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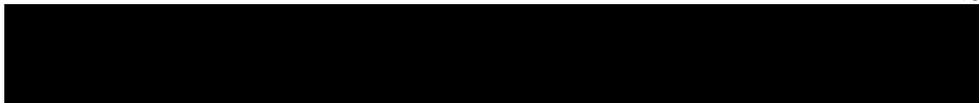
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FILE: LIN 03 238 50130 Office: NEBRASKA SERVICE CENTER Date: OCT 20 2005

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:



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 is an ethnic delicatessen. It seeks to employ the beneficiary permanently in the United States as an Eastern European specialty cook. 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. Accordingly, the director denied the petition.

On appeal, the petitioner submits a brief with 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12 an hour, or an annual salary of \$24,960. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on December 2, 1990, to have seven employees, and a gross annual income of \$164,193 and a net annual income of \$34,027. In support of the petition, the petitioner submitted copies of its Schedule C from its Form 1040, Individual Income Tax Return, for the years 2001 and 2002. These documents reflected a net profit of \$13,561 in 2001 and \$9,526 in 2002. The petitioner also submitted letters of work experience from the beneficiary's former employers in the United States and in the Ukraine, as well as documentation on her studies in food preparation at Lviv Cooperative College, Lviv, Ukraine.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 25, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2003 and 2004 federal tax returns and an itemized list of monthly recurring household expenses including but not limited to: mortgage or rent payments, automobile payments, installment loans, credit card payments, household expenses, and checking and savings account balances.

In response, counsel submitted the petitioner's Form 1040 for 2003. This document indicated the petitioner had an adjusted gross income of \$43,326. The petitioner also submitted a list of monthly recurring household expenses that indicated the petitioner had household expenses of \$3,235.16 a month, or \$38,821.92 a year. Counsel also submitted examples of telephone and other utility bills, as well as documentation of payments for automobiles. With regard to real estate owned by the petitioner and his wife, counsel submitted a notarized statement from the petitioner and his wife that listed the properties owned by the couple, and noted that two properties, worth approximately \$340,000 and \$589,900, were paid in full, while the third property had a mortgage of \$223,713.12. Counsel then submitted a letter of account verification along with computer printouts from TCF Bank in Chicago, Illinois, that indicated the petitioner's two checking accounts had balances of \$232,181.88 and \$18,210.94 as of May 12, 2004. Finally counsel submitted a copy of a memorandum dated May 4, 2004 and written by ██████████ Citizenship and Immigration Services (CIS) Associate Director for Operations, entitled "Determination of Ability to Pay under 8 CFR 204.5(g)(2)." Counsel highlighted the section of the memo that states: "Net income[:] The initial evidence reflects that the petitioner's net income is equal or greater than the proffered wage."

In the cover letter that accompanied the submissions, counsel stated that the petitioner's personal income tax return for 2003 showed a total income of \$44,363. Counsel also stated that the petitioner owned two residences in full, and they did not rely on income from their business for their household expenses. Counsel stated that all profits from the petitioner's business could be used for business expenses, such as the beneficiary's salary. Counsel also noted that the petitioner's personal checking and saving account information showed a total cash balance of \$250,392.72. Counsel noted that the petitioner and his wife, based on their cash assets, did not need to rely on any income from their business, and that all company profits could be used for business expenses, such as the beneficiary's salary.

On June 9, 2004, the director denied the petition. In his denial, the director examined the petitioner's Schedules C and noted that the 2001 Schedule C indicates a net profit of \$9,526, and the 2002 Schedule C indicates a net profit of \$13,561. The director noted counsel's reference to the explanation of net income as a basis for examining a petitioner's ability to pay the proffered wage outlined in the Yates memo and stated that in the instant petition, the petitioner's net income in 2001 and 2002 were below the proffered wage. The director also stated that CIS did not accept personal funds in calculating an ability to pay the proffered wage because these funds were not business funds at risk. In conclusion, the director stated that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and to the present.

On appeal, counsel submits a copy of an Internal Revenue Service (IRS) Publication 1635 that contains the definition of sole proprietor. Counsel also resubmits the Yates memo. Counsel also submits banking statements for the business from TCF Bank for various months in 2001, 2002, 2003, and 2004. In particular,

the checking balance monthly statement dated May 17, 2001 indicates a balance of \$35,880.58. The August 17, 2001 and January 18, 2002 monthly checking statements indicate balances of \$30,169, and \$32,788.24. Counsel also submits a restricted use appraisal report of the petitioner's store, [REDACTED] Sausage and Deli that states the estimated fair market value for the business property, subject to assumptions and limited conditions contained in the report, as of May 1, 2004 would be \$320,000. In addition counsel submits a letter signed by [REDACTED] Sales and Service Representative, TCF Bank. This letter, dated July 6, 2004, states that the bank account for the sole proprietor and his wife, account number [REDACTED] has a current and available balance of \$16,537.09. The letter continues that the bank account for the business, namely account number [REDACTED] has a current and available balance of \$28,290. Counsel also submits a letter from [REDACTED] Branch Sales Manger [REDACTED] dated July 6, 2004 that states the petitioner has an available balance of \$11,629.73 in account number [REDACTED]. Finally counsel submits photographs of the petitioner's business site.

Counsel states that the director erroneously stated that the petitioner's personal funds are not accepted in calculating the petitioner's ability to pay the proffered wage because these funds are not business funds at risk. Counsel then asserts that the petitioner is a sole proprietorship entity and as such does not exist separately from the owner. Counsel states that based on the evidence previously submitted of the petitioner's extensive personal assets, the sole proprietorship has sufficient income and assets to pay the proffered wage. Counsel then asserts that even if the income of the individual owner were insufficient to pay the prevailing wage, the petitioner, maintained at all times a checking account, which had an average balance that exceeded the proffered wage. Counsel also states that the sole proprietorship owns the building where it is located. Counsel states that should the sole proprietorship ever need additional liquid assets to pay for wages or any other expenses, it may open a line of credit against the building with any lender.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. For example, the petitioner submitted a letter of account verification dated May 2004 that indicated the sole proprietor had a checking account, number [REDACTED] with a balance of \$232,181.88. On appeal, counsel submits another balance statement dated July 6, 2004 that indicates this same account has a current balance of \$16,537.08. Nevertheless, counsel is correct that the personal assets of the sole proprietorship are considered in determining whether the petitioner had the ability to pay the proffered wage. This issue is examined further in these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. As established by the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following the priority date.

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. 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).

As correctly noted by counsel, 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. 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 supports himself, his wife, and two children. Since the petitioner only submitted Schedule C of his Forms 1040 for 2001 and 2002, the petitioner's adjusted gross income for tax years 2001 and 2002 is unknown. Since the priority date for the petition is April 27, 2001, the petitioner has no evidence in the record to establish that it has the ability to pay the proffered wage as of the priority date or during 2002. Without more persuasive evidence, such as the petitioner's complete Form 1040, with all accompanying attachments and statements, the petitioner cannot establish that it had sufficient adjusted gross income to cover both the petitioner's annual household expenses and the proffered wage as of the priority date and in 2002. Nor can it be determined what part of the proffered wage would need to be covered by the petitioner's additional assets, if the petitioner's adjusted gross incomes in 2001 and 2002 were not sufficient to cover both the petitioner's household expenses and the proffered wage.

With regard to tax year 2003, the petitioner's adjusted gross income is \$43,363. In response to the director's request for an itemized list of household expenses, the petitioner provided a breakdown of monthly expenses that totaled \$3,235.16 a month, or \$38,82.92 a year. When the monthly expenses of the petitioner are subtracted from the petitioner's gross adjusted wage for 2003, only \$4,504.08 remains, which is less than the proffered wage. To pay the proffered wage, the petitioner would have to have additional funds of \$20,456.92 to pay the proffered wage. Thus the petitioner's adjusted gross income for 2003 is not sufficient to cover the proffered wage.

As previously stated, although the petitioner provided relevant evidence as to its adjusted gross income in 2003, it did not provide relevant financial documentation for tax year 2001 or 2002. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant petition, the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date, April 27, 2001. Without more persuasive evidence, such as the petitioner's complete federal income tax returns from 2001, and 2002, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his three dependents, based on his adjusted gross income as of the priority date and onward.

In addition, counsel correctly states that the assets and liabilities of the sole proprietorship are considered in determining whether the petitioner has the ability to pay the proffered wage. Counsel indicates that the petitioner has two unencumbered real estate properties, and cash assets in savings and checking accounts. Counsel states on appeal that the petitioner, based on these assets does not need to pay for any household expenses from its business profits. However, the petitioner failed to establish any such business profits in 2001 and 2002. In addition, at least one of the assets to which the petitioner referred, namely his personal residence, is not viewed as liquidable enough to be utilized to pay the proffered wage. In other words, in order to use the equity in his personal property to pay the proffered wage, the petitioner would have to sell some of the property, or obtain a line of credit. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). With regard to the petitioner's cash assets, these can be considered as funds available to pay the proffered wage; and as noted by counsel, there are substantial cash assets in the petitioner's personal checking accounts as of 2004; however, the record contains only fragmentary documentation as to the petitioner's personal savings accounts as of the priority date in 2001 or 2002. Without more persuasive evidence with regard to the petitioner's personal liquidable cash assets, from 2001 to 2003, that are available to pay the proffered wage, the petitioner has not established that it had sufficient additional funds to pay the difference between the adjusted gross income of the petitioner and the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2002.

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 with regard to the petitioner's ability to pay the proffered wage. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.