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U.S. Citizenship
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FEB 10 2005

FILE: [Redacted]
WAC 03 100 54046

Office: CALIFORNIA SERVICE CENTER

Date:

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

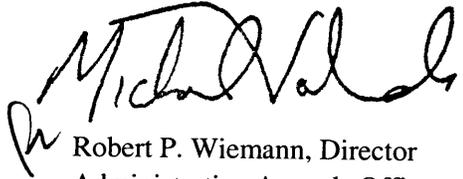
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a graphic design and advertising firm. It seeks to employ the beneficiary permanently in the United States as a computer graphic designer. 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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$2,074 per month, which amounts to \$24,888 per year. The ETA 750B, signed by the beneficiary on March 1, 2001, does not reflect that the petitioner employed the beneficiary at that time.

Part 5 of the petition, filed February 6, 2003, reflects that the petitioner was established in 1992, claims a gross annual income of \$692,546, and currently employs four workers. The petitioner is structured as a sole proprietorship. As evidence of its ability to pay the proffered salary of \$24,888 per year, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. It shows that the sole proprietor filed jointly with his spouse and declared two dependents. He reported an adjusted gross income of -\$70,724 in 2001. This amount includes a net business income of \$10,338 as

reflected on Schedule C, Profit or Loss from Business and on line 12 of page 1 of the tax return. The adjusted gross income also includes a net operating loss carryover reflected as -\$77,434, as shown on line 21 of page 1 of the tax return.

Additionally, the petitioner included a letter, dated October 1, 2002, signed by its owner, indicating that he is confirming that the beneficiary "is employed at our company as a computer graphic designer," and receives a salary of \$2,074 per month. The letter does not state when the beneficiary began working for the petitioner.

The director issued a notice of intent to deny the petition on April 21, 2003. The director noted that the sole proprietor's adjusted gross income of -\$70,724, as reflected on his 2001 individual tax return was not sufficient to cover the certified wage of \$24,888 and did not demonstrate the ability to pay the proffered wage. The director afforded the petitioner an additional thirty days to provide evidence or argument that it had the financial ability to pay the proffered salary.

In response, counsel submitted a partial copy of escrow instructions, dated March 25, 2003, related to the sale of the assets of a business named "Color & Copy," located at [REDACTED] for \$180,000. Counsel also provided a copy of a US Bank statement, dated March 21, 2003, indicating that the petitioner has an available line of credit for \$14,997.64. Counsel's accompanying transmittal letter indicates that these assets represent available resources that could be utilized to generate revenue to pay the proffered wage. Counsel also suggests that the director should not have considered the net loss carryover figure reflected on the sole proprietor's individual income tax return.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on June 13, 2002, denied the petition. The director noted that the petitioner's line of credit and escrow documents from 2003 do not reflect the petitioner's liquidity during the year that is being evaluated. The director concluded that the petitioner's adjusted gross income of -\$70,724, as indicated on the sole proprietor's 2001 tax return, failed to demonstrate the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel resubmits a copy of the sole proprietor's 2001 tax return and asserts that the director should have considered the net operating loss carryover of \$77,434 in calculating the petitioner's adjusted gross income. Counsel also asserts that the petitioning business had sufficient gross income to pay the proffered wage and had paid \$76,974 in wages. Counsel also claims that the depreciation expense should have been added back to the petitioner's income.

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, although the petitioner's owner suggested in a 2002 letter that he was employing the beneficiary at the certified wage, he failed to indicate when this employment commenced and failed to provide any credible documentary evidence of payment of such wages. It is noted that a G-325A, Biographic Information form, signed by the beneficiary and contained in the record, indicates that such employment did not begin until 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing financial

ability to pay the proffered wage beginning at the priority date. The available evidence does not suggest that the petitioner employed the beneficiary prior to 2002.

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, 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). 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. It is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that income. 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. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

With reference to the bank line of credit, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase a petitioner's liabilities and will not improve the overall financial position. Similarly, as noted by the director, CIS will not augment the petitioner's income by adding in a line of credit available through borrowing against a set limit, as it represents the acquisition of debt and a potential liability. It will not be treated as cash or as a cash asset available to pay the proffered wage.

It is also noted that the copy of the escrow document submitted in response to the director's notice of intent to deny appeared to represent the sale of a business with the same name as the petitioner's, although the address given was different. Other than asserting that the funds to be realized from the sale could support future payment of the proffered wage, no further explanation was offered as to whether this transaction would affect the continued viability of the petitioning business. As also explained by the director, this transactional document, dated in 2003, cannot be considered in the evaluation of the petitioner's ability to pay the proffered wage during an earlier period. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. See *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

That said, the AAO agrees with counsel's contention that the net loss carry over from previous years should be factored into the calculation of the petitioner's adjusted gross income as shown on the 2001 individual

federal tax return. A loss claimed in a year other than the year in which it was incurred is a net operating loss (NOL). Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing to pay the proffered wage. Partnerships and S corporations cannot use an NOL, but partners or shareholders can use their separate shares of the partnership's or corporation's business income and deductions to calculate their own net operating losses. The AAO concludes that a similar consideration should also apply when reviewing individual tax returns submitted in support of a sole proprietor's ability to pay the proffered wage. In this case, as indicated on the 2001 individual income tax return, the sole proprietor's adjusted gross income, excluding the net loss carryover of \$77,434, would be \$6,710.

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 evidence indicates that the sole proprietor supports himself and a family of three. In 2001, the sole proprietorship's adjusted gross income (excluding net operating loss carryover) of \$6,710 could not cover the proffered wage of \$24,888, even without consideration of any necessary living expenses. Other than as discussed above, the record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001. It cannot be concluded that the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date of March 26, 2001.

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.