative of the petitioner's ability to pay the proffered wage. However, counsel has also submitted evidence, in the form of W-2s that the S corporation with a different EIN is paying the beneficiary. Counsel has not explained the relationship, if any, between the sole proprietorship and the corporation of the same name. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability

and sufficiency of the remaining evidence offered in support of the visa petition.”

From the record it is concluded that the petitioner is a sole proprietor, a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor’s adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner’s gross income.

In the instant case, the sole proprietor supports a family of four. In 1999, the sole proprietor’s adjusted gross income was less than the proffered wage. In 2000 and 2001, the sole proprietor’s adjusted gross income of \$70,530 and \$75,100 barely covers the proffered wage of \$58,240. It is improbable that the sole proprietor could support himself and his family on \$12,290 or \$16,860 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage in 2000 or 2001. Moreover, the petitioner submitted a list of monthly expenses, totaling \$3,500 monthly (\$42,000 annually), more than the \$12,290 and \$16,860 remaining in 2000 and 2001.

We acknowledge the submission on appeal of bank statements reflecting, after February 21, 2003, six figure balances. It is ambiguous whether these statements reflect the accounts of the petitioner or the corporation with the same name. Regardless, prior to the \$210,000 deposit on February 21, 2003, from an unknown source, the bank statements do not reflect sufficient funds to continuously pay the proffered wage as of the priority date in 1999.

Counsel’s implicit argument that the bank statements constitute a source of funds by which the petitioner can pay the beneficiary is not persuasive. Counsel might be more persuasive if, in July 1999, the petitioner already had a sufficient balance to pay his monthly expenses for the following years and was subsequently drawing down the funds in that account to do so. The statements do not reflect such a history. Rather, they reflect accounts being drawn down and replenished on a monthly basis. Counsel does not explain how these accounts are replenished after payment of expenses if not from the petitioner’s or sole proprietor’s income. In general, checking accounts are a means of storing and moving cash, not an ultimate source of income. Counsel does not assert, and the record does not reflect, that the sole proprietor is paying his family’s living expenses out of the interest earned on these accounts. Moreover, any interest would also be reflected in the sole proprietor’s adjusted gross income, considered above.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of 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.