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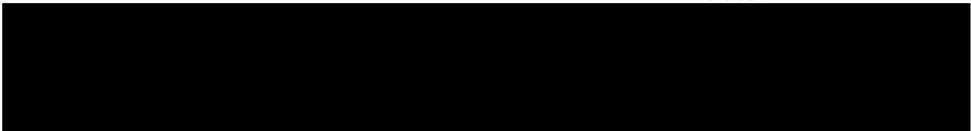
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MAR 08 2005



FILE: WAC 02 242 51030 Office: CALIFORNIA SERVICE CENTER Date:

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 service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states that it is a garment wholesaler. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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. It is noted that although the petitioner submitted a letter to CIS stating that Legal Solution Group, Inc. would represent the petitioner in the process of the I-140 petition, there is no G-28 in the file that identifies any individual in this business entity as an attorney of record, or an accredited representative recognized by the Bureau of Immigrations Appeals or the AAO. Therefore, the petition is viewed as self-represented.

On appeal, the petitioner states that he is able to pay the beneficiary for her work based on his gross sales, and that the beneficiary's husband brings in extra income. The petitioner submits additional documentation.

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 6, 1998. The proffered wage as stated on the Form ETA 750 is \$12.44 per hour, which amounts to \$25,875 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in February of 1998, has a gross annual income of \$95,000, and that it has two employees. With the petition, the petitioner submitted net income statements for the years 1998 to 2001.

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 October 22, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 business payroll summary, with W-2 forms, showing wages paid to all employees. The director also requested state of California Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters. Finally the director stated that the Form ETA 750 claimed that the beneficiary had been working for the

petitioner since 1996, and he requested evidence of this employment, such as pay stubs or the beneficiary's W-2 forms (official IRS printout only) or the DE-6 Quarterly Wage Reports.

In response, the petitioner submitted copies of Forms 941 and DE-7 for the year 2001. The petitioner indicated that he had just compiled these forms and would make payment to the IRS and to the state of California. The petitioner acknowledged that he did not properly file the paperwork in the past and was willing to correct this oversight. The petitioner also stated that the beneficiary had worked for him on a part-time basis in the past and that, due to the small amount of her wages, he paid her in cash. For the years 1996 to 2000, the petitioner submitted IRS Form 1099 that identified the total wages earned by the beneficiary. The petitioner submitted an unsigned and undated Form 941 for the quarter ending on December 31, 2001. With regard to the Form 1099s submitted by the petitioner, they reflect the following wages: \$2,400 in 1996; \$2,400 in 1997; \$3,000 in 1998; \$3,600 in 1999, and \$3,800 in 2000.

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 10, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. In particular, the director requested that the petitioner submit signed and certified copies of its federal income tax returns, with accompanying statements and schedules, for the year 1998, 1999, 2000, 2001, and 2002.¹

In response, the petitioner submitted its federal income tax returns for 1998 through 2002, with accompanying schedules and statements.

On June 27, 2003, the director issued a third request for further evidence. The director specifically requested the State of California Form DE-6, Quarterly report for the last four quarters and also the identification of each employee listed on the form as to job title and duties. The director also requested Form W-3 Transmittal of Wage and Tax Statement evidencing wages paid to employees from 1998 to 2002; copies of the petitioner's valid business licenses; and the beneficiary's W-2 forms from 1998 to 2002. The director also noted that [REDACTED] of [REDACTED] Inc. claimed to be an authorized representative of the petitioner. The director stated that it had no record of this organization's recognition by the Bureau of Immigration Appeals (BIA) to serve as an authorized representative. The director requested [REDACTED] submit a copy of the letter granting such authorization if he wished to represent the petitioner or beneficiary.

On September 15, 2003, the petitioner submitted an unsigned, undated, Form DE-7 for 2001 and 2002; Form 941 for the quarter ending in December 2002 and 940 EZ for the year 2002; and also described the job title and duties of the beneficiary's duties. With regard to a payroll summary, the petitioner stated that from 1998 to 2000 the beneficiary was paid in cash that was reported on Form 1099. The petitioner submitted a copy of its seller's permit, its business license initially filed in 1997, a copy of the beneficiary's California ID, and a letter from the petitioner that authorized [REDACTED], Inc. to represent its I-140 petition. In addition, the petitioner submitted the beneficiary's IRS 1040 federal income tax return for 2002, with a reported income of \$3,800 and her 1040 federal income tax return for 2001, with a reported income of \$5,000.

On September 29, 2003, the director denied the petition. The director stated that the petitioner submitted its Form 1040 federal income tax returns for the years 1996 to 2002, all of which included Schedule C Profit or

¹ The director also appears to have requested audited financial statements from 1996 to the present; however, since the priority date is 1998, the audited financial statements from 1996 and 1997 would not have been dispositive.

Loss from Business.² The director examined the adjusted gross income figures in the petitioner's tax returns from 1998 to 2002, and determined that the petitioner's adjusted gross income in each year was less than the proffered wage of \$25,875. Thus, the director determined that the petitioner had not established the capability to pay the proffered wage as of the priority date and onward.³ The director also stated that based on the gross income figures, it was not reasonable to assume that the petitioner's household of five persons could live off the amount of income remaining after the beneficiary's proffered wage had been subtracted. The director stated that any income that the petitioner earned must first be applied toward the maintenance of his or her own cost of living, and that any remaining funds could then be used to pay the beneficiary's wage.

On appeal, the petitioner states that the weekly wages listed on its petition are incorrect based upon the tax returns it filed. The petitioner provides no further explanation of the relationship between the income tax returns, and the weekly wage indicated on the I-140 petition. The petitioner also stated that the beneficiary is married and has a husband who works full-time as a truck driver to supplement their income. The petitioner states that his gross sales from 2000 to year 2002 ranges from \$380,000 to \$660,000. The petitioner states that this is enough to cover the beneficiary's wage. The petitioner also states that when he prepared his income tax return, he did not make a separate line for the beneficiary's wages, but included the beneficiary's wage in the cost of goods sold.

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

	1998	1999	2000
Proprietor's adjusted gross income (Form 1040)	\$ 9,871	\$ 9,983	\$ 12,272
Petitioner's gross receipts or sales (Schedule C)	\$ 10,035	\$ 96,450	\$ 412,282
Petitioner's wages paid (Schedule C)	\$ 0	\$ 0	\$ 0
Petitioner's net profit from business (Schedule C)	\$ 10,035	\$ 10,569	\$ 12,141
	2001	2002	
Proprietor's adjusted gross income (Form 1040)	\$ 15,591	\$ 17,576	
Petitioner's gross receipts or sales (Schedule C)	\$ 384,540	\$ 662,715	
Petitioner's wages paid (Schedule C)	\$ 0	\$ 0	
Petitioner's net profit from business (Schedule C)	\$ 16,456	\$ 12,912	

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. The petitioner claimed that it employed the beneficiary from 1998 to 2002 on a part time basis, and the sums paid to her as documented by the 1099 forms submitted by the petitioner, reflect wages considerably less than the proffered wage. As previously stated, the beneficiary earned the following: \$3,000 in 1998; \$3,600 in 1999, and \$3,800 in 2000. With regard to 2001 and 2002, the petitioner submitted an Annual Reconciliation Statement for the state of California that reflects the petitioner

² The record only reflects federal income tax returns from 1998 to 2002.

³ The director incorrectly identified the priority date in his decision as January 13, 1996. The Form ETA 750 indicates the priority date is July 6, 1998.

paid one employee \$5,000 during the year. A Form 940-EZ indicated that the petitioner paid an employee \$5,200 during 2002. In addition, the beneficiary's federal income tax returns for 2001 and 2002 reflect the same wages. Although some of the petitioner's and beneficiary's documents are viewed as problematic, overall they indicate that the petitioner employed the beneficiary in the years 1998, 1999 and 2000, and suggest that the petitioner also paid the beneficiary some wages in 2001, and 2002.⁴ The petitioner did not establish that it paid the beneficiary a sum equal to or greater than the proffered wage of \$25,875 as of the priority date and 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. CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in this analysis. 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). In the instant petition, the petitioner had the following net incomes: \$9,983 in 1999, \$12,272 in 2000, \$15,591 in 2001, and 20,675 in 2002. Thus, the petitioner did not have the capability of paying the proffered wage from its adjusted gross income during any of the relevant years from the priority date to the present time.

However, 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.⁵ 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.

⁴ The record is not clear that the petitioner or beneficiary filed the relevant documentation during the appropriate years, or whether the documentation was generated to address the inadequacies identified in the director's requests for further evidence.

⁵ In the instant petition, it is noted that the Schedule C's for tax years 1998 to 2002 vary with regard to the petitioner's name and business. For the tax year 1998, Schedule C contains no business name, but indicates the petitioner's principal business is lawn maintenance. In tax years 1999, 2001, and 2002, the Schedules C's are in the name of USA [REDACTED] or USA [REDACTED] Inc. In the year 2000, the Schedule C is in the name LA Sports Shoes.

In the instant case, the sole proprietor supports himself, his wife, and three daughters. In 1999, the sole proprietorship's adjusted gross income of \$12,272, minus the proffered wage of \$25,875, left negative financial resources to support a household of five family members. In the years 2000, 2001, and 2002, the petitioner's adjusted gross income was also insufficient to cover the beneficiary's salary, and as a consequence, all three years also indicate insufficient resources to support a family of five members.

It is noted that in his requests for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal expenses. Therefore there is no list of household expenses or discussion of the sole proprietor's household expenses to allow further examination of this issue. Only in his decision, did the director allude to the fact that the petitioner was a sole proprietor, and find the petitioner's financial resources insufficient to both pay the proffered wage and provide sufficient support for the petitioner's family. Although the petitioner states on appeal that his gross sales are sufficient to pay the beneficiary's salary, this method of analyzing a sole proprietor's ability to pay the proffered wage is not utilized in these proceedings. In addition, the petitioner's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). The petitioner would have to submit sufficient evidentiary documentation to support this assertion.

As stated previously, the record is insufficient due to the lack of information on the petitioner's household expenses. The record contains no request by the director for a list of household expenses and documentation of these expenses at any point during his deliberations. Nevertheless, the AAO will not remand the decision to the director for further consideration based on the lack of such a request. The record, as presently constituted, clearly establishes that the petitioner had insufficient financial resources from 1998 to 2002 to both pay the beneficiary the proffered wage and to support his family. Furthermore, evidence that the petitioner created after CIS pointed out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. The petitioner appears to have done exactly this, with regard to, at a minimum, submitting state of California employee tax and withholding information after the fact. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. While the petitioner's candor in establishing that he was making amends in not having submitted such tax or employee information previously is commendable, the submission of these documents is too late to establish the petitioner's ability to pay the proffered wage. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Finally, the record contains documentation that is confusing without further clarification, or irrelevant. The three versions of the sole proprietor's name and the three versions of the beneficiary's name that are contained in the record only confuse the record with regard to the petitioner's and beneficiary's identification and pertinent income tax information.⁶ The petitioner's assertion on appeal as to the ability of the

⁶The sole proprietor is identified as [REDACTED] in various documents in the record. Form I-140 identifies the beneficiary as [REDACTED] while Form ETA-750 identifies the beneficiary as [REDACTED]. The 1099 tax forms submitted in response to the director's request for further evidence identify the beneficiary as [REDACTED].

beneficiary's husband to supplement her salary is irrelevant. However, such an assertion does raise questions as to whether the petitioner intends to pay the proffered salary to the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Thus, even without the sole proprietor's documentation on household expenses, the petitioner did not establish that it has the ability to pay the beneficiary the proffered salary. In addition, enough conflicting evidence in the record warrants the denial of the petition.

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. The appeal is dismissed. The petition is denied.

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