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FILE: EAC-02-198-53136 Office: VERMONT SERVICE CENTER

Date: FEB 24 2005

IN RE: Petitioner:  
Beneficiary:



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 private household. It seeks to employ the beneficiary permanently in the United States as a live-in cook. 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.

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 February 16, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually.

The petitioner is a physician whose practice is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedules C, Profit or Loss from Business statements, for 1999, 2000, and 2001.<sup>1</sup>

The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$59,459	\$10,113	\$9,941
Petitioner's gross receipts or sales (Schedule C)	\$169,172	\$198,519	\$182,873
Petitioner's wages paid (Schedule C)	\$33,430	\$44,615	\$47,644
Petitioner's net profit from business (Schedule C)	\$8,590	\$5,327	\$1,692

<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage on the priority date.

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 November 7, 2002, the director requested additional 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. The director specifically requested copies of any W-2 forms issued to the beneficiary, since the beneficiary indicated she was employed by the petitioner from April 2000 to the present on her Form ETA-750B. Additionally, the director requested the petitioner's 2001 household expenses and pointed out that the sole proprietor's adjusted gross income appeared insufficient to pay the proffered wage.

In response, the petitioner submitted a letter from the sole proprietor stating that he receives funds as social security benefit and income from the sole proprietorship, and that he has no debt for a home or car as they are paid in full. Additionally, the sole proprietorship states that he has not "[personally hired]" the beneficiary since she does not have a properly issued employment authorization document and thus the sole proprietor was not complying with "any government regulations regarding the process of hiring an alien worker" until that time.

A copy of correspondence from the Social Security Administration was submitted reflecting that the sole proprietor received \$1,287 on January 8, 2003. Additionally, the sole proprietor provided a list of household expenses that included groceries, home insurance, utilities, property taxes, and miscellaneous, that totaled \$17,541 per year<sup>2</sup>.

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 April 15, 2003, denied the petition. The director noted that the petitioner failed to provide evidence of wages actually paid to the beneficiary.

On appeal, counsel submits a compiled, but not audited, Statement of Financial Condition, dated April 30, 2003, prepared by Clark & Anderson, P.C., certified public accountants, and asserts that although the petitioner has retired from his medical practice, he still retains a need for a live-in cook. The financial statement indicates that the petitioner has four automobiles, a personal residence, office building, commercial store, cash in a checking account, pension plan assets, and a loan owed to him. The financial statement also indicates that the petitioner has liabilities including a note payable to his pension plan and an amount remaining on a mortgage.

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. The petitioner has not established that it has previously employed the beneficiary, despite the beneficiary's attestation on the Form ETA-750B that she has been employed by the petitioner.

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

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<sup>2</sup> The expenses sheet submitted in response to the director's request for evidence states that these are monthly figures; the AAO believes this is a clerical error and that \$17,541 is the sole proprietor's annual expenses.

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the financial statement submitted on appeal is not credible and probative evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal capacity, but has retired at some time. 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 supports a family of one. In 2001, the sole proprietorship's adjusted gross income of \$9,941 is less than the annual proffered wage of \$24,960. The petitioner's annual expenses are \$17,541. It is thus impossible for the sole proprietor to support himself on negative numbers, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and further reduce that by his expenses.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001. While the unaudited financial statement lists potentially substantial assets owned by the petitioner, he has not provided evidence of ownership aside from the incompetent evidence submitted on appeal. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).<sup>3</sup> It is also noted that many of the petitioner's assets listed on the unaudited financial

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<sup>3</sup> Additionally, the AAO notes that a mortgage is listed as a liability on the unaudited financial statement provided on appeal. The petitioner previously stated that he did not have a mortgage. If the mortgage pertains to his home, this is an inconsistent statement. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)

statement, such as real estate and automobiles, are not the type of liquefiable assets typically used to pay wages to household employees.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the 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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states: "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." Any additional proceedings in this matter will need to address that issue.