



U.S. Citizenship  
and Immigration  
Services

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

BG



FILE: WAC 02 202 50708 Office: CALIFORNIA SERVICE CENTER Date: FEB 10 2005

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

CC: [Redacted]

**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 remanded for further consideration.

The petitioner is a cutting service. It seeks to employ the beneficiary permanently in the United States as a sample cutter/cutting machine II<sup>1</sup>. 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 submits 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 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 August 17, 1998. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour or \$20,800 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner failed to submit any evidence of its continuing ability to pay the proffered wage. On November 13, 2002, the director requested evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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 of

---

<sup>1</sup> 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented “by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.” In this case, the person listed on the G-28 is not an authorized representative.

August 17, 1998 and continuing to the present. The director also specifically requested copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California, and to provide all schedules and tables that accompany any submitted tax returns. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that he may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc.

In response, the petitioner submitted complete copies of the owner's 1998 through 2001 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business. The petitioner also submitted copies of its 1998 through the third quarter of 2002 Forms 941, Employer's Quarterly Federal Tax Returns. The 1998 tax return reflected an adjusted gross income of \$55,470, and Schedule C reflected gross receipts of \$260,024, wages paid of \$0, net profit of \$41,446, and cost of labor of \$106,264. The 1999 tax return reflected an adjusted gross income of \$38,735, and Schedule C reflected gross receipts of \$195,263, wages paid of \$0, net profit of \$12,646, and cost of labor of \$93,516. The 2000 tax return reflected an adjusted gross income of \$32,442, and Schedule C reflected gross receipts of \$180,944, wages paid of \$0, net profit of \$29,084, and cost of labor of \$50,569. The 2001 tax return reflected an adjusted gross income of \$26,280, and Schedule C reflected gross receipts of \$121,530, wages paid of \$40,568, net profit of \$30,261, and cost of labor of \$615. The Forms 941 indicated that the beneficiary did not work for the petitioner in 1998 through the third quarter of 2002.

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 July 11, 2003, denied the petition.

On appeal, the petitioner submits evidence of several properties purchased by the petitioner's owner that includes cemetery plots for the owner and his spouse. The petitioner states:

We possess enough capital to make our business grow. We are attaching copies of the properties acquired in which they have been invested considerable quantities. It leaves equity to our favor as the properties have gain value. One of them has been paid in full, where our business is located.

Our Federal Tax Return form 1040 for year 1998 shows an adjusted gross income of \$55,470.00. If we had paid \$20,000 to our future employee, we could have \$35,370.00 for our particular expenses. At this income we add our savings and it is not difficult for a family of six to live comfortable. As we are working family because we don't throw our money in extravagancy.

In 1999 our Federal Tax Return form 1040 show[s] an adjusted gross Income of \$38,735. If we had paid \$20,000 to our future employee, we could have an income of \$17,935.00 to take care of 6 dependents, again we answer that we have a way out in our economy position. That we have enough strength to maintain of our family without counting with our business. To add one more employee to our business is a necessity for our benefit to expand our number of

clients that we can serve. If we stay the way we are operating we are not able to obtain new clients that represent more profit for our business.

Our Federal Tax Return Form 1040 for tax years [sic], 2000 show[s] an adjusted gross income of \$32,442.00 the proffered wage is \$20,000 this would leave us with \$12,442.00 to care of six dependents, again we can explain that we can support the expenses of our families because we have a strong financial position.

Our Federal Tax Return Form 1040 for tax year 2001 show[s] an adjusted gross Income of \$26,280.00 the proffered wage is \$20,000.00. This would leave us with \$6,280.00 to take care of 6 dependents. Again we can explain that we can take care of our financial grows of our families needs, because we have a strong financial position.

As soon [as] we have our new employee we will invest material and machines to expand our business, as he is a person with a great experience and he will help us a lot to make our clients, profits and business grow.

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 did not establish that it employed the beneficiary at a salary equal to or greater than the proffered wage.

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. Contrary to the assertions of counsel, 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 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 (7<sup>th</sup> 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 six in 1998 through 2001. In 1998 through 2001, the sole proprietorship's adjusted gross income was more than the proffered wage. However, as the petitioner failed to provide a statement of monthly expenses for the years 1998 through 2001 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining incomes.

The petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a sample cutter/cutting machine II will significantly increase profits for a cutting service. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 1998 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of its household expenses, other sources of income, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. 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 director's July 11, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.