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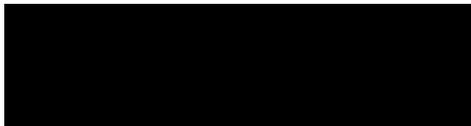
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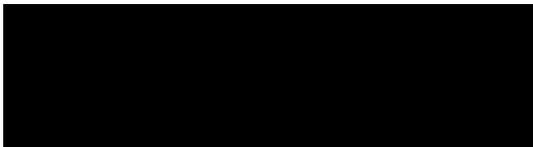
IN RE:

Petitioner:
Beneficiary:



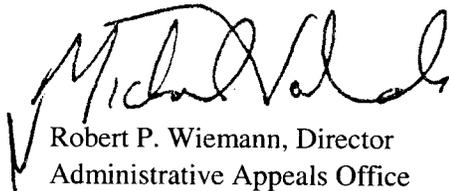
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a preschool day care facility. It seeks to employ the beneficiary permanently in the United States as a teacher 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. The director also concluded that the petitioner failed to establish that the beneficiary possessed the requisite work experience as set forth on the ETA 750.

On appeal, the petitioner, through counsel, submits additional evidence relating to the beneficiary's work experience and also asserts that the petitioner has demonstrated its ability to pay the proffered salary.

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:

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. 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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be

accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on Form ETA 750 is \$25,980 per year. On Form ETA 750B, signed by the beneficiary in April 24, 2001, the beneficiary does not claimed to have worked for the petitioner.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 states that an applicant must have two years of prior work experience in the job offered.

Part 5 of the petition, filed May 2003, reflects that the petitioner was established in 1997 and currently employs two workers. The petitioner is structured as a sole proprietorship. As evidence of its ability to pay the proffered salary of \$25,980 per year, the petitioner initially submitted a partial copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001, consisting of Schedule C, Profit or Loss From Business. It shows that the petitioning business reported a net profit of \$18,673 (line 31).

On July 23, 2003, the director requested additional evidence from the petitioner. As evidence of the petitioner's ability to pay the proffered wage, she requested either the petitioner's 2001 and 2002 federal tax returns with all schedules and attachments, or copies of the beneficiary's Wage and Tax Statement(s) showing wages paid, or bank statements for 2001 and 2002. The director also requested that the petitioner submit letters from former employer(s) or trainer(s) showing that the beneficiary possesses the required two years of prior work experience in the job offered.

In response, counsel resubmitted Schedule C from the sole proprietor's 2001 individual tax return and also supplied Schedule C of the 2002 individual tax return. The 2002 Schedule C reflects that the petitioning business earned a net profit of \$3,005 in that year.

Counsel also provided an original statement containing the declarations of four individuals who affirm that their children attended the School of Saint Geltrude in Naples, Italy from 1990 to 1993, where the beneficiary was their teacher.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage or establish that the beneficiary had the requisite two years of prior work experience, and, on December 31, 2003, denied the petition. The director noted that the original letter of reference submitted in support of the beneficiary's qualifications was written in the same handwriting but was supposed to be from four different individuals, thus raising a question as to the authenticity of the statements in support of the beneficiary's prior work experience. The director further concluded that the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage.

On appeal, counsel submits a copy of a letter from the nursery school of the "Benedictine Nuns of Saint Geltrude" in Naples, Italy, signed by [REDACTED] who is identified as a legal representative of the school. The letter affirms that the beneficiary was a kindergarten teacher at the school from 1990 to 1993. Counsel asserts that this letter establishes that the beneficiary has the requisite work experience to satisfy the terms of the ETA 750. The AAO accepts that this employment verification letter sufficiently establishes the requisite experience to satisfy the terms of the ETA 750A.

Counsel also submits copies of two W-2s from 2003. They show that the petitioner paid two employees, 13,940 and \$12,608.50, respectively, during that year. Neither employee is the beneficiary. Counsel offers these W-2s in rebuttal to the director's observation that the petitioner's combination of \$18,828 in labor costs (line 37, 2002 Schedule C) and \$3,005 in net income (line 31, 2002 Schedule C) fell short of the proffered wage by \$4,148. As these documents involve two different years, such a comparison is not determinative of the petitioner's ability to pay the proffered wage beginning on the priority date, April 26, 2001.

Counsel contends that the director erroneously interpreted the petitioner's figures on Schedule C for the years submitted. She maintains that the depreciation expense taken in 2002 of \$7,150 should also be considered, as it is a non-cash deduction. Counsel also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of the position that the petitioner's evidence sufficiently demonstrates the ability to pay the proffered wage. That decision includes a criticism of CIS for failure to specify a formula used in determining the proffered wage and for failure to consider a worker's potential ability to contribute to the company's revenue. In this instance, however, no detail or documentation has been provided to explain how the beneficiary's employment as a teacher's assistant will significantly increase the petitioner's net revenue, particularly as here. Further, the regulation at 8 C.F.R. § 204.5(g)(2), issued in 1991, specifies that the type of evidence required to establish the continuing financial ability to pay the proffered wage must include federal tax returns, annual reports, or audited financial statements.

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 may have 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. To the extent that a petitioner may have paid wages less than the proffered salary to the alien will, these amounts will also be considered. In the instant case, the record does not suggest that the petitioner employed the beneficiary.

If the petitioner does not establish that it may have 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. It is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now

CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

When a petitioner is a sole proprietorship, additional factors will be considered. 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 petitioner elected to submit incomplete copies of the beneficiary's individual tax returns, therefore the analysis is limited to the figures contained on Schedule C. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. The complete tax returns would have shown the amount of adjusted gross income the sole proprietor reported to the Internal Revenue Service (IRS) and further reveal the petitioner's ability to pay the proffered wage. It is noted that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). As it is, it is clear that neither the net profit of \$18,673 reported in 2001, nor the net profit of \$3,005 declared in 2002, was sufficient to pay the proposed wage offer of \$25,980 per year for the certified position, even without the consideration of any applicable living expenses.

Other than as discussed above, the record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage during the relevant period. Even if the petitioner's evidence submitted on appeal established that the beneficiary's past work experience meets the requirements of the approved labor certification and visa classification, it cannot be concluded that the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date of April 30, 2001.

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.