

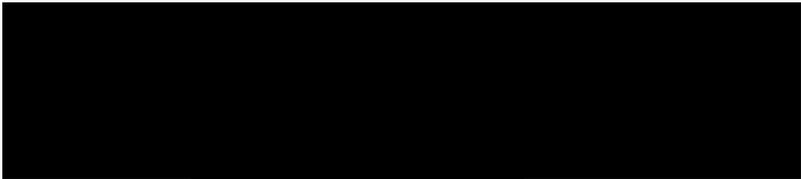
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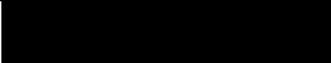
U.S. Citizenship
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Office: CALIFORNIA SERVICE CENTER

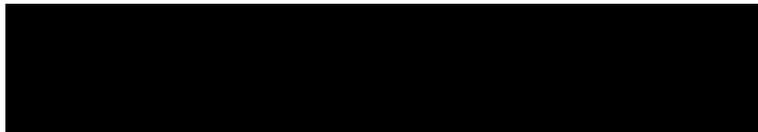
Date: JUN 28 2005

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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 sustained.

The petitioner is a construction management business. It seeks to employ the beneficiary permanently in the United States as a civil engineer. 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 the beneficiary met the experience requirements as stated on the Form ETA 750. The director also determined that the petitioner had not established its continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

On appeal, 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is July 17, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education 4 Yrs	College Degree Required Bachelor's or equivalent	Major Field of Study Civil Engineering
Experience Job Offered 5Yrs.	Related Occupation 0 Yrs.	

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of civil engineer must have a bachelor's degree in civil engineering and five years of experience as a civil engineer.

With the initial petition, the petitioner failed to submit any evidence of its ability to pay the proffered wage, but did provide sufficient evidence of the beneficiary's bachelor's degree. However, the director found that the evidence submitted as proof of the beneficiary's experience was inadequate to show the five years of experience required by the labor certification. On January 28, 2003, May 6, 2003, and September 2, 2003, the director requested evidence that the beneficiary met the five-year experience required by the labor certification before the date of filing the petition, July 17, 2001. The petitioner was informed that evidence of prior experience should be submitted in letterform on the employer's letterhead showing the name and title of the person verifying the information. The verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours. The director also requested evidence pertinent to the petitioner's ability to pay the proffered wage. The director informed the petitioner that the evidence should be in the form of copies of annual reports, signed and certified federal tax returns, or audited financial statements. The director specifically requested that the petitioner provide the documentation for the years 2001 and 2002. The director also requested copies of the petitioner's California Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California to include the names, social security numbers and number of weeks worked for all employees. The director further requested copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements.

In response, the petitioner, through counsel, submitted a copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of Forms DE-6 for 2002 and the first two quarters of 2003, copies of the beneficiary's 2001 and 2002 Forms 1099 (two forms), Miscellaneous Income, a copy of the beneficiary's 2002 Form W-2, a copy of the petitioner's Business Registration Certificate, and letters of the beneficiary's experience from the petitioner, [REDACTED] Corporation, [REDACTED] Corporation, [REDACTED] Indonesia, [REDACTED] Corporation, [REDACTED] Joint Operations Group and counsel stating that one of the beneficiary's prior employers, [REDACTED] Proponents, Inc., had been out of business since 1997, and, therefore, it is not possible for [REDACTED] to obtain an employment certification from them. The owner's 2001 Form 1040 reflected an adjusted gross income of \$260,812, and Schedule C reflected gross receipts of \$911,602, wages paid of \$353,237, and a net profit of

\$199,432. The petitioner's 2002 Form 1120S reflected an ordinary income of -\$18,460 and net current assets of \$14,971. The beneficiary's 2001 Form 1099 reflected wages earned of \$54,283.20. The beneficiary's 2002 Form 1099 from the petitioning entity reflected wages earned of \$9,956.22, and the beneficiary's Form 1099 from the petitioner's owner reflected wages earned of \$9,910.56. The beneficiary's 2002 Form W-2 reflected wages earned of \$29,942.44. The Forms DE-6 showed that the petitioner employed the beneficiary from the 2nd quarter of 2002 through the 2nd quarter of 2003.

The director determined that the evidence submitted did not establish that the beneficiary met the experience required by the labor certification and that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition on November 19, 2003. The director pointed out that the letters from the beneficiary's prior employers did not list the beneficiary's duties and that the letters failed to state the number of hours worked per week by the beneficiary. The director also stated that the beneficiary's 2002 Form 1099 for \$9,910.56 was unacceptable as proof of the petitioner's ability to pay the proffered wage as it was from the owner of the company and not the petitioner itself.

On appeal, the petitioner submits new letters from the beneficiary's prior employers and a copy of the petitioner's owner's 2002 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The 2002 Form 1040 reflects an adjusted gross income of \$226,942, and Schedule C reflects gross receipts of \$227,618, wages paid of \$117,668, and a net profit of \$56,429. The new letter of employment from [REDACTED] Indonesia lists the beneficiary's duties and states that the beneficiary was employed as a Building Engineer/Estimating Engineer from November 28, 1994 to December 27, 1996 (two years and one month). The letter from [REDACTED] and [REDACTED] Inc. lists the beneficiary's duties and states that the beneficiary was employed as an Estimator/Project Controls Engineer from July 1992 to October 1994 (two years three months). The new letter from [REDACTED] Corporation lists the beneficiary's duties and states that the beneficiary was employed in various engineer positions from February 1987 to May 1992 (five years and three months). Counsel states:

1. Employer has the ability to pay wages as shown on Schedule C of employer's individual tax returns for 2001 & 2002, and corporate tax return for 2002 (Form 1120S).
2. Beneficiary had sufficiently proven his qualifications and experience as a civil engineer.

The first issue to be discussed is whether the beneficiary met the experience requirements as listed on the labor certification.

The more detailed experience letters submitted by the beneficiary's prior employers on appeal clearly show that the beneficiary had obtained the experience required by the labor certification, namely from February 1987 to December 1996 for a total of approximately nine years and ten months. Thus, in compliance with the regulation at 8 C.F.R. § 204.5(l)(3), the petitioner has established that the beneficiary met the experience requirements of the labor certification before the priority date, July 17, 2001.

The second issue in the proceeding is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on July 17, 2001. The proffered salary as stated on the labor certification is \$70,761.60 per year.

The petitioner operated as a sole proprietorship in 2001 and in January and February of 2002. On February 21, 2002, the petitioner incorporated as an S Corporation.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 and 2002 at a salary equal to or greater than the proffered wage. The beneficiary earned wages of \$54,283.20 in 2001 and \$49,809.22 in 2002 (\$39,898.66 from the corporation and \$9,910.56 from the petitioner's owner = \$49,809.22).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the

proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2002 (Form 1120S) were \$14,971. The petitioner could not have paid the proffered wage in 2002 from its net current assets.

In 2001 and in January and February of 2002, the petitioner was structured as 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 the instant case, the sole proprietor supported a family of five. In 2001, the petitioner's adjusted gross income was \$260,812. In 2001, the beneficiary earned \$54,283.20. Therefore, the petitioner would have needed \$16,478.40 to pay the salary of \$70,761.60 in 2001. The petitioner has established its ability to pay the wage in 2001 (\$260,812 - \$16,478.40 = \$244,333.60). The petitioner had a total of \$244,333.60 left to cover the owner's expenses and to support a family of five.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In 2002, the petitioner's adjusted gross income was \$226,942. In 2002, the beneficiary earned \$49,809.22² (\$39,898.66 from the corporation and \$9,910.56 from the petitioner's owner = \$49,809.22). Since the petitioner was a sole proprietorship for only fifty-one days of 2002, the AAO will only consider fifty-one days of the petitioner's adjusted gross income or \$31,709.71 ($\$226,942 / 365 = \$31,709.71$). The proffered wage is \$70,761.60, and if the wage is divided by 365 days, the result is \$9,887.24 that the beneficiary should have been paid during those fifty-one days. The beneficiary was actually paid \$9,910.56 by the petitioner's owner or \$23.32 more than the proffered wage for those fifty-one days. The petitioner was an S corporation for 314 days in 2002, and the beneficiary should have been paid a salary of \$60,874.36 for those 314 days. The petitioner's 2002 Form 1120S showed an ordinary income of -\$18,460; therefore, the petitioner would have needed \$79,334.36 to pay the proffered wage. The corporation paid the beneficiary \$39,898.66 in 2002. The 2002 Form 1120S showed net current assets of \$14,971, and when that amount is added to the amount paid to the beneficiary, the result is \$54,869.66 or \$24,464.70 less than the \$79,334.36 needed to pay the proffered wage. However, the petitioner has a sole shareholder who took \$96,492 as compensation of officers in 2002. The amount needed to pay the proffered wage is \$24,464.70 or approximately 25% (1/4) of the amount of officer compensation. The sole shareholder has shown that he possesses other means of income besides the petitioner and that the amount taken, as compensation of officers is discretionary.

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 met that burden.

ORDER: The appeal is sustained.

² The AAO is not in agreement with the director that the wages earned of \$9,910.56 could not be included as proof of the petitioner's ability to pay the proffered wages simply because the Form 1099 shows the employer as the owner and not the business. The petitioner was structured as a sole proprietorship in January and February of 2002, and the address listed on the Form 1099 is the same as the business and not the home address of the owner.