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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted]
SRC 04 024 51469

Office: TEXAS SERVICE CENTER Date: **DEC 15 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:

[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour (\$38,480 per year¹). The Form ETA 750 states that the position requires one year of experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax return for 2001; bank statements; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The tax return submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,480 per year from the priority date of April 30, 2001:

¹ Based upon a 40 hour/week. The certified Alien Employment application indicates the workweek is 45 hr/weekly.

- In 2001, the Form 1040 stated adjusted gross income² of \$10,954.00.

The director denied the petition on August 11, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that additional evidence such as bank account records will show the ability to pay, and submits additional evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Counsel asserts in the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel cites no legal precedent for the contention, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel submits a statement from a bank dated September 8, 2004 stating that "Shop Rite" had a balance in its account of \$147,085.75. There is no statement concerning the relationship between Shop Rite and [REDACTED] whose tax form was submitted into evidence. Evidence was submitted that demonstrated [REDACTED] is the owner of the business. This was a tax return submitted that states on Schedule C that [REDACTED] is the proprietor of a grocery store with its business name "Shoprider Exxon" at the correct business location.

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 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).

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.

² IRS Form 1040, Line 33.

³ 8 C.F.R. § 204.5(g)(2).

In the instant case, the sole proprietor⁴ is single. In 2001, the sole proprietorship's adjusted gross income of \$10,954.00 is not sufficient to pay the proffered wage of \$38,480 per year. It is improbable that the sole proprietor could support himself on \$10,954.00 for an entire year and pay the proffered wage.

Counsel advocates the use of the cash balance of the business account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

The record of proceeding contains a bank statement from the petitioner's checking account dated September 30, 2003, with a current balance of \$3,829.75.⁵ This balance is not substantial enough to cover the proffered wage for a year. Counsel on appeal has submitted a letter dated September 8, 2004, with the same bank with no account identification or details stating that "Shop Rite" has a balance of \$147,085.75. There is no explanation for this increase in the account balance in one year or why the business that had approximately a \$4,000.00 balance a year before, now has a very large balance. It is not reasonable nor credible that the business would have increased its bank balance by a factor of 36 in one year.

Further according to a letter dated September 7, 2004, the owner of the "Shop Rite Exxon" is [REDACTED] but the tax return and bank account record information submitted to show the ability to pay is from a [REDACTED]. There are no tax returns from the owner [REDACTED] in the record of proceeding. Since [REDACTED] is the petitioner on the I-140 petitioner and the employer on the certified Alien Employment Application, the petitioner has not come forth with evidence as required by the regulation first above recited to substantiate its ability to pay the proffered wage. According to the 2001 tax return submitted into evidence, [REDACTED] was the owner and manager of the business at that address.⁶ The evidence presented is contradictory and inconclusive.

Beyond the decision of the director, the certified ETA 750A requires only one year of job experience, whereas, according to regulation, a skilled worker position requires two years of experience to qualify. The job requirements indicate that manager is not a skilled worker position.

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.

⁴ There is an issue in this case, raised by the contradictory evidence submitted, whether or no [REDACTED] or [REDACTED] is the owner of the business.

There is a letter from a bank in the record of proceeding dated October 24, 2003, stating that "Average balance on Account ... [account number deleted] is \$16,548.00" with no account records or duration of deposits submitted to substantiate this sum. This has no probative value.

⁶ Although the business is described as a grocery store named [REDACTED] not a gas station described as [REDACTED]