



U.S. Citizenship
and Immigration
Services

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FILE: EAC-03-066-53010 Office: VERMONT SERVICE CENTER Date: NOV 10 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. 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.

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 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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$16.44 per hour, which amounts to \$34,195.20 annually. On the Form ETA 750B, signed by the beneficiary on March 7, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on December 23, 2002. On the petition, the petitioner claimed to have been established in 1997, to currently have two employees, to have a gross annual income of \$185,512.00, and to have a net annual income of \$75,104.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 8, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on December 30, 2003.

In a decision dated June 3, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the petitioner's net income in 2001 and 2003 was sufficient to pay the proffered wage. Counsel also states that although the petitioner's net income in 2002 was less than the proffered wage, the petitioner had other financial resources available, including funds in bank accounts, which could have been used to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on March 7, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another 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 for a given year, 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 the Immigration and Naturalization Service, now 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 the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2002. The record before the director closed on December 30, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2003 was not yet due. Therefore

the tax return of the petitioner's owner and his wife for 2002 is the most recent return available. The record contains copies of the Schedule C, Profit and Loss from a Business, for the petitioning business for 2001 and for 2003, but no copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner have been submitted for those years. The RFE had specifically requested the petitioner's federal income tax returns for 2001 and 2002, with all schedules and attachments.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The tax return of the petitioner's owner and his wife for 2002 shows the amount for adjusted gross income as shown in the following table:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	not submitted	not submitted	\$34,195.20*	no information
2002	\$19,927.00	not submitted	\$34,195.20*	-\$14,268.20
2003	not submitted	not submitted	\$34,195.20*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. A Form 1040 tax return was submitted for only the year 2002, and the adjusted gross income on that return is less than the proffered wage. Moreover, the Form 1040 of the petitioner's owner and his wife for 2002 lists five children as dependents. Therefore the household size of the petitioner's owner is seven persons. To establish the petitioner's ability to pay the proffered wage it would be necessary for the adjusted gross income figure to exceed the proffered wage by an amount sufficient to pay the reasonable household expenses of a seven-person household.

Counsel asserts that the petitioning business showed substantial net profits in 2001 and 2003. Counsel's assertions rely on the information in the Schedule C's of the petitioning business for those years. Since the petitioner is a sole proprietorship, however, the relevant figure for net income is not the profit shown on the Schedule C of the business, but the adjusted gross income as shown on the Form 1040 of the petitioner's owner, as stated above.

Counsel states in his brief that CIS has previously acknowledged that tax returns may demonstrate a loss as a result of tax deductions taken to lower a petitioner's taxes, and cites a decision of the AAO *In re: X*, EAC9325451009, 13 Immigration Reporter B2-166, 167 (AAU, September 23, 1994). Counsel provides no citation to an official publication of that case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Based on the citation to an unofficial publication, the AAO has reviewed the above decision cited by counsel. Nothing in that decision indicates that it is a precedent decision. Moreover the decision in that case is a dismissal of an appeal on the grounds that the evidence failed to establish the petitioner's ability to pay the proffered wage. In the decision, the AAO stated the following:

Furthermore, the Service is aware that the "loss" shown on some tax returns may be caused by the taking of depreciation, bad debts, or other deductions for tax purposes to reduce the tax consequences to the employer. However, the burden is on the petitioner to show that these are artificial losses and not actual expenses to the business. In this particular case, the petitioner has not shown that the depreciation figure or any of the other deductions listed on its tax return are actually available funds that could easily be converted to ready cash for the purpose of paying the proffered wage as certified.

In re: X, EAC9325451009, 13 Immigration Reporter B2-166 ¶ 8 (AAU, September 23, 1994)

As noted above, the foregoing decision is not a precedent decision. Moreover, while it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns. Nonetheless, the regulation does not permit bank statements to be submitted as evidence in lieu of one of the three alternative forms of evidence required by the regulation, namely copies of annual reports, federal tax returns, or audited financial statements.

On the petitioner's bank statements the ending balances are as follows:

	Acct. # . . . 650	Acct. # . . . 195
2001:		
January	\$1,124.32	no statement
February	no statement	no statement
March	no statement	no statement
April	no statement	no statement
May	\$1,309.20	no statement
June	no statement	no statement
July	no statement	\$4,526.76
August	no statement	no statement
September	no statement	no statement
October	no statement	no statement
November	no statement	no statement
December	\$2,050.41	no statement
2002		
January	\$1,741.39	-\$667.14
February	\$1,436.24	\$1,923.55
March	\$6.09	\$3,895.02
April	\$173.52	-\$207.99
May	-\$1,870.48	-\$974.40
June	-\$9.11	\$0.00
July	no statement	-\$876.45
August	no statement	\$0.00

The petitioner's bank statements in the record cover only selected months during the relevant period. Moreover, the statements show repeated negative ending balances. In none of the months was the combined total of the balances in the petitioner's two accounts greater than the annual proffered wage. Moreover, no bank statements were submitted for any month after August 2002.

Counsel asserts that in addition to the two accounts referenced above, the petitioner has another account. Counsel states the account number, which is a number ending in the digits 016. A copy of only one month's bank statement for that account is in the record, for April 2002. However, the name on that account is [REDACTED]. Although the petitioner's name also contains the word "Ultimate," the petitioner is a sole proprietorship painting contractor. The record establishes no relationship between the corporation [REDACTED] and the petitioner.

For the foregoing reasons, the information in the petitioner's bank statements fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel states that in addition to the funds in the petitioner's bank accounts, copies of the petitioner's Form 1099-MISC, Miscellaneous Income statements in the record show funds available to the petitioner to pay the proffered wage. The record contains copies of Forms 1099-MISC for 2002 showing payments to the petitioner by nine different companies in the following amounts: \$4,140.00; \$2,390.00; \$2,250.00; \$1,200.00; \$47,000.00; \$5,105.00; \$845.00; \$19,160.00; and \$8,790.00. The record also contains a copy of a Form 1099-G, showing a state or local tax refund of \$244.00 to the petitioner's owner in 2002; a copy of a Form 1099-INT, Interest Income, showing interest of \$0.52 paid to the petitioner's owner in 2002; and a copy of a Form 1098 Mortgage Interest Statement showing interest paid by the petitioner's owner in the amount of \$11,209.70 in 2002.

The evidence does not establish that any of the funds stated on the foregoing tax statements represent additional funds available to the petitioner's owner, beyond those shown on the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2002.

The record also contains a copy of a profit and loss statement of the petitioner for the period January 2004 through June 2004. Nothing in the record indicates that the profit and loss statement is an audited financial report. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Furthermore, the information in the petitioner's profit and loss statement covers only the first six months of 2004. Even if that report was an audited financial statement, the information in that report would add no further support to establish the petitioner's ability to pay the proffered wage in the years 2001, 2002 and 2003.

Counsel states that the director failed to cumulatively weigh all relevant factors affecting the petitioner, and cites *Mattis v. U.S.*, 774 F.2d 965 (9th Cir. 1985) and *Cerillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987) quoting *A Restatement of Scope-of-Review Doctrine*, 38 *Ad. L. Rev.* 235 (1986)(§(b)(2)). The decision in *Mattis* is a reversal of a Board of Immigration Appeals (BIA) decision denying a motion to reopen in a case involving suspension of deportation, based on a claim of hardship to a U.S. citizen spouse. Similarly, the decision in [REDACTED] is a reversal of a BIA decision on the merits of a claim for suspension of deportation based on a claim of hardship to U.S. citizen children. The two decisions are relevant to the instant petition only with regard to the general proposition that an administrative agency must consider all of the evidence in the record. In the instant petition, however, the director considered all the evidence which had been submitted prior to the director's decision. Moreover, all evidence submitted for the first time on appeal has been considered by the AAO, as discussed above.

In his decision, the director based his analysis of the petitioner's ability to pay the proffered wage on the net profit of the business as shown on the Schedule C's submitted for the record. That method of analysis was incorrect. As discussed above, where a petitioner is a sole proprietorship, the relevant figure for net income is the adjusted gross income of the petitioner's owner. Nonetheless, the decision of the director to deny the petition was correct, based on the evidence submitted for the record prior to the director's decision. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are insufficient to overcome the decision of the director.

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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.

ORDER: The appeal is dismissed.