

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



Be

FILE:



EAC 03 156 51145

Office: VERMONT SERVICE CENTER

Date:

AUG 18 2006

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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an attorney. It seeks to employ the beneficiary permanently in the United States as a paralegal. 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 the director's decision is incorrect based on the law and the facts. Counsel submits 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 December 19, 1994. The proffered wage as stated on the Form ETA 750 is an annual salary of \$46,645. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since February 1991.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner did not establish when it was established, or the number of its employees. The petitioner did state that it had an annual income of \$130,000. In support of the petition, counsel submitted a cover letter that noted that the instant petition was the second petition submitted on behalf of the beneficiary, and that the earlier petition was denied because the Department of Labor failed to place a certification stamp on the approved Form ETA 750. Counsel submitted the petitioner's Form 1040, individual income tax return, for 1998 as evidence of the petitioner's ability to pay the proffered wage. This document indicated the petitioner had an adjusted gross income of \$51,468 in tax year 1998. The accompanying Schedule C indicates on line 11, commission and fees, that the beneficiary received \$48,000 in tax year 1998. Counsel in his cover letter noted that the petitioner's 1998 tax return

indicates a total income of \$130,000, which clearly established that the petitioner has the ability to pay the beneficiary the proffered wage.<sup>1</sup>

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 June 21, 2004, the director requested additional evidence pertinent to that ability. The director stated that the Form ETA 750 was being returned to the petitioner so that it could be returned to the Department of Labor (DOL) to be stamped by them. The director also requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of December 19, 1994, the priority date, and to the present. The director stated that the petitioner needed to submit its 1994 U.S. federal income tax return with all schedules and attachments. The director also stated that if the petitioner employed the beneficiary in 1994 to the present, the petitioner should submit copies of the beneficiary's W-2 forms to establish the beneficiary's actual wages during these years. The director also noted that the petitioner should also submit accredited profit/loss statements, bank account records, or personnel records for 1994.

In response, counsel asserted that the petitioner's law practice is well established and has been in existence for many years. Counsel stated that as of the 1994 priority date, the petitioner has had the ability to pay the proffered wage of \$46,645, and that legacy INS, now CIS, initially approved the I-140 petition, and thus legacy INS had determined that the petitioner had established its ability to pay the proffered wage as of December 19, 1994. Counsel also noted that the beneficiary has been receiving the proffered wage continuously since the filing of the labor certification, which is proof of the petitioner's ability to pay the proffered wage.

Counsel submitted the Form ETA 750 with an original DOL certification stamp. Counsel also submitted the petitioner's Forms 1040 for tax years 2001, 2002, and 2003. The petitioner in a cover letter dated September 7, 2004 explained that he could not find earlier returns since he had moved his offices twice since the priority date of December 19, 1994, and that, in the course of moving, many files got lost or destroyed. The petitioner also stated that he had not employed any other personnel since the priority date.

The petitioner's Forms 1040 for 2001, 2002, and 2003 indicated that the sole proprietor supported himself and had adjusted gross incomes of \$21,135 in tax year 2001, of \$53,233 in tax year 2002, and of \$2,753 in tax year 2003. The petitioner's Schedules C for the tax years 2001, 2002, and 2003 listed the beneficiary's paralegal wages of \$46,645 on line 11. Counsel also submitted copies of the beneficiary's W-2 forms from 1994 to the present. These documents indicated that the petitioner paid the beneficiary \$46,645 in wages each year, withheld \$1,446 each year in social security tax, and withheld Medicare tax of \$338 in the years 1994 to 2003. The W-2 forms also indicated the various locations of the petitioner's office and the beneficiary's residences in the New York area over the period of time from 1994 to 2003.

Counsel also submitted the petitioner's unaudited profit and loss statement for the year 2001 for the petitioner, a Form SSA-1099-Social Security Benefits statement that indicated the petitioner received \$16,546

---

<sup>1</sup> Counsel describes the petitioner's gross receipts or sales, as identified on Part I, line 1 of the sole proprietor's Schedule C, Profit or Loss from Business, as its total income for tax year 1998.

in social security benefits during 2001, and copies of monthly balances from January to December for the petitioner's escrow and client funds management account for a Chase Bank banking account. Counsel submitted similar documentation for tax years 2002 and 2003. The profit and loss statement for tax year 2004 covered the months January to August 2004. Finally counsel submitted a certificate for Outstanding Academic Excellence presented to the beneficiary's daughter in 2001 from the President's Education Awards Program.

On October 29, 2004, the director denied the petition. In her decision, the director stated that the petitioner submitted its 1998 Form 1040, U.S. Individual Income Tax Form, as well as its Forms 1040, for the tax years 2001, 2002, and 2003. The director noted that the petitioner did not submit its tax form for tax year 1994, as requested. The director then noted that the petitioner had submitted W-2 forms for the beneficiary for the years 1994 to 2003 and that these documents indicated that he beneficiary had been paid the same salary every year since 1994. The director then noted that the social security tax withheld and the Medicare tax withheld were incorrect, based on the percentage numbers available for reference from the IRS.<sup>2</sup> The director further noted that the W-2 forms appeared to be altered, and that they appeared to be created in response to the director's request for further evidence, and were not copies of the historic documents submitted to the IRS. The director then determined that the petitioner had not established its ability to pay the proffered wage as of the 1994 priority date.

On appeal, counsel states that the director's decision is incorrect based on the law and on the facts. Counsel states that a copy of the petitioner's Schedule C from its 1994 income tax return which had been previously been submitted is submitted, and that employees payments are listed on line 11 under commissions and fees.<sup>3</sup> Counsel also states that the W-2 Forms that were submitted to the record were a reconstruction of the original W-2 Forms issued in the years 1994 to 1997 as the originals were destroyed or lost in the course of moving. Counsel adds that federal law does not required that these records be retained for more than four years. Counsel then states that the petitioner in his Schedule C demonstrated sufficient funds to pay the proffered salary based on the petitioner's \$130,000 gross income. Counsel notes that the beneficiary's earnings are already deducted from the petitioner's gross income prior to establishing the petitioner's net profit on line 31 of the petitioner's Schedule C.

Counsel in his response to the director's request for further evidence, stated that the petitioner at the time of filing the Form ETA 750, had the ability to pay the proffered wage. Counsel further stated that the CIS had initially approved the petitioner's first I-140 petition for the beneficiary and only revoked it due to the DOL's administrative error in not stamping the approved labor certification. Thus, counsel appears to infer that CIS had already adjudicated the issue of whether the petitioner had the ability to pay the proffered wage. While the record reflects no earlier examination of the petitioner's ability to pay the proffered wage, this by itself does not establish that CIS did or did not examine this issue in its previous adjudication. Furthermore, the

---

<sup>2</sup> Although the director did not explicitly state this in her decision, the beneficiary had also paid the same Medicare tax and social security tax amounts every year from 1994 to 2003.

<sup>3</sup> A Schedule C from the petitioner's 1994 Form 1040 is not found in the appeal materials. A copy of a notice from the IRS that the petitioner owed past due taxes of \$2,731.96 for tax year 1994 is found in the appeal materials.

Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of the beneficiary based on the director's determination that the petitioner had the ability to pay the proffered wage, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd.* 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director in her request for further evidence stated that the petitioner should submit accredited profit/loss statements, bank account records, or personnel records for 1994. The record is not clear why the director requested such materials instead of the evidentiary documentation stipulated by 8 C.F.R. 204.5 (g)(2), namely, copies of annual reports, federal tax returns, or audited financial statements. Documents such as profit and loss statements, personnel records, or bank account record would only be viewed as supplementary documentation.

In responding to the director's request for further evidence, the petitioner submitted profit and loss statements for tax years 2001, 2002, and 2003, and a profit and loss statement for the first eight months of 2004. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Since the profit and loss statements are not audited financial statements, they are given no weight in these proceedings.

In response to the director's request for further evidence, the petitioner submitted copies of its escrow and client management banking accounts. The petitioner's reliance on the balances in the petitioner's escrow and client funds management bank account 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. Third, the petitioner provides no explanation as to why the funds in an escrow account could ever be available to pay the petitioner's expenses, such as the beneficiary's wages.

It is also noted that neither the petitioner nor counsel provided any explanation for the reconstructed W-2 forms at the time these documents were submitted to the record. Counsel also provides no explanation on appeal that is persuasive. Only after the authenticity of the W-2s was questioned does counsel state that because the W-2 Forms were lost or destroyed in the course of the petitioner's moving his offices, the petitioner was unable to provide copies of the original documents, but rather had to reconstruct them. First, 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). Second, counsel does not examine the possibility of the beneficiary also being in possession of the original W-2 documents, or of using the beneficiary's income tax returns to provide some minimal corroboration of any actual wages received by the

beneficiary in the years 1994 to 2003. Third, it is noted that despite counsel's review of the petitioner's 1998 tax return and the inclusion of the beneficiary's wages on line 11, of Schedule C, the record reflects discrepancies between the wages stated on the 1998 W-2 form submitted to the record, namely \$46,645, and the petitioner's claimed wages to the beneficiary, described on the petitioner's 1998 tax return, namely, \$48,000. This discrepancy diminishes further the evidentiary weight to be given the information provided by the petitioner on the W-2 Forms found in the record. Furthermore, the director's comments with regard to the uniformity of the Medicare and social security taxes withheld are well founded. Neither the petitioner nor counsel provides any further explanation of why these withheld taxes did not change over the course of nine years. Therefore, the W-2 Forms submitted to the record by the petitioner are given no weight in these proceedings.

With regard to the sole proprietor's tax returns, it is noted that the entries with regard to fees and commissions provided to the beneficiary on the respective Schedules C also appear to have been altered, with white out also used to correct figures for gross income, and also used to insert the beneficiary's name on this line item. As stated previously, the federal corporate income tax return submitted with the instant petition, namely the tax return for tax year 1998, also reported a higher salary than the W-2 forms reported, which creates a discrepancy between the beneficiary's wages for tax year 1998 reported on the Schedule C and on the beneficiary's alleged W-2 Form. The record is also not clear why the beneficiary's wages would be reported as commissions and fees, when he was allegedly given W-2 forms, used to record wages and salaries. Finally the record contains a letter from the petitioner submitted a letter to former counsel dated September 3, 2004, in which the petitioner stated that he had submitted copies of his income tax forms previously but they contained errors. The petitioner then asked his former counsel to return the tax forms to the petitioner. The record is not clear if the tax returns were then altered to correct accounting errors or to further substantiate the petitioner's employment of the beneficiary through commissions and fees, or a fixed salary. As a result the record is somewhat unclear as to what weight to give the petitioner's tax returns, in particular the Schedules C submitted with the tax returns. For purposes of these proceedings, the petitioner's tax returns for 1998, 2001, 2002, and 2003 are given limited evidentiary weight. The AAO will examine them only for illustrative purposes when evaluating the petitioner's ability to pay the proffered wage.

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 employ the beneficiary as of February 1991 and therefore employed the beneficiary as of the 1994 priority date. Although the petitioner submitted reconstructed W-2 forms to establish the actual wages paid to the beneficiary, as previously stated, these documents are given no weight in these proceedings. As previously stated, the AAO views the petitioner's tax returns as also having limited evidentiary weight. Therefore the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 1994 priority date and to the present. The petitioner is also obligated to establish its ability to pay the entire proffered wage from the 1994 priority date to the present.

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 (7<sup>th</sup> 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. As previously stated, the petitioner did not submit its tax returns for tax years 1994, 1995, 1996, or 1997. Therefore the AAO cannot examine the sole proprietor's ability to pay the proffered wage of \$46,645 and pay his household expenses based on his adjusted gross income in the years 1994, 1995, 1996, or 1997. Thus, the petitioner cannot establish that it has the ability to pay the proffered wage as of the priority date year of 1994 through 1997, and the petition shall be denied.

However, the AAO, for illustrative purposes, will examine the petitioner's other tax returns submitted to the record. As previously stated, the AAO did not find the petitioner's documentation submitted to the record, namely, W-2 Forms for the beneficiary and the petitioner's Schedules C to be persuasive evidentiary documentation as to the petitioner's ability to pay the proffered wage in the tax years 1998, 2001, 2002, and 2003. Therefore the petitioner would have to establish that it has the ability to pay the entire proffered wage out of its adjusted gross income, identified on page one of each respective Form 1040 for the years in question, as well as pay the petitioner's household expenses.

The petitioner's adjusted gross income reflected in the petitioner's Forms 1040 for the years 1998, 2001, 2002, and 2003 are as follows: \$51,468 in 1998, \$21,135 in 2001; \$53,233 in 2002; and \$2,753 in 2003. The director did not request and nor did the petitioner provide an itemized list of household expenses. Nevertheless, it does not appear reasonable that the petitioner could have paid the proffered wage of \$46,645 and paid his household expenses based on the above-described adjusted gross incomes, in any of the years in question.

Thus, the petitioner has not established that it can pay the proffered wage, and sustain himself, based on his adjusted gross income in the years 1998, 2001, 2002, and 2003. Furthermore, the petitioner has not identified any other personal assets or funds with which he could pay the proffered wage. In the petitioner's response to

the director's request for further evidence, and on appeal, the petitioner asks that the educational awards certificate given to the beneficiary's daughter be given substantial weight when evaluating the petitioner's ability to pay the proffered wage. However, such evidence, while noteworthy, is immaterial to the issues to be evaluated and adjudicated in these proceedings. Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the 1994 priority date and continuing to the present.

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.