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**DEC 20 2006**

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC-03-164-50840

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, 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 appeal will be sustained.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 May 23, 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 U.S. Department of Labor. 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 U.S. Department of Labor 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 March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$10.44 per hour (\$21,715.20 per year). The Form ETA 750 states that the position requires two (2) years of experience in the proffered position.

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<sup>1</sup>. Relevant evidence in the record includes the beneficiary's 1099 form for 2002 and W-2 forms for 2003 and 2004, Scott J. Embree's Form 1040 U.S. Individual Income Tax Return for 1999 through 2004, bank statement for business checking account for June to December 2002 and June to December 2003, and a statement of Scott J. Embree's personal expenses. 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 a sole proprietorship. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$152,969, and to have a net annual income of \$62,659. The petitioner did not indicate the number of current employees on the form. On the Form ETA 750B, signed by the beneficiary on March 3, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner was represented by a person practicing law without a license, that the director should have considered the statement of the CPA to add depreciation back to net profits, and that the director should have accorded more weight to the information that the petitioner paid the sole proprietor's personal expenses.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

The petitioner does not submit these required documents for claim of ineffective assistance of counsel. However, considering counsel's assertion regarding the representation by an unauthorized person and evidence that counsel was seeking prosecutorial action, the AAO will review all evidence in the record, especially the evidence newly submitted or resubmitted by counsel on appeal as evidence submitted with the initial filing and in response to the director's request for evidence (RFE).

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.

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<sup>1</sup> 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 evaluate the decision of the director, based on all the evidence submitted in the record.

*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 evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. However, it submitted the beneficiary's 1099 form for 2002 and W-2 forms for 2003 and 2004. These documents show that the petitioner paid the beneficiary the following amounts for the following years: \$15,285 in 2002, which is \$6,430.20 less than the proffered wage in that year; \$13,812.50 in 2003, which is \$7,902.70 less than the proffered wage in that year; and \$19,563.50 in 2004, which is \$2,151.70 in that year. The beneficiary's Form 1040 individual tax returns submitted do not show that the beneficiary had additional income from the petitioner in the relevant years. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$21,715.20 in 2001 and the difference of \$6,430.20 in 2002, \$7,902.70 in 2003 and \$2,151.70 in 2004 between the wages it actually paid to the beneficiary and the proffered wage respectively.

As previously noted, the evidence indicates that the petitioner in the instant case 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 (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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33<sup>2</sup>, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 1999 through 2004. Since the priority date in the instant case is March 15, 2001, the sole proprietor's 1999 and 2000 tax returns are not necessarily dispositive. The AAO reviews the tax returns for 2001 through 2004 in determining the petitioner's ability to pay in this case. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage in 2001 and the difference between wages actually paid to the beneficiary and the proffered wage in 2002 through 2004:

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<sup>2</sup> The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

In 2001, the Form 1040 stated adjustable gross income of \$26,633.  
In 2002, the Form 1040 stated adjustable gross income of \$6,913.  
In 2003, the Form 1040 stated adjustable gross income of \$26,691.  
In 2004, the Form 1040 stated adjustable gross income of \$88,540.

On appeal counsel submits a statement from the sole proprietor attesting that his household expenses in 2001 and 2002 totaled \$14,030 and \$15,870 respectively. The expenses include rent, food, insurance utilities, gas/travel, medical and clothing. The record of proceeding contains letters from the petitioner's accountant regarding the sole proprietor's personal expenses. The accountant's letter states that "all of [the sole proprietor]'s personal expenses (Rent/Mortgage, Real estate taxes, personal property taxes, utilities, food and insurance) are paid from the business." The accountant also submitted copies of cancelled checks of the petitioner paying the sole proprietor's personal expenses to support his assertions. The AAO will accept the accountant's assertion and consider the sole proprietor's personal expenses specifically listed in the accountant's letter as already covered by the petitioner, and therefore, the sole proprietor needs to demonstrate his ability to cover those personal expenses which are not listed, such as gas and travel, medical and clothing. Thus, the remaining amounts of the sole proprietor's living expenses that need to be covered with his adjusted gross income are \$1,920 in 2001 and \$3,370 in 2002.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was \$26,633, which leaves the sole proprietor \$4,917.80 to cover his personal living expenses after paying the beneficiary the proffered wage of \$21,715.20. As discussed above, the sole proprietor needs to cover his additional personal expenses of \$1,920 in 2001. Therefore, the sole proprietor had sufficient adjusted gross income to pay the proffered wage and to cover his personal living expenses in 2001, the year of the priority date.

In 2002 the adjusted gross income was \$6,913, which is \$2,887.20 less than the difference of \$6,430.20 between wages actually paid to the beneficiary and the proffered wage and the sole proprietor's living expenses that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage as well as the sole proprietor's living expenses for 2002.

In 2003 the sole proprietor's adjusted gross income on Form 1040 was \$26,691, which leaves the sole proprietor \$18,788.30 to cover his personal living expenses after paying the beneficiary the difference of \$7,902.70 between wages actually paid to the beneficiary and the proffered wage in that year. The sole proprietor did not submit a statement for his living expenses for 2003, however, it is likely that the sole proprietor could sustain himself and his family with that surplus if the situation in 2003 was similar with 2002. Therefore, the AAO considers that the sole proprietor had sufficient adjusted gross income to pay the proffered wage and to cover his personal living expenses in 2003.

In 2004 the sole proprietor's adjusted gross income on Form 1040 was \$88,540, which seems sufficient to pay the proffered wage and the sole proprietor's household living expenses. The petitioner has established its ability to pay the proffered wage as well as to cover the personal living expenses.

Therefore, the sole proprietor had sufficient adjusted gross income to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage and to cover his personal living expenses in 2001 through 2004 except for 2002 with a shortfall of \$2,887.20.

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 bank statement for

the petitioner's business checking account for 2002 and 2003. However, the statement represents the sole proprietor's business checking account, and these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the balance in the petitioner's business checking account cannot be considered as part of available funds in determining its ability to pay. 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 such evidence. The petitioner should address this issue in any further proceedings.

Counsel argues with letters from the petitioner's accountant that the depreciation expense should be added back to net profits and considered in determining the petitioner's ability to pay. Counsel's and accountant's reliance on depreciation is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner has been business for more than thirteen years and the tax returns submitted for 1999 through 2004 show that gross income has been growing from \$73,523 in 1999 to 172,133 in 2004 and the business has always been profitable. Considering the fact that the petitioner had proven its ability to pay the proffered wage three out of four relevant years in this case, it is reasonable to conclude that the sole proprietor would have additional income or liquefiable assets of \$2,887.20 for the shortfall in 2002. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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 met that burden.

**ORDER:** The appeal is sustained. The decision of the director is withdrawn. The petition is approved.