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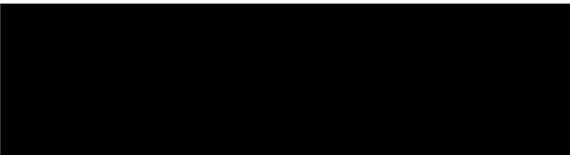
AUG 18 2005

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, Director
Administrative Appeals Office

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

The petitioner is an automobile upholstery company. It seeks to employ the beneficiary permanently in the United States as an automobile upholsterer. 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.

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 granting 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 February 22, 1999. The proffered wage as stated on the Form ETA 750 is \$16.46 per hour, which equals \$34,236.80 per year.

On the petition, the petitioner stated that it was established during May 1982 and that it employs 11 workers. The petition states that the petitioner's gross annual income is \$473,059 and that its net annual income is \$88,121. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Garden Grove, California.

In support of the petition, counsel submitted the 1998, 1999, and 2000 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Those return show that the petitioner's owner and owner's spouse had three dependents, four dependents, and one dependent during those years, respectively. Corresponding Schedules C, Profit or Loss from Business, show that the petitioner's owner owned the petitioner as a sole proprietorship during all three years.

The 1998 Schedule C shows that during that year the petitioner returned a profit of \$43,899. The tax return shows that the petitioner's owner and owner's spouse had adjusted gross income of \$41,757 during that year, including the petitioner's entire profit offset by deductions. This office notes, however, that the priority date in this matter is February 22, 1999, and that evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 1999 return shows that during that year the petitioner returned a profit of \$90,769. The tax return shows that the petitioner's owner and owner's spouse had adjusted gross income of \$62,307 during that year, including the petitioner's entire profit offset deductions and losses from another business.

The 2000 return shows that during that year the petitioner returned a profit of \$60,607. The tax return shows that the petitioner's owner and owner's spouse declared a loss of \$4,092 during that year, including the petitioner's entire profit offset by deductions and losses from another business.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 8, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

Counsel's response is dated July 31, 2003. In response, counsel submitted a copy of the petitioner's owner and owner's spouse's 2001 Form 1040 U.S. Individual Income Tax Return.

The 2001 tax return shows that the petitioner suffered a loss of \$88,970 during that year. The joint return of the petitioner's owner and owner's spouse shows that during that year they had one dependent and declared adjusted gross income of \$36,739, including the petitioner's loss.

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 September 13, 2003, denied the petition.

On appeal, counsel provides a copy of the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return. That return includes a Schedule C Profit or Loss from Business showing that the petitioner returned a profit of \$21,940 during that year. The petitioner's owner declared adjusted gross income of \$28,594 during that year, including the petitioner's profit.

Counsel cites the petitioner's profits, its depreciation deductions, its total wage expense, and amounts paid to outside contractors as evidence of the petitioner's ability to pay the proffered wage during various years.

Counsel alleges that the petitioner paid \$91,509, \$82,660, \$36,544, and \$59,063 to contractors during 1999, 2000, 2001, and 2002, respectively. This office notes that those amounts are not shown on the petitioner's

owner's tax returns. Further, even if the record contained evidence that the petitioner expended those amounts on contractor services, that would be insufficient to show that they were a source of funds to be considered in the determination of the petitioner's ability to pay the proffered wage. For those amounts to be so considered, the petitioner would be obliged to demonstrate that the payments were for provision of services consistent with the proffered position, services that the beneficiary might be expected to provide if hired. Counsel's assertions are the only support for those propositions in the record.

The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). No evidence supports the proposition that the petitioner paid contractors to perform the duties of the proffered position and none of those alleged contractor payments will be included in the determination of the petitioner's ability to pay additional wages.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income,² the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that

¹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

² The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

Citizenship and Immigration Services (CIS) should have considered income before expenses were paid rather than net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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, supra*; *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner, however, is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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. In addition, they 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$34,236.80 per year. The priority date is February 22, 1999.

During 1999 the petitioner's owner and owner's spouse had adjusted gross income of \$62,307. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year, he would have been left with \$28,070.20 with which to support his household of five during that year. No evidence pertinent to the petitioner's owner's family's budget was requested and none was submitted. This office cannot find that the petitioner's owner was unable to support his family on that remaining amount. The petitioner has sufficiently demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner and owner's spouse declared a loss of \$4,092 as their adjusted gross income. The petitioner's owner is unable to show the ability to pay any portion of the proffered wage out of his adjusted gross income during that year. The petitioner has not demonstrated that it had any other funds available with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner and owner's spouse had adjusted gross income of \$36,739. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year, he would have been left with \$2,502.20 with which to support his household of five during that year. Although the record contains no evidence pertinent to the petitioner's owner's family's budget, to believe that the petitioner's owner could support his household of three during that year on that remaining amount is unreasonable. The petitioner has not demonstrated that it had any other funds available with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$28,594. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.