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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 21 2005
WAC 03 068 53522

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:

[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 service center director denied the employment-based visa petition. The director rejected the subsequent appeal because the beneficiary signed the G-28, and pursuant to 8 C.F.R. 103.3(a)(1)(iii)(B), the beneficiary does not have legal standing in the proceeding. The petitioner then submitted a motion to reopen the petition with a new G-28 signed by the petitioner and with an explanation of why the original G-28 was not signed by the petitioner. The petitioner also submits new evidence with regard to the petitioner's employment of the beneficiary. The motion to reopen is now before the Administrative Appeals Office (AAO). The motion to reopen will be granted. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is an auto and tire service company. It seeks to employ the beneficiary permanently in the United States as a fuel injection mechanic. 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.

In the initial appeal, counsel submitted a statement with regard to the petitioner's ownership of two businesses and the respective business income for each business. Counsel also submitted the first page of the petitioner's Form 1040 for 2000, with two Schedules C; the first two pages of the petitioner's 2001 Form 1040, along with two Schedules C; the first two pages of the petitioner's 2002 Form 1040, with two Schedules C; and a statement of Income and Expense for the petitioner that examined the years 2000 to 2002. The petitioner also submitted IRS Form 941 Employer's Quarterly Federal Tax Return, for 2001. As stated previously, the director rejected this appeal because the beneficiary, who is not a party with standing in the matter, signed the G-28. Although the director was correct in his rejection of the appeal, on motion to reopen, the petitioner submitted a new G-28, signed by himself and a new attorney of record. In addition, the petitioner submits new documentation with regard to the beneficiary's wages while employed by the petitioner.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted new documentation with regard to wages paid to the beneficiary in the period of time in which the petitioner has to establish its ability to pay the proffered wage. This evidence is viewed as sufficient to reopen the proceedings.¹

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.

¹ Counsel's and the petitioner's assertions with regard to the misleading advice of the previous attorney is not viewed as persuasive or as new information with regard to reopening the petition. In addition, the petitioner did not meet the criteria outlined in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), for ineffectiveness assistance of previous counsel as grounds for granting the motion to reopen. In addition, the record also reflects that only the beneficiary signed the initial G-28 for the I-140 petition.

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 June 12, 2000. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour, which amounts to \$38,188 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in 1991, has five employees, and a gross annual income of \$898,430. With the petition, the petitioner submitted a letter of support from the petitioner as to the beneficiary's position, and a certificate of employment from the beneficiary's previous employer.

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 February 28, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns for 2000, 2001, and 2002, with all appropriate forms, required schedules and statements. In response, counsel submitted the petitioner's signed Forms 1040 for 2000, 2001, and 2002, with corresponding Schedules C.

The director determined that the evidence submitted did not establish that the petitioner as a sole proprietor had the continuing ability to pay the proffered wage beginning on the priority date, based on the petitioner's adjusted gross income for the years 2000, 2001, and 2002. The director stated that it is not appear reasonable to assume that the petitioner's household of one person could live off the available funds after paying the beneficiary's proffered wage.

On appeal, counsel states that the petitioner does have sufficient funds to pay the offered wage from the priority date onward. Counsel points out that the business income described on line 12, of the petitioner's Form 1040 is the combination of two businesses: namely, [REDACTED] and [REDACTED] of Huntington Beach (MRI), that operate independently of each other. Counsel states that to determine whether the petitioner is able to support itself and additional employees, the financial condition of TC Auto must be examined separately from that of MRI. Counsel provides the following sums of business income for TC Auto taken from line 31, Schedule C for the years 2000, 2001, and 2002: \$52,229, \$88,989, and \$36,858. Counsel also states that if the depreciation expense, which he stated was not a cash expenditure, were to be not included in the petitioner's calculations, the cash available for operations would be the following: in 2000, \$85,481; in 2001, \$116,096; and in 2002, \$51,905. Counsel also notes that the petitioner paid substantial costs of labor in all three years, and that it provided health insurance to its employees.

In the subsequent motion to reopen, new counsel submits some of the same documentation as submitted by the previous counsel, with explanations as to the business incomes of both businesses owned by the petitioner. In addition, counsel submits Forms 1099-MISC for two employees in 2002. According to this documentation, the beneficiary earned \$34,629. A second Form 1099-MISC for 2001 indicates that the beneficiary earned \$33,971.04, and a third Form 1099-MISC for 2000 states that the beneficiary earned \$30,842.86. The new attorney of record states on a page entitled 1999 financial information for [REDACTED] that in 1999, [REDACTED] owned [REDACTED], and that in 2000, [REDACTED] purchased the company. Counsel submits Mr. [REDACTED] Form 1040 for 1999 and states that with the combined net income and net cash from operations or depreciation of \$45,349, the petitioner in 1999 had \$61,940 in available cash to hire additional personnel to expand the business. Counsel states that the beneficiary in 1999 earned \$30,271.36. Counsel also submits the payroll register for the beneficiary dated January 1, 1999 to December 1999 that indicated the beneficiary earned \$30,271.36.

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. On the Form ETA 750 and a subsequent amendment of it, the petitioner stated that the beneficiary had been unemployed since January 2000. The Form ETA 750 was dated January 27, 2000. A subsequent correction that the petitioner sent to the Department of Labor stated that the beneficiary had been unemployed since 1997. Although the petitioner did not explicitly state anywhere in the record when it employed the beneficiary in 2000, the Forms 1099-MISC add considerable evidentiary weight, and in some years, are further substantiated by the petitioner's payroll register. Although the petitioner provided documentation as to the beneficiary's 1999 wages, the priority date for the petition is April 12, 2000. Therefore the AAO does not view the 1999 documents as dispositive in these proceedings.²

According to the documents submitted on appeal, the beneficiary earned \$30,842 in 2000, \$33,971 in 2001, and \$34,629.68 in 2002. As previously stated, the proffered wage is \$38,188. Although the petitioner did not pay the complete proffered wage as of the priority date to the present time, it did pay a substantial part of the proffered wage. Accordingly the beneficiary's wages were \$7,346 less than the proffered wage in 2000, \$4,217 less than the proffered wage in 2001, and \$3,559 less than the proffered wage in 2002. Although the petitioner established that it employed the beneficiary from the year 2000 to the present, it did not establish that it paid the full proffered wage from the priority date to the present.

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).

² In addition, these documents further confuse the record as to when the petitioner actually hired the beneficiary. The ETA Form 750 does not reflect that the petitioner employed the beneficiary in 1999.

The petitioner submitted its 2000, 2001, and 2002 federal income tax returns. With regard to the petitioner's federal income tax returns the petitioner filed as single and listed no dependents. The petitioner's Schedules C for TC Auto for 2000, 2001, and 2002 reflect the following information:

	2000	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ -14,713	\$ 12,153	\$ -\$2,630
Petitioner's gross receipts or sales (Schedule C)	\$ 831,359	\$ 898,528	\$ 949,726
Petitioner's wages paid (Schedule C)	\$ 179,094	\$ 199,750	\$ 228,831
Petitioner's net profit from business (Schedule C)	\$ 52,229	\$ 88,989	\$ 36,858

With regard to the petitioner's second business, Management Recruiters of Huntington Beach, the Schedules C for 2000, 2001 and 2002 reflect the following information:

	2000	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ -14,713	\$ 12,153	\$ -\$2,630
Petitioner's gross receipts or sales (Schedule C)	\$ 6,950	\$ 46,250	\$ 63,921
Petitioner's wages paid (Schedule C)	\$ 11,269	\$ 23,296	\$ 0
Petitioner's net profit from business (Schedule C)	\$ -67,727	\$ -83,436	\$ -60,466

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$38,188 in 2000, 2001, and 2002. With regard to the sole proprietor's adjusted gross income in 2001, the petitioner appears to have sufficient combined adjusted gross income to pay the difference between the actual wage and the proffered wage, namely, \$4,217. However, the petitioner's adjusted gross incomes in 2000 and 2002, which is a combination of the receipts and expenses for both of the petitioner's companies, are not sufficient to pay the difference between the actual wages and the proffered wage, namely, \$7,346 in 2000, and \$3,559 in 2002.

In addition, 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. Contrary to counsel's assertion, the assets of both the businesses owned by the sole proprietor in the instant petition are examined in this proceeding. The AAO examines all the assets of the sole proprietor in its analysis of the petitioner's ability to pay the proffered wage, not simply the business which exhibits greater financial resources. 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 sole proprietor supports herself. In 2001, the sole proprietorship's adjusted gross income of \$12,153, minus the difference between the actual wages paid to the beneficiary and the proffered wage of \$38,188, or \$4,217, would leave \$7,936 for the petitioner's annual expenses. This office finds that such an amount is insufficient to support one individual. With regard to the years 2000 and 2002, although counsel states that the petitioner's businesses operate separately, the Form 1040 combines the assets and liabilities of both companies on the front page of Form 1040. As stated previously, these combined figures indicate negative adjusted gross incomes, which cannot support both the difference between the beneficiary's actual wages and the proffered wage, and the petitioner's annual household expenses. Therefore the petitioner has not established that it had the ability to pay the beneficiary the proffered wage as of the priority date and to the present time.

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 its burden. The AAO concurs with the director's decision. The appeal is dismissed. The petition is denied.

ORDER: The appeal is dismissed. The petition is denied.