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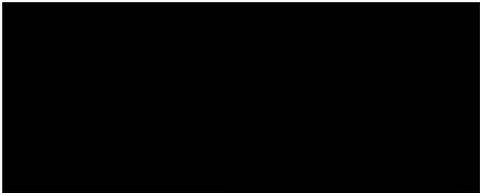


U.S. Citizenship  
and Immigration  
Services

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APR 21 2005



FILE:

WAC 03 005 52982

Office: CALIFORNIA SERVICE CENTER

Date:

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:



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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an electrical business. It seeks to employ the beneficiary permanently in the United States as an electrical engineer. 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 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 4, 2000. The proffered wage as stated on the Form ETA 750 is \$22.90 per hour or \$47,632 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business; a compiled financial statement for the period ended December 31, 2001; bank statements for two locations for the period December 31, 2001 through June 28, 2002; Form DE-6, Quarterly Wage and Withholding Report, for the quarter ended March 31, 2002; various contracts the petitioner had secured; and copies of utility expenses for the business. The tax return reflected an adjusted gross income of \$31,804, and the Schedule C reflected gross receipts of \$788,952, wages of \$76,433, net income of \$34,222,

and outside labor of \$93,534. The bank statements for [REDACTED] reflected balances from a low of \$15,333.83 to a high of \$58,843.96. The bank statements for [REDACTED] reflected balances from a low of \$878.52 to a high of \$50,018.62. The Form DE-6 showed that the beneficiary did not work for the petitioner during the quarter ended March 31, 2002. The contracts show that they were awarded in 2001 and 2002. No expenses related to these contracts were provided.

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 February 10, 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 a copy of its 2000 and 2001 federal income tax return with all schedules and attachments, a copy of the petitioner's personal monthly expenses, and copies of Forms DE-6 for all employees for the last four quarters that were accepted by the State of California along with a description of the employees' job titles and duties. The director also requested that the petitioner explain his relationship to the beneficiary.

In response, the petitioner submitted a complete copy of the owner's 2000, 2001, and 2002 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, copies of Forms DE-6 for the quarters ended September 30, 2002 and December 31, 2002, a copy of the petitioner's personal monthly expenses, and personal bank statements for September 20, 2000, February 26, 2003, March 13, 2003, and March 25, 2003. The 2000 tax return reflected an adjusted gross income of \$9,079, and the 2000 Schedule C reflected gross receipts of \$328,117, wages paid of \$22,927, a net profit of \$9,770, and a outside labor of \$152,323. The 2002 tax return reflected an adjusted gross income of \$55,266, and the 2002 Schedule C reflected gross receipts of \$609,566, wages paid of \$45,410, net income of \$44,468, and outside labor of \$183,984. The petitioner's personal monthly expenses were listed as \$2,992.45 or \$35,909.40 annually. The September 20, 2000 personal bank balance reflected a balance of \$5,108.84 with a wire transfer from Korea of \$4,985.00. The February 26, 2003 personal bank balance reflected a balance of \$17,970.09 with a wire transfer from Korea of \$9,995. The March 13, 2003 personal bank balance reflected a balance of \$26,440.81 with a wire transfer from Korea of \$9,877.00. The March 25, 2003 personal bank balance reflected a balance of \$38,941.87 with a wire transfer from Korea of \$9,977.00. The petitioner did not indicate a reason for receiving wire transfers from Korea or if they could be used to pay the wages of the beneficiary. The Forms DE-6 show that the petitioner did not employ the beneficiary in the quarters ended September 30, 2002 and December 31, 2002. The petitioner did explain that the beneficiary is his brother, but did not feel that the relationship had anything "to do with this petition."

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 15, 2003, denied the petition.

On appeal, counsel submits additional contracts secured in 2002 and 2003, a letter from the business' C.P.A., 2000, 2001, and 2002 Forms 1096, Annual Summary and Transmittal of U.S. Information Returns, and additional bank statements for 2003 for the Lee Street address reflecting balances from a low of \$22,433.25 to a high of \$69,967.52. The C.P.A. states:

The company has been preparing for the expansion of the current electrical contract business and also for the bidding of larger government contracts from the year 2001 on. In this preparation stage, in order to achieve this goal, the company made several investments such as follows:

1. It made additional investments in the transportations equipment and heavy power tools and
2. It hired more personnel in administrative department of the company.

\* \* \*

The reason that the net income of the Valley Electric was low was due to the following reasons.

First, the company's cost of sales is higher than usual year for the purchase of some efficient electrical small tools and other top quality electrical supplies is included in cost of sales.

Secondly, the company had several out of town service contracts in such cities as San Diego, Barstow, Las Vegas, and Kawaii, Hawaii.

- A. These contracts incurred additional auto related expenses such as gasoline expenses, repairs of automobiles and equipment, auto insurance and out of town travel expenses.
- B. These contracts also created additional wages and payroll tax expenses and workmen's compensation insurance and additional telephone expenses to meet the deadline of the completion of contract within the predetermined stipulation of the contract.
- C. The company men were to be provided the room at the motels and board also.

Thirdly, the company hired two men to do increased administrative work in supporting the management of different jobs.

In the process of meeting these needs of expansion of the company it incurred more expenses which resulted [in] lower net income for the years 2001 and 2002.

In 2003 the company has already made several contracts and subcontracts which will create more income. The net income will be sufficient enough to cover payroll expenses of the new applicant. The projected net income before federal income taxes for this year 2003 of the company will be \$220,056. This projected income is only based on the contracts it already has obtained. It did not include any contracts in the projected statement of income which the company might get for the remaining period of this year 2003. The related information on the contracts in progress is provided here. I will also enclose the projected income statement for the year ending December 31, 2003.

<u>Contract Date</u>	<u>Contracts in Progress</u>	<u>Amount</u>
	Valley [REDACTED] Electric Company is the subcontractor of [REDACTED] Inc. (General Contractor)	
12/30/2002	[REDACTED]	\$ 525,000
3/ 3/2003	[REDACTED]	\$ 200,000
12/12/2002	[REDACTED]	\$ 265,000
3/12/2003	[REDACTED]	<u>\$ 392,500</u>
	Total amount of subcontracts	\$1,382,500
	[REDACTED] is the general contractor.	
12/ 2/2002	[REDACTED]	<u>\$ 390,000</u>
	Total amount of contract	\$1,772,500

The petitioner states:

For the last twenty six (26) years, we have been engaged in electric constructions for buildings, residence, commercial, California School District School, and Military facilities. It's \$1,750,000 for contract which has been made solely for this year. In order to have larger contract and hire more employees, we must have well experienced electrical technician. We must have skilled electrical technician to prevent leak of our income by not issuing 1099 for sub-contractors. As you can see from Exhibit, we have wasted total of \$359,676.25 for last three years to pay sub-contractors. That's because we did not have skilled electrical technician. If we have skilled electrical technician, our [sic] net income has been dramatically increased.

\* \* \*

We have provided you with our income tax return from 2000 to 2002. Even though petitioner's gross income is pretty large, net income is fairly small. The reasons are as follows:

1. As gross income increased, petitioner cannot be handled by owner alone. We needed to have skilled labor force.
2. Difficulty in insuring skilled worker. So, we had to hire sub-contractors and paid them wages (1099) which was unnecessary expenses.
3. Failure in managing work site, employees, and materials. Since we hire sub-contractors, it was really difficult to oversee site and materials.

That's all because petitioner did not have reliable labor force. In the future, we will have to secure reliable labor force to participate in larger Federal and State projects. In order to not to repeat mistakes, we urgently need reliable employees.

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 the beneficiary at a salary equal to or greater than the proffered wage in 2002, 2001, or 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. 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).

The petitioner is a sole proprietorship, 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 (7<sup>th</sup> 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 present case, the wage proffered to the beneficiary was more than the petitioner's adjusted gross income in 2000 and 2001 and approximately 86.2% of the petitioner's adjusted gross income in 2002.

The petitioner provides his business and personal bank statements as evidence that he has established the ability to pay the proffered wage. However, the petitioner has submitted his business bank statements for only part of 2002 and 2003, for only one month in 2001, and has submitted no statements for 2000. The petitioner did provide one personal bank statement for 2000 and three personal bank statements for 2003. These partial yearly bank statements are not sufficient to establish that the petitioner could pay the proffered wage for the entire 2000, 2001, and 2002 years.

The petitioner points to the contracts he has secured as evidence of his ability to pay the proffered wage. These contracts, however, are for 2001 through 2003, and, therefore, cannot show that the petitioner had the ability to pay the proffered wage in 2000. In addition, these contracts only show the amount the petitioner will receive when they are complete and do not take into account the expenses the petitioner will incur to accomplish the projects. CIS will not consider gross receipts without also considering the expenses involved to obtain those gross receipts.

It is noted that in 2000, 2001, and 2002, the petitioner paid a total of \$429,841 in outside labor. However, the petitioner has not stated that the beneficiary would replace any of the employees paid under outside labor, and there is no evidence that the position of the other employees involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The sole proprietor supported a family of four in 2000, 2001, and 2002. It is clear that since the proffered wage is more than the petitioner's adjusted gross income in 2000 and 2001 and approximately 86.2% of the adjusted gross income in 2002, the petitioner could not pay the proffered wage and pay the monthly expenses for a family of four.

The record of proceeding does not contain any other evidence or source (personal bank statements, CDs, etc.) of the petitioner's ability to pay the proffered wage from 2000 to the present. 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, the record in this case lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether a pre-existing family or business relationship may have influenced the labor certification. Since the beneficiary is the brother of the petitioner, whether a bona fide job opportunity is available to U.S. workers is questionable.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that

[CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary is the brother of the petitioner, the facts of the instant case suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

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.