



U.S. Citizenship
and Immigration
Services

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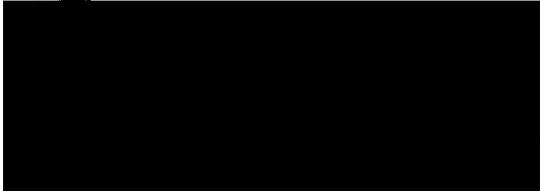


FILE: WAC-02-198-52503 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturing firm for products relating to canines. It seeks to employ the beneficiary permanently in the United States as a sample maker. 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.

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 or seasonal 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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is May 19, 1998. The proffered wage as stated on the Form ETA 750 is \$6.00 per hour, which amounts to \$12,480.00 annually. On the Form ETA 750B, signed by the beneficiary on May 13, 1998, the beneficiary did not claim to have worked for the petitioner. The Form ETA 750 was certified by the Department of Labor on January 25, 2002.

The I-140 petition was submitted on June 3, 2002. On the petition, the petitioner claimed to have been established in 1994, to currently have six employees, to have a gross annual income of \$300,000.00, and to have a net annual income of \$40,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 10, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on December 12, 2002.

This letter is in support of the petition for permanent residency filed on behalf of [the beneficiary].

Please be advised that Petitioner [REDACTED] changed name to [REDACTED] on or about December 2003. That I was the owner of [REDACTED] and now the owner of [REDACTED]. This company continues to operate at the same address, conducting the same type of business.

Attached you will find copies of the business city license and the articles of incorporation showing the new name.

[REDACTED] continues to assume all right, duties, obligations and assets as has always since the petition was originally filed with the Employment Development Department.

I trust that this information can help clarify this misunderstanding.

(Letter from Gregg Klepp, April 27, 2004, at 1).

The record contains a copy of articles of incorporation of [REDACTED] filed with the office of the Secretary of State of California on February 17, 1998. The record also contains a copy of a business certificate issued to [REDACTED] c., by the City of Yorba Linda, California. The effective date of the business license is June 11, 2003 and the expiration date is June 30, 2004. The name of the corporation on those documents is identical to that of the petitioner on the instant I-140 petition, except that on the petition the abbreviation "Inc." is not included as part of the name. On the Yorba Linda business license, the name of the owner of the business is stated as [REDACTED].

The filing date on the articles of incorporation, of February 17, 1998, indicates that [REDACTED] Inc., was in existence prior to the May 19, 1998 priority date, when the Form ETA 750 was filed under the name [REDACTED]. That fact is inconsistent with the assertion of [REDACTED] in his letter dated April 27, 2004 that Canine Innovations changed its name to "[REDACTED]" in December 2003. In the following sentence of his letter [REDACTED] uses the form of the new business name as "[REDACTED]". The structure of the letter indicates that [REDACTED] uses the names "[REDACTED]" interchangeably.

The record also contains copies of Schedule C, Profit or Loss from Business (Sole Proprietorship), for [REDACTED] for the years 1998, 1999, 2000, 2001, 2002 and 2003. The Schedule C's state the name of the proprietor as [REDACTED]. The fact that the business income of [REDACTED] is reported as a sole proprietorship is inconsistent with the articles of incorporation under that name submitted in evidence, and is inconsistent with the reference of [REDACTED] in his letter dated April 27, 2004 to the articles of incorporation as evidence of the change in business name from [REDACTED].

The principal business or profession of [REDACTED] is stated on the Schedule C's for 1998, 1999, 2001, 2002 and 2003 as "[REDACTED]" and on the Schedule C for 2000 as "[REDACTED]". Those statements are inconsistent with the statements on the Form ETA 750 that the nature of the business activity of the employer [REDACTED] that the offered position is as "original sample maker," and that the duties of the job to be performed include "Makes original sample of various types of leather and fabric items

for canines from blueprint sketch, such as leashes, collars, obedient tabs, beds, toys and [sic] other products.” (Form ETA 750, Part A, Items 8, 9 and 13.).

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” The record contains no explanation for the inconsistencies in the evidence noted above.

The status of successor in interest requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, the Form ETA 750 application for labor certification was submitted by the employer Canine Innovations and was certified by the Department of Labor for that employer. For the reasons discussed above, the evidence in the record fails to establish that the petitioner, Country Care Pet Resort, is a successor in interest to Canine Innovations.

The failure to establish a successor in interest relationship is sufficient grounds to deny the petition. Furthermore, even assuming that the petitioner is a successor in interest to Canine Innovations, the evidence in the record is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

It may be noted that in the second RFE the director requested evidence concerning whether the beneficiary is a substituted beneficiary. In a letter to the director dated May 20, 2004 submitted in response to the second RFE and in his brief in the instant appeal, counsel states that the instant petition is not for a substituted beneficiary. The statements by counsel on this point are consistent with the information on the ETA 750 and on the I-140 petition, both of which show the same individual as the beneficiary.

Concerning whether the beneficiary has been employed by the petitioner to the beneficiary, on the Form ETA 750B, signed by the beneficiary on May 13, 1998, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The only tax documents pertaining to the petitioner are copies of Schedule C, Profit or Loss from Business (Sole Proprietorship). The record contains copies of the Schedule C's for the petitioning business for the years 1998, 1999, 2000, 2001, 2002 and 2003. The record before the director closed on May 24, 2004. As of that date the tax return of the petitioner's owner for 2004 was not yet available, though the tax returns of the petitioner's owner through the year 2003 should have been available. The record before the director included Schedule C's for 1998, 1999, 2000 and 2001, but not for either 2002 or 2003. Schedule C's for 2002 and 2003 have been submitted for the first time on appeal. The record contains no copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner.

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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. In the instant case, however, the petitioner has submitted no copies of any Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Therefore the record lacks a basis for any finding concerning the owner's net income.

The Schedule C's submitted for the record contain information about the financial situation of the petitioning business, but since the business is a sole proprietorship those figures cannot be used to evaluate the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that evidence be in one of three alternative forms, namely, "copies of annual reports, federal tax returns, or audited financial statements." In accordance with that regulation the RFE requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In a letter dated December 2, 2002 submitted in response to the first RFE counsel states, "Please be advised that it is against [the petitioner's] policy to disclose confidential records, such as the company's tax returns." (Letter from counsel, December 2, 2002, at 1). Counsel then states that the petitioner was submitting copies of the petitioner's Schedule C's for the years 1998, 1999, 2000 and 2001, which counsel stated showed the petitioner's ability to pay the proffered wage during those years.



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FILE: [Redacted]
WAC 03 184 53915

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 21 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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, and, that it had not established that the beneficiary has the minimum requirements as stated on the labor certification petition.

The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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).