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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 22 2005

EAC 02 184 50175

IN RE: Petitioner:
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:

[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 employment based 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 service station and convenience store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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, counsel submits additional evidence and maintains that the petitioner has established its continuing ability to pay the proffered wage.

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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is $45,000 per year. The ETA 750B, signed by the beneficiary on March 29, 2001, indicates that the petitioner did not employ him at that time. It is noted that the record contains a biographic questionnaire document (Form G-325), signed by the beneficiary in September 2002, indicating that he has been employed by the petitioner since May 2001.

On Part 5 of the visa petition, filed May 6, 2002, the petitioner claims that it was established in 1995, has a gross annual income of approximately two million dollars, a net annual income of about $12,000, and currently employs three workers.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proposed wage offer of $45,000 per year, the petitioner initially submitted a copy of the alien beneficiary's Wage and Tax Statement (W-2) for 2001 and a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000. The beneficiary's W-2 reflects that the sole proprietor paid him $11,118 in wages in 2001. It is unclear whether this represents payment for full-time or part-time employment. The sole proprietor's federal tax return for 2000 shows that he files as a single individual and reported an adjusted gross income of $37,589 in 2000. This included a net business income of $40,016 as shown on line 12 of page 1 of the tax return, representing the cumulative net business income of three businesses. Each net income is reflected on an attached Schedule C, Profit or Loss from Business, line 31. All three Schedule Cs reflects that each business has the same employer identification number. The petitioner's net income was reported as $11,784. "White Ave. Crown" generated a net income of $7,241. "Sully Exxon's" net income was reported as $20,991.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on September 15, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist 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. The director requested that the sole proprietor submit a copy of the 2001 federal tax return. He also informed the petitioner that it should be accompanied by an itemized list of all monthly household expenses for 2001.

In response, the petitioner submitted a copy of the sole proprietor's individual tax return for 2001. It reflects that the sole proprietor declared an adjusted gross income of $47,941. This amount included a cumulative net business income of $51,166. Of this $51,166, $22,167 was generated as net profit by the petitioning business, as shown on Schedule C, line 31. A second Schedule C reflects that Sully Exxon reported a net profit of $30,120. No other Schedule C(s) accompanies the tax return. As the two net profit figures reported for the petitioning business and Sully Exxon do not add up to the combined figure for business net income reflected on page 1 of the income tax return, it is clear that either the third Schedule C was omitted or other calculation errors may be present on this return. The petitioner did not offer a copy of any household expenses with these submissions and did not provide an explanation for its omission.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on April 2, 2003, denied the petition. The director noted that the petitioner had failed to submit a summary of his monthly household expenses for 2001 and concluded that the sole proprietor's 2001 tax return failed to show that his adjusted gross income of $47,941 could cover the $33,882 difference between the wages paid, as reflected on the beneficiary's 2001 W-2, and the offered salary of $45,000, in addition to supporting himself.

On appeal, counsel resubmits a copy of the sole proprietor's individual tax return for 2001 and the alien's 2001 W-2 and further offers a copy of the sole proprietor's individual tax return for 2002, a copy of the alien's 2002 W-2, and copies of bank statement balances for the first three months of 2003. The sole proprietor's individual tax return shows that he declared an adjusted gross income of $54,363, including a business net income of $58,227 representing the cumulative net profit of the petitioner, as well as the sole proprietor's other two service stations.

Counsel also submits a copy of the beneficiary's W-2 for 2002 showing that the petitioner paid him wages of $11,706, or $33,294 less than the proffered wage.

Counsel further provides on appeal a summary of the sole proprietor's estimated monthly household expenses, which are represented as $1,180 per month or $14,160 per year. He also includes a copy of the federal poverty guidelines for 2001. Counsel asserts that they illustrate that the sole proprietor's remaining income after paying the balance of the proffered wage and paying his own expenses exceeds the minimum required for a household of two and supports the petitioner's ability to pay the proffered salary.

The AAO notes here that it will not consider the petitioner's summary of the sole proprietor's household expenses submitted for the first time on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider this evidence submitted for the first time on appeal and will not postulate the sole proprietor's actual household expenses based on the federal poverty guidelines.

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. Wages less than the proposed wage offer will also be given relevant consideration. As noted above, the petitioner paid the beneficiary $11,118 in 2001 and $11,706 in 2002. These amounts represent $33,882 and $33,294 less than the proffered wage of $45,000 in 2001 and 2002, respectively.

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 also 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 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 this case, the copies of three selected bank statements in 2003 provided on appeal are not dispositive of the petitioner's ability to pay the proffered wage in 2001 and 2002 as shown by the federal tax returns and the beneficiary's W-2s relevant to that period. In this matter, the AAO must concur with the director's denial based on the evidence before him. Although it is recognized that the sole proprietor files his tax returns as a single individual, without consideration of any actual household expenses, the shortfall of $33,882, between the wages paid to the beneficiary and the proffered wage of $45,000, represents 70% of the sole proprietor's adjusted gross income in 2001.[1] The 2002 shortfall of $33,294 represents 61% of the sole proprietor's adjusted gross income.

As noted above, the petitioner's previous failure to respond to the director's specific request for a summary household expenses, which was a material line of inquiry relevant to the petitioner's ability to pay the proffered wage, constitutes grounds for denying the petition. In view of the evidence contained in the record, the AAO cannot find that the director erred in denying the petition based on the insufficiency of the evidence submitted to the underlying record and further offered on appeal. Therefore, the petitioner has not established here that it has had the continuing ability to pay the full 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 appeal is dismissed.

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[1] Even if consideration of the 2001 monthly household expenses was allowed into the record, the petitioner's adjusted gross income of $47,941 would not cover the monies needed to pay the sole proprietor's household expenses of $14,160, as well as pay the $33,882 difference between the proffered wage and the actual wages paid to the alien.