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U.S. Citizenship
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BC

FILE: WAC 02 174 52735 Office: CALIFORNIA SERVICE CENTER

Date: JUL 21 2004

IN RE: Petitioner:
Beneficiary:



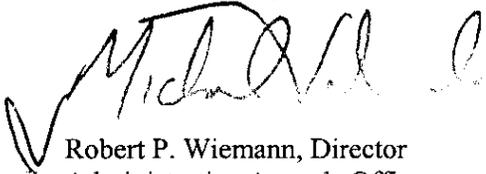
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a tile installation business. It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief and 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$25.77 per hour (\$53,601.60 per year)¹. The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for 2000, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on, July 22, 2002 requested evidence pertinent to that issue.

¹ Yearly rate calculated upon 2080 hours/year.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 either in the form of copies of annual reports, federal tax returns (with appropriate signature(s)), or audited financial statements.

The petitioner is requested to provide evidence from 2000, to 2001....

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1040 tax returns for year 2001.

The tax returns² submitted or previously submitted, demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$53,601.60 per year from the priority date.

- In 2001, the Form 1040 stated adjusted gross taxable income³ of \$24,884.00.
- In 2000, the Form 1040 stated adjusted gross taxable income of \$26,851.00.

The director denied the petition on March 31, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"The Director erred when he determined that the petitioner did not meet the burden of demonstrations that it could pay the wage offered the beneficiary."

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. In addition, they 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).

² Examining the two Form 1040 U.S. Income Tax Returns submitted by petitioner, Schedule C found in each of those returns indicates a business profit² of \$26,776.00 in 2001, and, in 2000 a business profit of \$29,148.00.

³ Form 1040, line 33. (Counsel in his brief asserts that Schedule C should be examined for the ability to pay the proffered wage, not Form 1040. Since from a review of petitioner's tax return, his business revenue was his sole source of income, but for the self-employment tax deduction, his business income was the amount reported as his adjusted gross income. Gross sales or income do not determine the ability to pay the proffered wage.)

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 four. In 2001, the sole proprietorship's adjusted gross income of \$24,884.00 does not equal the proffered wage of \$53,601.60 per year. It is improbable that the sole proprietor could support himself and his family for an entire year, after paying the amount required to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. There was no evidence submitted that the petitioner employed the beneficiary.

Counsel made no other assertions not examined herein.

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.