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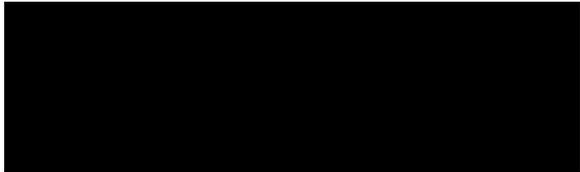
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE:



WAC-02-132-55788

Office: CALIFORNIA SERVICE CENTER

Date: DEC 21 2005

IN RE:

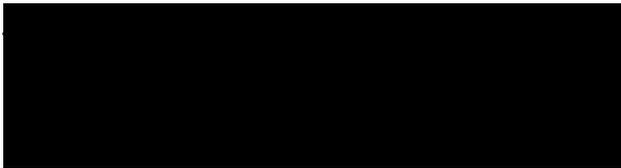
Petitioner:

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 of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion will be granted. The prior decision of the AAO will be affirmed. The petition remains denied.

The petitioner is a meat and food market. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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, 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$24,856.80 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

On December 5, 2002, 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 because its net income and net current assets reported for 2001 were less than the proffered wage, and denied the petition accordingly.

The AAO affirmed the director's decision on July 9, 2004 for the same reason. The AAO's decision analyzed the proportional income the petitioner reported while it was incorporated as well as while it was a sole proprietorship during 2001, applying relevant law to each situation, and still determined that the petitioner's total net income and net current assets were insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel submits additional evidence and a brief. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R.

¹ In determining the petitioner's ability to pay the proffered wage during a given period, 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.

§ 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3).

Counsel references precedent that he cited previously and thus the motion is not a motion to reconsider. Counsel also asserts that the AAO brought up the issue of the sole proprietor's expenses for the first time in its decision without providing the petitioner with a meaningful opportunity to overcome that deficiency. Counsel provides a breakdown of the sole proprietor's expenses and also states that the sole proprietor had \$100,000 moved into his personal bank account in 2001 while the petitioner was structured as a sole proprietorship. The petitioner submits its 2002 and 2003 tax returns and counsel states that they were previously unavailable, as well as a paystub issued to the beneficiary in 2004.

On review, the record of proceeding affirms the AAO's prior determination that the petitioner has not demonstrated a continuing ability to pay the proffered wage beginning on the priority date. The record of proceeding last closed in 2002 without the issue arising of the petitioner's ability to pay the proffered wage in 2002, 2003, or 2004, and will not become evidence for review nor a new issue on motion to reopen or reconsider. See 8 C.F.R. § 103.5(a)(3). The sole issue of denial was that the petitioner had not demonstrated its ability to pay the proffered wage in 2001, specifically the period of the year during which the petitioner operated as a sole proprietorship. Additionally, only counsel provides the breakdown of the sole proprietor's living expenses. The unsupported 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). Counsel did not provide supporting evidence of the sole proprietor's personal expenses. Regardless, the AAO correctly applied the standard delineated in *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the precedent applicable to sole proprietors, to the facts of the instant case². Thus, counsel's statement concerning the sole proprietor's personal expenses will not be given any evidentiary weight on motion.

² As the AAO properly noted previously, a sole proprietorship is 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 its previous decision, the AAO determined that it was unlikely that the petitioner could have paid the pro-rated portion of the proffered wage, \$18,642, for three months in 2001 when it was structured as a sole proprietorship and support a family of six on \$17,857, which is what would be left after reducing the sole proprietor's adjusted gross income by the pro-rated portion of the proffered wage. The AAO notes that the prior

The record of proceeding only contained the petitioner's bank statements from December 2001 through October 2002. The director never requested the petitioner's bank statements in any of his requests for evidence. The AAO did not discuss the petitioner's bank statements in its prior decision. Thus, the petitioner's bank statement, dated January 31, 2001, for its business checking account will be considered on motion and the motion is accordingly construed as a motion to reopen.

Counsel's reliance on the balance in the petitioner's bank account on January 31, 2001 is misplaced. The bank statement shows the amount in an account on a given date but does not show the sustainable ability to pay a proffered wage. The record of proceeding does not contain evidence about the account balance from February through June 2001 when the petitioner incorporated and began reporting its cash as its net current assets. There is insufficient evidence that those funds were not spent and could be contributed towards available funds for the petitioner, as a sole proprietor, to apply towards paying the proffered wage during that timeframe. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Upon review, the AAO's prior adjudicator accurately assessed the petitioner's adjusted gross income as a sole proprietor and net income and net current assets as a corporate entity and determined that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date in 2001 out of its net income or net current assets, or any other source.³ The AAO determines that the new evidence of cash assets held

adjudicator made this calculation without pro-rating the sole proprietor's adjusted gross income as it pro-rated the proffered wage. Thus, even less funds would be available.

³ As noted in the prior AAO decision, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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.

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

by the sole proprietorship in 2001 are insufficient evidence of the petitioner's continuing ability to pay the proffered wage and the remaining evidence and attorney assertions are not given any evidentiary weight. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 motion to reopen is granted. The prior decision of the AAO, dated July 9, 2004, is affirmed. The petition remains denied.

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. 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. 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.