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FILE: [Redacted]
EAC-04-143-52905

Office: VERMONT SERVICE CENTER

Date: **AUG 16 2006**

IN RE: Petitioner:
Beneficiary:

[Redacted]

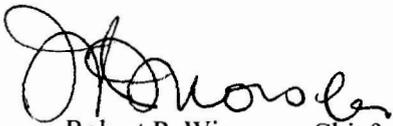
PETITION: *Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)*

ON BEHALF OF PETITIONER:

[Redacted]

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, Chief
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 remanded to the director.

The petitioner is an architectural firm. It seeks to employ the beneficiary permanently in the United States as an architect. 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.

On appeal, the petitioner submits a brief statement and/or additional evidence¹.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 August 28, 2003. The proffered wage as stated on the Form ETA 750 is \$40,014 per year. On the Form ETA 750B signed on March 5, 2003, the beneficiary claimed to have worked for the petitioner since September 2002.

On the petition, the petitioner claimed to have been established in 1983, to have a gross annual income of \$112,851, and to currently employ 2 workers. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.

The petition was filed on April 13, 2004 with the sole proprietor's Form 1040, U.S. Individual Income Tax Return, for 2003 and the beneficiary's W-2 form for 2003 pertinent to the petitioner's ability to pay the proffered wage. On November 15, 2004, the director denied the petition, finding that the petitioner's net profit reflected on Schedule C was insufficient to pay the difference between wages paid to the beneficiary

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

and the proffered wage in 2003, therefore, the petitioner failed to establish the ability to pay the beneficiary's proffered wage.

On appeal, counsel submits a letter from a CPA and other supporting documents, arguing that the account receivables, future earnings and the sole proprietor's personal assets should be considered in determining the petitioner's ability to pay the proffered wage.

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. In the instant case, the petitioner submitted the beneficiary's W-2 form for 2003. The beneficiary's Form W-2 Wage and Tax Statements in the record shows that the petitioner employed and paid the beneficiary in the amount of \$22,827.09 in 2003, which was \$17,186.91 less than the proffered wage. The petitioner is still obligated to demonstrate that it had ability to pay the difference between the wages already paid to the beneficiary and the proffered wage in 2003.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The priority date in the instant case is August 28, 2003. The instant petition was filed on April 13, 2004 and the instant appeal was submitted on December 13, 2004. As of the date of the appeal, the petitioner's owner's 2004 federal tax return was not yet due. Therefore, the 2003 tax return is the only available tax return to be considered in determining the petitioner's ability to pay the proffered wage and/or the difference between the wage already paid to the beneficiary and the proffered wage from the priority date.

Tax year	Adjusted gross income	Wage increase needed to pay the proffered wage	Surplus or deficit
2003	\$41,881.85	\$17,186.91	\$24,694.94

The above information shows that in 2003 the sole proprietor's adjusted gross income was \$24,694.94 more than the difference between the wage already paid to the beneficiary and the proffered wage the petitioner should pay the beneficiary in that year. However, it is not clear that the sole proprietor could sustain himself

with the amount of \$24,694.94 since the petitioner did not submit a statement of monthly expenses for the sole proprietor's household.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains the petitioner's business bank statements and the sole proprietor's financial statements. The funds in the sole proprietor's business checking account are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, the petitioner did not submit any statements for the sole proprietor's personal bank accounts and business savings accounts. The financial statements submitted are unaudited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner failed to demonstrate that the sole proprietor had additional liquefiable assets to be considered in determining the petitioner's ability to pay the proffered wage and to cover his personal living expenses.

The CPA's letter asserts that the petitioner's accounts receivable of approximately \$12,900 should be added to the net income in determining the petitioner's ability to pay the proffered wage. The CPA states that the petitioner's tax return is prepared according to a cash basis of accounting which may not accurately reflect the petitioner's profitability. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

The CPA letter also argues that the beneficiary will generate income for the petitioner. Reliance on the beneficiary creating future income is misplaced. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to determine the sole proprietor's monthly expenses and whether or not he could sustain his household in 2003 on \$24,694.94. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.