

Identifying data deleted to
prevent unauthorized
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

MAY 03 2005

FILE:

LIN 03 073 51336

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

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

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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Chinese medicine and herb business. It seeks to employ the beneficiary permanently in the United States as a pharmacy technician. 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 that the position stated on the Form ETA 750, did not meet the requirements of the position requested on the Form I-140, Immigrant Petition for Alien Worker. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

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 April 12, 2001. The proffered salary as stated on the labor certification is \$8.50 per hour or \$17,680 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The 2001 Form 1040 reflected an adjusted gross income of \$55,659, and Schedule C reflected gross receipts of \$236,203, wages of \$16,462, and a net profit of \$43,478. The director considered this documentation insufficient and on April 8, 2003, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of April 12, 2001 and continuing to the present. The director specifically requested the petitioner's 2002 personal federal income tax return, a list of monthly recurring household expenses, checking and savings account balances, and a comprehensive value of currently held properties, stock/bond/mutual fund portfolios, etc. The director also informed the petitioner that, after a phone conversation with [REDACTED] on April 7, 2003, who confirmed that the beneficiary should be classified as a skilled worker, the petitioner must submit an original form ETA-750 A

& B "Application for Alien Employment Certification" certified by the Department of Labor requiring a minimum of two years education/training/experience. The ETA-750 must have been certified by the Department of Labor before the filing date of the petition.

In response, counsel submitted a copy of the petitioner's 2002 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, and a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return. Counsel also submitted a list of the petitioner's monthly household expenses, bank account balances, and a comprehensive value of properties held. The 2002 Form 1040 reflected an adjusted gross income of \$60,554, wages paid of \$23,144 and a net profit of \$30,285. The 2002 Form 1120 reflected a taxable income before net operating loss deduction and special deductions of \$10,542. Schedule L was not provided with the 2002 Form 1120. The petitioner's monthly household expenses totaled \$2,273 per month or \$27,276 per year. The petitioner's bank accounts reflected balances of \$39,398.79 for a certificate and \$21,123.64 in savings as of June 6, 2003. The petitioner's statement reflects property values of \$650,000. Counsel stated:

As to paragraph I, referencing a telephone conversation with Marian S.K. Ming, esq., on April 7, in which Ming requested skilled worker classification:

Please be advised that Attorney Ming wishes to retract that statement-the (certified) ETA 750 was correctly filed with less than the 2 years' work experience necessary for the skilled worker category and was thus meant to qualify under the "other workers" category. At the time of the call, she believed or understood that the INS officer was merely calling her for verification of the proper (skilled worker) classification. But qualifying the alien as a skilled worker was never an option, therefore the ETA was correct as submitted, and Ming erred when she approved the telephone change to skilled worker-an honest but foreseeable mistake on her part uttered in the throes of an extremely busy and bewildering work week. Please accept our apologies for the mistake. See her attached affidavit marked Exhibit A.

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 that in spite of counsel's letter and affidavit, the petition must be analyzed on the basis of the original documents and the revisions that correct the original inconsistencies. On August 25, 2003, the director denied the petition.

On appeal, counsel submits an affidavit from the petitioner explaining the two separate tax returns for 2002 (the petitioner did not incorporate until the middle of 2002); a copy of the petitioner's Articles of Incorporation; copies of the petitioner's 2002 individual and corporate tax returns; a copy of a newspaper ad for the job offered, a copy of an internal posting, a copy of the petitioner's recruitment summary; another affidavit by counsel; and previously submitted documentation. Counsel states:

As stated, although Lisa's Herbal Company has been in continuous operation since the beginning of 1998, it was not a corporation until July 2002. That year's individual return accounts for all of the income earned by the business during the first six months of 2002, before it became a corporation. For tax purposes, the earnings of sole proprietorships are reported on the investor's individual return. Accordingly, income generated by the business

while it was still operating under that legal capacity would not be reported on any subsequent corporate return.

Any assessment of the employer's comprehensive, overall income picture for 2002, therefore, must consider the combined figures generated by both returns. Together-not in isolation from one another-they comprise the entire year. . . .

* * *

A simple-and fully and easily corrected-clerical error is solely responsible for the confusion over the qualifying employment category under which the Beneficiary applied, and the Respondent should not be penalized for a mistake that in any event should not be the basis for denial-particularly when all of the evidence (the Alien Labor Certification, e.g.) proves our contention that the Beneficiary was obviously and clearly petitioned not as a skilled, but as an unskilled, worker.

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.

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. Since Schedule L was not provided with the 2002 corporate tax return, the AAO is unable to determine the petitioner's net current assets for that year.

The record of proceeding shows that the petitioner was a sole proprietorship until the middle of 2002. A sole proprietorship is 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 two in 2001 and 2002 and had monthly household expenses of \$2,273 or \$27,276 per year. In 2001 and 2002, the owner's adjusted gross income was considerably more than the proffered wage. The petitioner could have paid the proffered wage and sustained herself and her dependents from her adjusted gross income (2001 adjusted gross income of \$55,659 - \$17,680 proffered wage - \$27,276 household expenses = \$10,703 remaining; 2002 adjusted gross income of \$60,554 - \$17,680 proffered wage - \$27,276 house expenses = \$15,598 remaining).

The 2001 Form 1040 reflects an adjusted gross income of \$55,659. The petitioner could have paid the proffered wage from its adjusted gross income in 2001.

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.

The 2002 Form 1040 reflects an adjusted gross income of \$60,554. The petitioner could have paid the proffered wage from its adjusted gross income in 2002.

The 2002 Form 1120 reflects a taxable income before net operating loss deduction and special deductions of \$10,542. The petitioner could not have paid the proffered wage from its taxable income in 2002. However, since the petitioner has shown that it did not incorporate until the middle of 2002, CIS will determine the petitioner's ability to pay the proffered wage by considering the petitioner's Form 1040 for the first six months of 2002 and by considering the petitioner's Form 1120 for the last six months of 2002. The petitioner's adjusted gross income in 2002 (Form 1040) was \$60,554. One half of that income would be \$30,227 - \$13,638 household expenses - \$8,840 wages for six months = \$7,749 remaining. The petitioner could pay the proffered wage for the first six months from one half its adjusted gross income. The petitioner's taxable income in 2002 (Form 1120) was \$10,542, more than enough to pay the remaining \$8,840 wage for the last six months of 2002².

The second issue in this proceeding is whether the position meets the requirements of the classification sought. The I-140 shows that under Part 2, Petition type, item "e" was marked for a skilled worker (requiring at least two years of specialized training or experience) or professional (Item F - no longer available). On April 7, 2003, the director called counsel to confirm that there was no error on the original petition in Part 2 where box "e" was checked. On April 8, 2003, the director issued a request for evidence to give the petitioner an opportunity to submit additional documentation in support of the confirmed skilled worker petition. In response, counsel indicated that an error had been made during the phone call and that the position should be that of an unskilled worker. The director refused to accept counsel's explanation and affidavit and denied the petition on August 25, 2003.

On appeal, counsel reiterates her position that a clerical error was made and further confusion occurred due to the phone conversation and contends that the petition was clearly meant for an unskilled worker. To support her assertion, counsel provides a copy of a newspaper ad verification, a copy of an internal posting, and an employer's recruitment summary.

Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. Ordinarily, we could not conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. However, in the instant case, the AAO does not concur with the director that in spite of counsel's letter and affidavit, the petition must be analyzed on the basis of the original documents and the revisions that correct the original inconsistencies. Given the fact that the director did request confirmation of the classification sought, it would be unfair not to consider all of counsel's statements regarding that confirmation. Counsel has clearly shown by the newspaper ad verification, internal posting, and recruitment summary that it was always the intent to petition for an unskilled worker. The record of proceeding contains no evidence to

² Note that the petitioner's household expenses need not be deducted from its taxable income (Form 1120) since the petitioner is a corporation. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

suggest that a clerical error was not made or that counsel's explanation of the phone call or original intent in petitioning for the beneficiary is unbelievable.

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.