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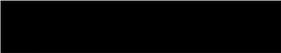


**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **NOV 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, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a landscape and stonework design firm. It sought to employ the beneficiary permanently in the United States as a stonemason supervisor. 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 of \$82,097.60 per annum beginning on the priority date of the visa petition and denied the petition on April 3, 2003. In denying the petition, the director considered the evidence initially provided with the petition and in response to the director's request for additional evidence issued on October 29, 2002. This evidence consisted of the second page of the sole proprietor's individual tax return for 2001 showing adjusted gross income of -\$7,793, an unaudited profit and loss statement showing that between January 1, 2002 and August 16, 2002, the petitioner claimed net income of \$21,938, copies of the petitioner's employer's quarterly federal tax returns for 2002, and various payroll records reflecting that wages paid to the beneficiary in 2001 and 2002 were far less than the proffered wage.

The AAO dismissed the appeal on July 9, 2004. The AAO considered the petitioner's evidence submitted to the underlying record as well as additional documentation provided on appeal. This evidence consisted of a copy of Schedule C, Profit or Loss from Business from the owner's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001, which showed net business profit of \$18,194 and \$36,544, respectively, a copy of an unaudited compilation report consisting of the petitioner's statement of income and balance sheet for the three months ending on March 31, 2003, and various copies of contracts for landscaping work. In denying the petition, the AAO also considered the wages of \$29,456 received by the beneficiary from the petitioner in 2001 and wages of \$42,828 received from the petitioner in 2002. The AAO determined that none of these documents demonstrated that the petitioner could pay the difference between the proffered wage of \$82,097.60 and the actual wages paid to the beneficiary during any of the relevant period.¹

Counsel requests reconsideration of the AAO's decision contending that it failed to properly consider the petitioner's net assets. Counsel submits additional evidence asserting that this documentation further supports the petitioner's ability to pay the proffered wage beginning at the priority date and continuing until the present. Pursuant to 8 C.F.R. § 103.5(a)(2) and (a)(3), counsel's motion will be considered as a motion to reconsider and to reopen, because it asserts an incorrect application of law or Citizenship and Immigration Services (CIS) policy and offers new facts.

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:

¹ The AAO also noted that because the petitioner had filed other petitions bearing similar filing dates and similar wages, it must demonstrate that it had sufficient continuing income to pay all proposed wage offers as of the individual priority dates.

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 CIS.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$39.47 per hour, which amounts to \$82,097.60 annually.

Although the petitioner styles itself as an "LLC" or limited liability company, it reports its financial information for tax purposes on Schedule C, Profit or Loss from Business. Therefore, as noted in the previous AAO decision, it will be reviewed as a sole proprietorship. 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).

On motion, counsel provides a copy of an unaudited balance sheet reflecting the petitioning business' financial status as of the period ending April 30, 2001. A copy of a note, dated June 23, 2004, signed by the sole proprietor, claims that this balance sheet is incorrect due to receipts being posted as negative balances, and that "this is in the process of being audited by an accountant and that the end result will be a positive balance of approximately \$83,000." Counsel asserts on motion that as of the priority date, the petitioner's net assets were \$83,000 and that this figure should be added to net income of \$21,938 in order to demonstrate that the total covers the proffered wage. Counsel references 2001 documents at "Exhibit B." Exhibit B submitted on motion does not relate to the figure of \$21,938, which as noted above, only appears on the unaudited profit and loss statement representing the petitioner's financial status for the period between January 1, 2002 and August 16, 2002 contained in the underlying record. Exhibit B on motion represents a duplicate copy of Schedule C of the sole proprietor's 2001 tax return. Counsel presents no rationale why figures from a four-month unaudited balance sheet for 2001 should be added to the yearly net income figure represented on the Schedule C extract from the sole proprietor's individual tax return.

Resubmitting the three-month 2003 compilation of the petitioner's statement of income and balance sheet, counsel also contends that the petitioner's "Net Assets as of March 31, 2003 were \$66,777 and Net Income was \$12,961" should have been added together to show an amount great enough to cover the difference in 2001 between the actual wages paid and the proffered wage. The AAO finds this assertion unconvincing. First, it is implausible to compare figures extrapolated from three months in 2003 to determine whether in 2001, the petitioner could cover the difference between the wages paid and the proffered salary. Second, counsel's representation of \$66,777 as the net asset figure from the compilation is not accurate. Current assets must be balanced against current liabilities. The three-month 2003 balance sheet shows that the petitioner's current liabilities were \$66,777 and current assets were \$55,742, resulting in net current assets of -\$11,035. Third, even if CIS were to combine such figures as net income with net current assets, the resulting amount of \$1,926 has little significance.

It must be emphasized that this petitioner failed to provide complete copies of any income tax return throughout the record of proceeding. Instead, copies of either internally generated financial statements or compilations have been submitted. It is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage and is not an acceptable substitute for other required forms of 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 ability to pay the proffered wage, those statements must be audited. A compilation is a presentation of financial statement information by an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented. The unsupported representations of management are not convincing evidence of a petitioner's ability to pay the proffered wage.

As noted in the previous AAO decision, the petitioner failed to submit evidence sufficient to demonstrate that it has had the ability to pay the proffered wage of \$82,097.60 during 2001 or subsequently. Even without considering living expenses of the sole proprietor, the petitioner's adjusted gross income of -\$7,793 was insufficient to cover the shortfall of \$52,641 between the actual wages paid and the proffered wage. Probative evidence of other available resources has not been submitted to the record. Upon review, counsel has been unable to overcome the findings of the director and the prior AAO decision that the petitioner failed to establish its continuing ability to pay the proffered wage as of the petition's priority date.

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 motion for reconsideration is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.