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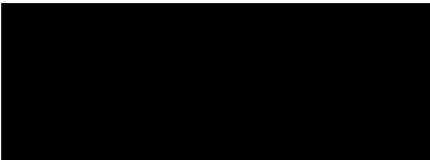
Office: VERMONT SERVICE CENTER

Date: DEC 22 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:



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

The petitioner is a general machinery business. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and 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, 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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is \$17.60 per hour or \$36,608 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted a copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The 2001 tax return reflected an adjusted gross income of \$107,303, and Schedule C reflected gross receipts of \$143,143, wages paid of \$37,920, and net profit of \$55,061.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 26, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested a copy of the owner's monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for

2001 and a copy of either the owner's birth certificate, biographical page of his passport, or naturalization certificate.

In response, the petitioner submitted a copy of the owner's passport biographical page and a copy of the owner's Certificate of Naturalization, but not an itemized list of the owner's monthly expenses.

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 May 28, 2004, denied the petition.

On appeal, the petitioner, through counsel, insists that it never received a request for an itemized list of monthly expenses. However, the request for an itemized list of monthly expenses was clearly present on the request for evidence forwarded to the petitioner, dated January 26, 2004. Counsel submits previously submitted documentation, a letter from the petitioner's accountant, copies of the owner's 2001 through 2004 monthly expenses, and copies of the owner's 2002 through 2004 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business. The 2002 tax return reflects an adjusted gross income of \$107,496, and Schedule C reflects gross receipts of \$151,138, wages paid of \$37,783, and net profit of \$46,144. The 2003 tax return reflects an adjusted gross income of \$104,451, and Schedule C reflects gross receipts of \$164,178, wages paid of \$46,606, and net profit of \$46,090. The 2004 tax return reflects an adjusted gross income of \$94,968, and Schedule C reflects gross receipts of \$179,129, wages paid of \$60,201, and net profit of \$31,814. The owner's 2001 through 2004 yearly expenses were \$69,374, \$71,763, \$75,364, and \$84,918, respectively.

The petitioner's accountant states:

Please note, that in order to make an equitable assessment, the 'adjusted gross income,' as reflected in the 2004 tax return, must be increased for depreciation, property taxes, mortgage expense, water expense, and house insurance as shown on schedule E in the 2004 tax return. Specifically, 'Adjusted Gross Income' of \$94,968.00 must be increased by \$11,329.00, since these amounts other than depreciation are also included in the 'Living Expense Itemization schedule on Attachment A.

* * *

Please note, that in order to make an equitable assessment, the 'adjusted gross income,' as reflected in the tax returns, must be increased for depreciation, property taxes, mortgage expense, water expense, and house insurance as shown on schedule E in the respective tax returns. Specifically, 'Adjusted Gross Income' must be increased by \$8,874.00 in 2001, \$8,378.00 in 2002, and by \$8,952.00 in 2003, since these amounts, other than depreciation are also included in the 'Living Expense Itemization schedule on Attachment A.

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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary an amount equal to or greater than the proffered wage from 2001 through 2004.

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). 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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 sole proprietor supported a family of four. In 2001, after paying the beneficiary's salary of \$36,608 and expenses of \$69,374, the petitioner would have had \$1,321 remaining. In 2002, after paying the beneficiary's salary of \$36,608 and expenses of \$71,763, the petitioner would have had a loss of \$875. In 2003, after paying the beneficiary's salary of \$36,608 and expenses of \$75,364, the petitioner would have had a loss of \$7,521. In 2004, after paying the beneficiary's salary of \$36,608 and expenses of \$84,918, the petitioner would have had a loss of \$26,558.

Counsel requests that depreciation and other expenses be considered when determining the petitioner's ability to pay the proffered wage. However, 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.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible 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 cost of equipment and buildings and the value lost as they 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner.

With regard to the other expenses counsel contends should be added back to the adjusted gross income when determining the ability to pay the proffered wage, even if CIS did add back those expenses, minus depreciation as noted above, the petitioner would still not have established its ability to pay the proffered wage in 2003 and 2004 (2003: \$104,451 adjusted gross income + \$5,926 expenses added back = \$110,377 - \$111,972 yearly expenses of \$75,364 + \$36,608 proffered wage = -\$1,595, 2004: \$94,968 adjusted gross income + \$6,019 expenses added back = \$100,987 - \$121,526 yearly expenses of \$84,918 adjusted gross income + \$36,608 proffered wage = -\$20,539). Further, it is noted that most of the expenses listed (property tax, mortgage, etc.) represent real costs borne by the petitioner and would not ordinarily be subtracted from the adjusted gross income.

The record of proceeding does not contain any other evidence of unencumbered and/or liquefiable personal assets that the petitioner could use to establish its ability to pay the proffered wage from 2001 and continuing to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.