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U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC-02-202-52819

Office: VERMONT SERVICE CENTER

Date: APR 14 2005

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

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a supervisor. 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 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 December 31, 1997. The proffered wage as stated on the Form ETA 750 is \$32.00 per hour, which amounts to \$66,560 annually.

The petitioner was structured as a sole proprietorship in 1997 but incorporated in 1998. With the petition, the petitioner submitted an incomplete Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 15, 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 the petitioner's 1997 tax return as well as evidence of wages paid to the beneficiary from the petitioner.

In response, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation for 1999 and 2000, as well as a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business, for 1997.

The petitioner also submitted copies of the beneficiary's Forms 1040, U.S. Individual Income Tax Returns, for 1999, 2000, and 2001, as well as checks made payable to the beneficiary from the petitioner. The petitioner also submitted copies of Forms 1099, Miscellaneous Income statements, issued to the beneficiary from the petitioner, evidencing wages paid in the amounts of \$14,750 in 2001, and \$18,650 in 2002, as well as a Form W-2 for 2002 showing additional wages paid in the amount of \$1,960. A Form W-2, Wage and Tax Statement, was also submitted evidencing wages paid by the petitioner to the beneficiary in the amount of \$5,600 in 1999.

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

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	\$4,849	\$1,872	\$2,779
Current Assets	\$2,647	\$1,205	\$n/a
Current Liabilities	\$647	\$605	\$n/a
Net current assets	\$2,000	\$600	\$n/a

1997

Proprietor's adjusted gross income (Form 1040)	\$30,572
Petitioner's gross receipts or sales (Schedule C)	\$378,906
Petitioner's wages paid (Schedule C)	\$0
Petitioner's cost of labor (Schedule C)	\$13,123
Petitioner's net profit from business (Schedule C)	\$32,449

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 June 23, 2003 denied the petition.

On appeal, the petitioner submits additional copies of checks made out to the beneficiary from the petitioner and the petitioner's 2002 tax return showing net income of \$54,214 and net current assets of \$11,000.

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 \$5,600 in 1999, \$6,780 in 2000, \$14,750 in 2001, and \$20,610 in 2002. Since the proffered wage is \$66,560, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$60,960 in 1999, \$59,780 in 2000, \$51,810 in 2001, and \$45,950 in 2002.

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 contrary to counsel's assertion. 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));

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

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).

The petitioner was a sole proprietorship in 1997, 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 supported a family of four in 1997. In that year, the sole proprietorship's adjusted gross income of \$30,572 is less than the proffered wage of \$66,560. Thus, the petitioner has failed to establish that it had the ability to pay the proffered wage in 1997 when it was structured as a sole proprietorship.

The petitioner failed to provide any evidence concerning its ability to pay the proffered wage in 1998.

In subsequent years, the petitioner is structured as a corporation. As noted above, 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income.

The petitioner's net incomes in 1999, 2000, 2001, and 2002 were \$4,849, \$1,872, \$2,779, and \$54,214, respectively, which, with the exception of 2002, are less than the remaining proffered wage in each respective year. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in 1999, 2000, or 2001, although it has demonstrates its ability to pay the proffered wage out of its net income in 2002. The petitioner failed to provide any evidence concerning its ability to pay the proffered wage in 1998.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 1999, 2000, and 2001, however, were less than the remaining proffered wage or not provided. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in 1999, 2000, or 2001. The petitioner failed to provide any evidence concerning its ability to pay the proffered wage in 1998

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in any relevant year.

Despite the petitioner's proof of its ability to pay the proffered wage in 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is no evidence in the record of proceeding that the beneficiary is qualified to perform the duties of the proffered position³. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is December 31, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The proffered position requires two years of employment experience in the job offered as delineated on Form ETA 750A⁴. No evidence was submitted to establish that the beneficiary had two years of qualifying employment

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

⁴ To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the

experience prior to filing the petition, which fails to conform to the regulatory requirements at 8 C.F.R. § 204.5(l)(3). Thus, the petitioner would also be denied for this reason. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

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.

beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).