

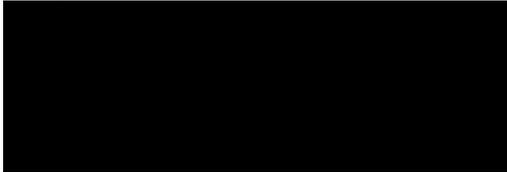
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 198 51053 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2005**

IN RE: Petitioner:
Beneficiary:

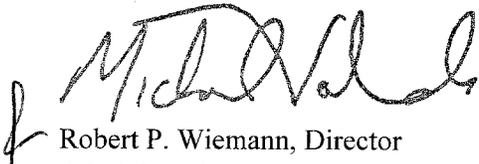


PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a photography laboratory. It seeks to employ the beneficiary permanently in the United States as a photograph retoucher. 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.

A Form G-28, Entry of Appearance, was filed in this matter. On that form the petitioner consents to be represented, and consents to disclosure to the ostensible representative, in "any and all matters before EDD and DOL re labor certification." The petitioner did not consent to be represented in this matter. Further, on that form, the petitioner's ostensible representative does not indicate that he is an attorney or that he is an accredited representative. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

On appeal, the petitioner submits a statement 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 granting 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 April 23, 1998. The proffered wage as stated on the Form ETA 750 is \$11.41 per hour, which equals \$23,732.80 per year.

On the petition, the petitioner declined to state the date upon which it was established and declined to state the number of workers it employs. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in La Crescenta, California.

In support of the petition, the petitioner submitted a copy of the joint 2001 Form 1040 U.S. Individual Income Tax Return of its owner and the owner's spouse. A Schedule C attached to that return shows that the petitioner is a sole proprietorship and that during 2001 it returned a profit of \$27,875. The Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$28,790, including the petitioner's profit.

Because 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 September 9, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted copies of its owner's 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns. The petitioner did not submit a copy of its owner's 2001 return and did not explain its absence.

The Schedule C attached to the 1998 return shows that the petitioner earned a profit of \$16,809 during that year. The 1998 tax return shows that the petitioner's owner and owner's spouse had five dependents during that year and declared adjusted gross income of \$15,621, including the petitioner's profit offset by deductions.

The Schedule C attached to the 1999 return shows that the petitioner earned a profit of \$34,419 during that year. The 1999 tax return shows that the petitioner's owner and owner's spouse had three dependents during that year and declared adjusted gross income of \$32,916, including the petitioner's profit offset by deductions.

The Schedule C attached to the 2000 return shows that the petitioner earned a profit of \$25,710 during that year. The 2000 tax return shows that the petitioner's owner and owner's spouse had three dependents during that year and declared adjusted gross income of \$23,893, including the petitioner's profit offset by deductions.

On November 16, 2002 the California Service Center issued another Request for Evidence in this matter. The Service Center reiterated its request for copies of annual reports, federal tax returns, or audited financial statements showing the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner also requested copies of W-2 Wage and Tax Statements showing amounts the petitioner paid to the beneficiary since the priority date.

In response, the petitioner submitted a statement, dated December 2, 2002, from its owner. The petitioner's owner stated that it had no employees and that the beneficiary was not then in the United States. The petitioner also submitted a copy of its owner's 2001 Form 1040 U.S. Individual Income Tax Return. The Schedule C attached to that return shows that the petitioner earned a profit of \$27,875. The Form 1040 shows that the petitioner's owner and owner's spouse had three dependents and declared adjusted gross income of \$28,790 during that year, including the petitioner's profit.

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 May 28, 2003, denied the petition.

On appeal, the petitioner states,

Once the beneficiary comes, the job will increase five folds. [sic] We have been waiting for her expertise, before we can expand our production line. We currently have pending contracts with schools and other business [sic] that we need to complete. However, we are waiting for [REDACTED] arrival. Please reconsider this petition. We can afford to pay her full salary without any question.

In support of the appeal, the petitioner submitted copies of contracts between it and various schools.

The contracts submitted demonstrate that the petitioner conducts photo shoots at schools, preschools, and other institutions. Those contracts do not support the petitioner's assertion that hiring the petitioner would increase its business, thus enabling it to pay the proffered wage out of its increased revenue. The record contains no evidence to support that proposition.

Masonry Masters, Inc. v. Thornburgh, 875 F.2d 898 (D.C. Cir. 1989) urges that the ability of the beneficiary in that case to generate income for the petitioner should be considered.¹ It appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Although that decision urges the Service to consider the income that the beneficiary would generate, it does not urge the Service to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence the Service will make no such assumption.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 petitioner did not establish that it employed and paid 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had

¹ That portion of the decision in *Masonry Masters* is clearly dictum, however, as the decision was based on other grounds.

properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally an entity separate from its owner. Therefore the sole proprietor's income and assets are properly included in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their business on their individual (Form 1040) Federal tax return each year. The business-related income and expenses are reported on the Schedule C and the profit or loss carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents on the amount remaining. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982, *aff'd* 703 F2d 571 (7th Cir. 1983).

In *Ubeda* 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 additional dependents on a gross income of slightly more than \$20,000 where the proffered wage was \$6,000 or approximately 30% of the petitioner's gross income.

The proffered wage is \$23,732.80 per year. The priority date is April 23, 1998.

During 1998 the petitioner's owner declared adjusted gross income of \$15,621. That amount is insufficient to pay the proffered wage. The petitioner did not provide evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income of \$32,916. That amount is greater than the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, however, he would have been left with the difference of \$9,183.20. To expect that the petitioner's owner could have supported his family of five during that year on that amount is unreasonable. The petitioner submitted no evidence to demonstrate that it or its owner had any other funds available during that year with which to pay wages. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of \$25,710. That amount is greater than the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, however, he would have been left with the difference of \$1,977.20. To expect that the petitioner's owner could have supported his family of five during that year on that amount is unreasonable. The petitioner submitted no evidence to demonstrate that it or its owner had any other funds available during that year with which to pay wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income of \$27,875. That amount is greater than the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, however, he would have been left with the difference of \$4,142.20. To expect that the petitioner's owner could have supported his family of five during that year on that remaining amount is unreasonable. The petitioner submitted no evidence to demonstrate that it or its owner had any other funds available during that

year with which to pay wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, or 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.