



U.S. Citizenship  
and Immigration  
Services

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SEP 17 2004

FILE: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: SEP 16 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:

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

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prevent clearly unwarranted  
invasion of personal privacy**

**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 a gas station and store. It seeks to employ the beneficiary permanently in the United States as a manager. 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, the petitioner submits a statement 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 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 March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$21.27 per hour, which amounts to \$44,241.60 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted pay stubs of wage compensation paid to the beneficiary for the first two months in 2003 totaling \$2464; a Form W-2, Wage and Tax Statement from 2002 and 2001 reflecting wages paid by the petitioner to the beneficiary in the amount of \$14,168 and \$15,036, respectively; and pay stubs and W-2 forms from other employers.<sup>1</sup> Additionally, the petitioner's sole proprietor provided his Form 1040, U.S. Individual Income tax returns for 2000 through 2002.

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<sup>1</sup> One W-2 form has a handwritten notation: "previous employer."

The sole proprietor's tax returns reflect the following information:

	<u>2000<sup>2</sup></u>	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$-41,004	\$-144,573	\$-153,550
Petitioner's gross receipts or sales (Schedule C)	\$2,107,317	\$2,970,127	\$3,060,115
Petitioner's wages (Schedule C)	\$58,940	\$65,464	\$53,883
Petitioner's net profit (Schedule C)	\$-118,432	\$-68,123	\$-10,888

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 5, 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 its quarterly wage reports for the last four quarters and the sole proprietor's monthly expenses.

In response, the petitioner submitted copies of its quarterly wage reports for the quarters ending March 31, 2003, December 31, 2002, September 30, 2002, and June 30, 2002. The quarterly wage reports show that the petitioner paid wages to the beneficiary during the various quarters covered by the reports in an amount totaling \$14,784 (\$3,696 per quarter). Additionally, the petitioner's sole proprietor submitted his monthly expenses that totaled \$5360.

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 July 30, 2003, denied the petition. The director noted the sole proprietor's negative adjusted gross income and low wages actually paid to the beneficiary.

On appeal, the petitioner states that the "bottom line on our taxes does not show a profit that is and of itself is not indicative [sic] of our inability to pay wages," and that the petitioner's business generates enough income to satisfy its payroll obligations. The petitioner submits a letter from Schulz & Associates, an accountant for the petitioner that states the following concerning Schedule C of the sole proprietor's individual income tax return:

In 2002 the Schedule C reflected income of \$-10,880 but when you add back the depreciation the business would reflect a positive cash flow of \$63,082. What also has taken place in June 2003 was the addition a **Post Net** franchise, which will be an additional profit center for [the sole proprietor's] business.

(Emphasis in original).

Additionally, almost nine months after the appeal was filed, correspondence was received from [redacted] of "American Link Immigration Services, Inc." While Mr. [redacted] signed the petitioner's initial petition, no Form G-28, Notice of Entry of Appearance of Attorney or Representative has been submitted into the record of proceeding. Mr. [redacted] has made no assertion that he is the petitioner's representative. A review of recognized organization and accredited representatives reported in July 2004 by the

<sup>2</sup> 2000's tax figures are not relevant to the petitioner's continuing ability to pay the proffered wage from the date of the priority date since the priority date is in 2001.

Executive Office for Immigration Review, does not mention Mr. [REDACTED] or "American Link Immigration Services, Inc."<sup>3</sup> Hence, his purported representation is not properly before this agency in this proceeding.

Mr. [REDACTED] submits a letter from the "accountant of the employer." The letter is also from Schulz & Associates and is dated May 2004. Because the letter is from the same accountant who submitted a letter earlier in the proceedings, the AAO will exercise favorable discretion and review this piece of evidence, especially since it elucidates cryptic language previously used by the accountant. This new letter states in pertinent part the following:

[The sole proprietor's] business went through a major remodel in Dec [sic] 2000. He converted the 3 bays of his service station into a [c]onvenient [s]tore. The business was closed for several months and upon reopening there has been a steady recovery and improvement to the overall sales numbers. The C-Store has been improving year after year but has been slow and steady climb. In mid 2003 [the sole proprietor] added an additional profit center inside the store when he added an additional profit center of "Postnet" a mail service franchise. This also required additional capital improvement and remodeling which unfortunately disruptive to the other business activity while the construction was in process. These improvements that were made to the site brought with it a substantial amount of depreciation.

Thus, the accountant concludes, depreciation should be added back to the sole proprietor's income in order to reflect a "truer availability of disposable cash income."

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 established that it employed and paid the beneficiary the wages in 2001 and 2002. As the director correctly noted, the petitioner has established that he was paid \$14,168 in 2002, which is \$30,073.60 less than the proffered wage; and he was paid \$15,036 in 2001, which is \$29,205.60 less than the proffered wage. Thus, the petitioner or its sole proprietor must show that it can pay \$30,073.60 in 2002 and \$29,205.60 in 2001.

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*

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<sup>3</sup> Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives.

*v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Contrary to the petitioner's accountant's position, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

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 for businesses 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 (7<sup>th</sup> Cir. 1983).<sup>4</sup>

In the instant case, the sole proprietor supports a family of two. The sole proprietor reports negative adjusted gross income for 2001 and 2002. The petitioner reports negative net profits for 2001 and 2002. Thus, the sole proprietor's adjusted gross income and the petitioner's net profits cannot be used to illustrate its ability to pay the remainder of the proffered wage in 2001 or 2002. The accountant's premise for adding back depreciation has been rejected in the federal court system. The accountant's letter concedes financial difficulties purportedly overcome by an undocumented addition to the petitioner's business – a mail service franchise. The mail service franchise and its "profit center" are not corroborated with any evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). No other assets of the sole proprietor were brought to bear upon the petitioner's ability to pay the proffered wages. After considering the documentary evidence contained in the record of proceeding, the AAO cannot find in the petitioner's favor.

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.

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<sup>4</sup> 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.