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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

SEP 27 2005

EAC 03 251 53835

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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

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 a painting company. It seeks to employ the beneficiary permanently in the United States as a house 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. Accordingly, the director denied the petition.

On appeal, counsel states that in its decision CIS ignored relevant case law and the binding precedent decision of *Matter of Sonogawa*, 12 I&N Dec. 612(1967). Counsel submits no further 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.27 per hour, which amounts to \$46,321.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to work for the petitioner since April 2001.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$75,000, and to currently employ one worker.

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 November 10, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns with all accompanying schedules and tables, or audited financial statements to demonstrate its continuing ability to pay the proffered wage or salary of \$890.80 a week as of April 30, 2001 and continuing to the present. The director specifically requested that the petitioner provide

copies of its federal income tax return for 2001 and 2002 with all schedules and attachments. If the petitioner's business was organized as a sole proprietorship, the director requested that the petitioner submit its Form 1040 individual tax return as well as Schedules C relating to the business. If the petitioner employed the beneficiary, the director requested copies of the beneficiary's Forms W-2 Wage and Tax Statement. If the petitioner had over 100 employees, the director stated that the petitioner could submit a statement to that effect from a financial officer of the company. In addition, the director stated that annual reports for 2001 and 2002 could be submitted accompanied by audited or reviewed financial statements. The director stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records may be considered but only as supplementary evidence to establish the petitioner's ability to pay the proffered wage.

In response the petitioner submitted its Forms 1040 for 2001 and 2002, with accompanying Schedules C. These documents indicated that the petitioner's adjusted gross income for 2001 was \$23,261, and for 2002, the petitioner's adjusted gross income was \$26,825.

On April 7, 2004, the director denied the petition. In his denial, the director noted that the petitioner's adjusted gross income for both tax years was not sufficient to pay the proffered wage of \$46,321.60 as of the priority date. The director then determined that the petitioner had not established that it had the ability to pay the proffered wage as of April 2001 to the present.

On appeal, counsel states that the director's decision was made following a review of the petitioner's 2001 and 2002 tax returns, and despite adjusted gross income figures for both years in excess of \$23,200 and gross revenues in excess of the wage offered. Counsel also notes that no request was made or any mention made of any other assets that the petitioner had available to pay the proffered wage. Counsel states that the director in his denial failed to request, ignored and/or failed to consider factors relative to the petitioner's ability to pay, including its availability of bank funds, other assets, and its generated overall revenue. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612(1967) and states that this case makes it clear that a decision on the ability to pay a proffered wage can only be made after a fair and careful review of all factors associated with the petitioner's business, including evidence that the petitioner has been in business for a number of years, that its business revenues or assets have been steadily growing, and any other evidence that demonstrates that its revenues can justify the hiring of more employees. In the instant petition, counsel states, the petitioner has been in business since 1996, its revenues, income, and assets have been steadily growing, and its overall financial condition clearly demonstrates its need for and ability to pay a new employee. Apart from the petitioner's tax returns, counsel provides no further evidentiary documentation to further substantiate his assertions with regard to the petitioner's increased revenues, income, assets, or bank funds.

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 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 employed the beneficiary as of April 2001. However the petitioner did not submit any further documentation of such employment, such as W-2 forms or copies of paychecks, to further substantiate the beneficiary's employment.

Without more persuasive evidence, the petitioner has not establish that it employed or paid the beneficiary a salary equal to or grater than the proffered wage 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).

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 and his wife. As previously stated, the petitioner's adjusted gross income in the years 2001 and 2002 are as follows: in 2001, \$23,261, and in 2002, \$26,825. It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's household expenses. Nevertheless, even without such information, the sole proprietorship's adjusted gross income for 2001 and 2002, minus the proffered wage of \$46,321.60, leaves only substantial negative adjusted gross income to support a household of two family members. Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his one dependent, based on his adjusted gross income.

In addition, while counsel asserts on appeal that evidence with regard to the petitioner's additional assets was not requested, such evidence can be submitted without any specific request on the part of the director. Without more persuasive evidence with regard to the petitioner's assets, the petitioner has not established that it has the ability to pay the proffered wage as of 1999 and onward.

On appeal, counsel also refers to *Matter of Sonogawa*, and states that CIS did not examine the relevant factors as to the petitioner's ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of

profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in the instant petition to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Furthermore, on appeal, counsel asserts that the petitioner has been in business since 1996, that its revenues, income and assets have been steadily growing, and that its overall financial condition clearly demonstrates its need for and ability to pay a new employee. Nevertheless counsel does not provide any further evidence to substantiate his assertions, such as tax returns from 1996 to demonstrate his claim of steady growth, or saving account statements to show funds available to pay the wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the petitioner has not provided any further evidence with regard to other sources of funds with which to pay 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.

ORDER: The appeal is dismissed.