



U.S. Citizenship  
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FILE: [REDACTED]  
WAC 03 113 50248

Office: CALIFORNIA SERVICE CENTER

Date: JAN 25 2005

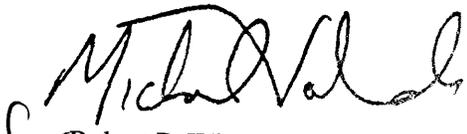
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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: 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.

  
for 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 engages in furniture refinishing and retail sales. It seeks to employ the beneficiary permanently in the United States as a furniture refinisher. 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 asserts the beneficiary's skills are needed by the business and would increase the petitioner's revenue.

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 July 15, 1999. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002. It shows that the sole proprietor files as a single person and reported adjusted gross income of \$37,687, including business income of \$45,123.

The director issued a notice of intent to deny on April 21, 2003. The director noted that the evidence did not support the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the visa classification sought. The director gave the petitioner an additional thirty days to provide further evidence. The director also requested various tax documentation covering 1999 through 2002, as well as a list of monthly household expenses from the petitioner if it were relying on personal assets.

In response, the petitioner submitted copies of the petitioner's seller's permit and city tax registration certificate. The petitioner also provided copies of the sole proprietor's 1999, 2000, and 2001 individual tax returns, but did not offer a summary of household expenses.

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

	1999	2000	2001
Proprietor's adjusted gross income (Form 1040)	-\$ 4,924	-\$ 4,679	-\$ 4,248
Petitioner's gross receipts or sales (Schedule C)	\$47,03	\$50,838	\$43,811
Petitioner's wages paid (Schedule C)	-0-	-0-	-0-
Petitioner's net profit from business (Schedule C)	\$ 285	\$ 245	\$ 431

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 6, 2003, denied the petition.

On appeal, the petitioner and sole proprietor states that the alien beneficiary is her brother. She further states that he is an experienced furniture refinisher and would enable the business to increase sales. She is sure that she would be able to pay the proffered wage.

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. In the instant case, the record does not indicate that the petitioner has not established that it has previously employed the beneficiary.

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 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, in three out of the four relevant years, the sole proprietor reported losses as her adjusted gross income. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date. The priority date in this case is July 15, 1999. The losses reflected on the sole proprietor's tax returns for 1999, 2000, and 2001, do not suggest it was probable that the sole proprietor could pay the proffered wage as well as support herself for an entire year. Nor does the 2002 return establish that it would be probable that the sole proprietor could support herself on the \$6,487 remaining after deducting the proffered salary of \$31,200, which represents 83% of her adjusted gross income that year. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in any of the pertinent years.

The petitioner asserts that the beneficiary will increase the petitioner's business but no detail or documentation has been provided to explain how the beneficiary's employment as a furniture refinisher will significantly increase net profits for the petitioner. Her hypothesis cannot be concluded to outweigh the evidence presented in the federal tax returns and cannot be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. 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).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the relevant period. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), which involved whether the alien beneficiary had an interest in the petitioning business, the commissioner noted that if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Although this appeal has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.

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.