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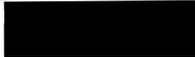
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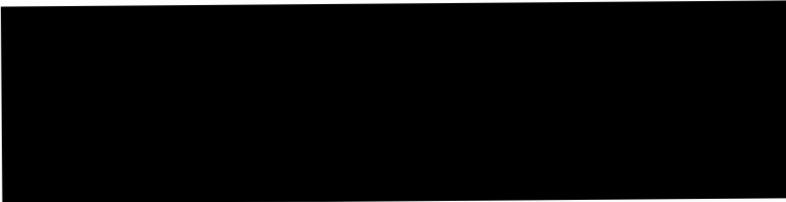
Petitioner:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is a residential home repair and improvement company. It seeks to employ the beneficiary permanently in the United States as a carpentry mechanic/painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 5, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$23.18 per hour (\$48,214.40 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a carpenter apprentice or painter.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all

pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, the petitioner's IRS Forms 1099-MISC for 2001 and a previously submitted IRS Form 1040, Schedule C, for 2001 for [REDACTED]. Other relevant evidence in the record includes IRS Form 1040, U.S. Individual Income Tax Return, for [REDACTED] and [REDACTED]. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in September 1992 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner since May 1996.

On appeal, counsel asserts that whether the petitioner showed a profit or loss in 2001 is irrelevant. Counsel states that the employer is only required to show that it had the ability to pay the beneficiary the proffered wage that year. Counsel asserts that the petitioner paid \$49,544.00 in compensation to its employees in 2001 and that its wage expense establishes its ability to pay the proffered wage. Counsel states that the petitioner's wage expense was erroneously listed on the petitioner's tax return as an "other cost" rather than a "cost of labor." Counsel also asserts that paying employees as individual contractors with IRS Forms 1099 instead of IRS Forms W-2 is an acceptable business decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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 has established that it paid the beneficiary \$26,800.00 in income in 2001 pursuant to the beneficiary's IRS Form 1099-MISC in the record. Therefore, for the years 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2001. Since the proffered wage is \$48,214.40 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$21,414.40 in 2001.

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.² Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well

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).

² Contrary to counsel's assertion, the petitioner's net income is relevant to the determination of its ability to pay the proffered wage.

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).

Counsel asserts on appeal that the petitioner's wage expense was erroneously listed on the petitioner's tax return as an "other cost" rather than a "cost of labor." The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel further asserts that the petitioner paid \$49,544.00 in compensation to its employees in 2001 and that its wage expense establishes its ability to pay the proffered wage. However, counsel's reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient, regardless of whether the wage expense is supported by IRS Forms W-2 or Forms 1099.

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 his child. In 2001, the proprietor's IRS Form 1040 reflects that the proprietor's adjusted gross income was \$24,332.00. After paying the difference between the wages actually paid to the beneficiary and the proffered wage, the petitioner would have had \$2,917.60 to support himself, his spouse and his child in 2001. The record does not contain a statement of the petitioner's monthly expenses for 2001. Therefore, the AAO cannot determine if the petitioner was able to pay his household expenses and the difference between the wages actually paid to the beneficiary and the proffered wage with the remaining income. Regardless, it is improbable and the preponderance of the evidence does not show that the sole proprietor could support himself, his spouse and his child on the amount remaining after reducing the adjusted gross income by the amount required to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Finally, on appeal, counsel states that the employer is only required to show that it had the ability to pay the beneficiary the proffered wage that year. Contrary to counsel's assertion, the petitioner must establish that it has sufficient funds to pay the proffered wage from the priority date in 2001 and continuing until the beneficiary obtains lawful permanent residence.³ 8 C.F.R. § 204.5(g)(2). As set forth above, the petitioner has not done so.

³ Counsel's assertion on appeal highlights a fundamental deficiency in the evidence. The petitioner filed Form I-140 on July 21, 2004. As of that date, the petitioner's 2003 tax return is the most recent return

Therefore, the petitioner has failed to establish by the preponderance of the evidence its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains permanent residence.

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.

available. However, the record lacks the petitioner's tax records for 2002 or 2003. Therefore, the AAO is unable to determine if the petitioner had the ability to pay the proffered wage in 2002 or 2003.