



U.S. Citizenship
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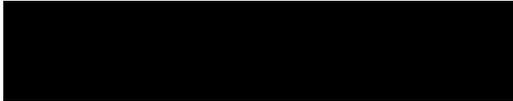
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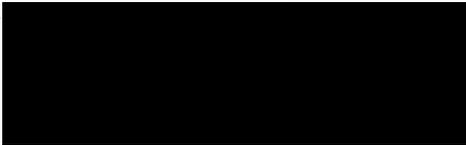
Petitioner:



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

The petitioner is an irrigation contractor. It seeks to employ the beneficiary permanently in the United States as a foreman. 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, through counsel, asserts that the director misinterpreted the evidence and should have approved the petition.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 November 24, 2000. The proffered wage as stated on the Form ETA 750 is \$34.25 per hour, which amounts to \$71,240 per year. The ETA 750B, signed by the beneficiary on September 25, 2000, does not reflect that the petitioner employed the beneficiary at that time.

The petitioner is structured as a sole proprietorship. As evidence of its ability to pay the proffered salary of \$71,240 per year, the petitioner initially submitted a partial copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001, consisting only of Schedule C, Profit or Loss from Business, and two other miscellaneous attachments. In 2000, Schedule C shows the petitioner reported \$153,620 in gross income, \$117,534 in total expenses including \$12,000 in wages, and net profit of \$36,086.

In 2001, Schedule C reveals that the petitioner declared gross income of \$150,854, total expenses of \$115,527 including \$12,800 in wages, and net profit of \$35,327.

On December 5, 2003, the director requested additional evidence in support of the petitioner's continuing ability to pay the proffered salary as of November 24, 2000. The director specifically requested the petitioner's 2002 federal income tax return with all schedules and attachments. Additionally, the director requested the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002 if it employed the beneficiary during that period.

In response, the petitioner submitted copies of bank statements from two different accounts covering the period between January 2000 and November 2003. A transmittal letter from counsel's office emphasizes that the average monthly balances ranged from \$29,077.78 to \$41,045.49. The letter also states that the beneficiary has not worked for the petitioner and does not have a W-2. No explanation is offered to explain why the sole proprietor's 2002 tax return was not provided as requested by the director.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on May 12, 2004, denied the petition. The director noted that the sole proprietor's net profit from the petitioning business as stated on the 2001 Schedule C, Profit or Loss from Business, was \$35,913 less than the proposed wage offer of \$71,240 and failed to support the petitioner's ability to pay the certified wage.

On appeal, counsel asserts that the petitioner's bank statements offered in response to the director's request for additional documentation constitute strong evidence of the petitioner's ability to pay the proffered wage. Counsel asserts that the director erred in failing to recognize their significance contrary to the policy interests underlying the Immigration and Naturalization Act. Counsel cites *Matter of La Madrid-Peraza*, 492 F.2d 1297 (9th Cir. 1974). Counsel further maintains that *Matter of Yarden*, 15 I&N Dec. 729 (Reg. Comm. 1976) supports the argument that it is an abuse of discretion to erroneously focus on the absence of tax returns.

The AAO cannot agree. It is noted that 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," it neither states nor implies that such material may be offered as a substitution for the required evidence. Moreover, bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Further, no evidence was submitted to the underlying record demonstrating that the funds reported on the petitioner's bank statements, which presumably represent the normal day-to-day business revenue somehow are representative of amounts other than those already included in the calculation of the petitioner's gross income and total expenses shown on the corresponding portion of Schedule C provided to the record.

It is also noted that we do not find *Matter of La Madrid-Peraza* or *Matter of Yarden* *apropos* to the determination of the petitioner's ability to pay the proffered wage in this case. The court in *Matter of La Madrid-Peraza* found that an alien was not deportable merely because she overstated the wages she was to receive on her application for labor certification. The court determined that although the application misstated the wages to be paid, the labor certification could not have been issued if in fact her proposed job paid less than the prevailing rate. The case in *Matter of Yarden* did not involve a district director's focus on the absence of tax returns. Rather, it related to an application for adjustment of status filed by an alien seeking to qualify for an exemption to the requirements

of Section 212(a)(14) of the Act as an investor. The Regional Commissioner found that as a matter of administrative discretion, an alien would not be granted permanent resident status on the basis of a labor certification or exemption therefrom, which is predicated on unlawful employment in the United States.

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 may have 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. To the extent that a petitioner may have paid wages less than the proffered salary to the alien will, these amounts will also be considered. In the instant case, the record does not suggest that the petitioner has employed the alien beneficiary.

If the petitioner does not establish that it may have 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, if provided, 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). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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 (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 2000 and 2001 tax returns initially provided with the petition were incomplete, so no determination of the sole proprietor's income or other personal assets or liabilities could be made. Even if only the petitioning business' net profit of \$36,086 in 2000 and \$35,327 in 2001, are examined, neither figure was sufficient to cover an additional certified wage of \$71,240 per year. The sole proprietor's 2002 tax

return, which was specifically requested, was also not provided. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a copy of its 2002 tax return, which would have demonstrated the amount of adjusted and taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage during this period. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In the context of the financial information contained in the record, counsel maintains that the petitioner's situation is similar to that described in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the tax returns contained in the record are incomplete do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Here, the sole proprietor's Schedule C shows a slight decline in both the petitioner's gross income and net profit from 2000 to 2001. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the arguments presented on appeal, the AAO concludes that the petitioner has not sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the visa priority date.

Beyond the decision of the director, and as an independent basis for denial, it is noted that the approved labor certification requires that an applicant for the certified position of foreman must have two years of employment experience in the job offered of foreman. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) provides that a claim of such experience must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The record in this case contains one letter submitted to support the beneficiary's acquisition of the required two years as a foreman. It is from [REDACTED] dated October 28, 2000, and signed by Michael [REDACTED]. He states that the beneficiary was employed from 1994 to 1997 as an irrigation mechanic specializing in well and pump installation, pump maintenance and repair. Although Mr. [REDACTED] speaks highly of the beneficiary's reliability, no mention is made of any supervisory duties or of previous experience as a foreman. As such, this document fails to establish that the beneficiary has met the required terms of previous work experience as a foreman as set forth in the approved labor certification.

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.