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FILE: EAC 04 114 54380 Office: VERMONT SERVICE CENTER

Date: DEC 29 2006

IN RE: Petitioner:
Beneficiary:



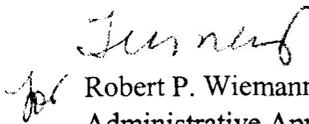
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


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 dismissed.

The petitioner is a roofing firm. It seeks to employ the beneficiary permanently in the United States as a roofer. 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, counsel asserts that the director erred in his analysis of the evidence submitted and maintains that the petitioner has the financial ability to pay the proffered wage.

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 \$14.00 per hour, which amounts to \$29,120 per annum. On Part B of the ETA 750, signed by the beneficiary on April 25, 2001, the beneficiary claims that he has worked for the petitioner since May 2003.

Part 5 of the preference petition, filed on March 4, 2004, indicates that the petitioner was established in February 2001 and currently employs five workers. It claims an annual income of \$287,257 and an annual net income of \$73,431.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001 and 2002. They reflect that the sole proprietor filed as a head of household and claimed three dependents in each year. The tax returns contain the following information:

Petitioner's gross receipts (Schedule C)

\$ 77,824

| | 2001 | 2002 |
|---|-----------|-----------|
| Petitioner's Gross Income (Schedule C) | \$287,257 | \$302,903 |
| Petitioner's total expenses (Schedule C) | \$212,317 | \$258,782 |
| Petitioner's net profit (Sched. C) | \$ 73,431 | \$ 42,743 |
| Total business net income (Form 1040) | \$ 73,431 | \$ 42,743 |
| Sole Proprietor's adjusted gross income (Form 1040) | \$ 68,243 | \$ 39,723 |

The petitioner also provided a copy of a contract that it had with "CTR Corporation" in which it was to provide roofing services. The agreement provided that it began on February 1, 2001 and ended on January 1, 2002. The petitioner further provided copies of Form 1099, Miscellaneous Income that it had received from CTR in 2001 and 2002. In 2001, its compensation is shown as \$287,256.87 and in 2002, its compensation was \$302,903.41.

With the petition, the petitioner supplied a copy of the sole proprietor's household expenses for 2001 and 2002, as well as a copy of the beneficiary's 2003 Form 1099, Miscellaneous Income. In 2001, the sole proprietor claimed \$32,819 household expenses and in 2002, her household expenses were \$35,000. The petitioning business paid \$19,608 in compensation to the beneficiary in 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 31, 2004, denied the petition. The director noted that the sole proprietor's adjusted gross income in 2001 showed that after paying household expenses, \$35,424 was left to pay the proffered wage. The director further noted that the petitioner had filed five Immigrant Petitions for Alien Workers (I-140s) in the past year and that its resources must be sufficient to cover all of the sponsored beneficiaries.

On appeal, counsel submits duplicates of the underlying documentation and additionally provides copies of Form 1099s provided by the petitioner to fourteen employees in 2001 and copies of 1099s issued to eight employees in 2002. Counsel asserts that sufficient resources existed to pay all of the beneficiaries. Referring to *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), counsel asserts that the overall circumstances of a sole proprietorship must be considered. Counsel also relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the claim that an unprofitable year does not justify the denial of a petition if the petitioner can demonstrate profitable years before and/or after the year in which the labor certification case was filed.

While we agree that the overall circumstances of a sole proprietorship must be considered where it is the named petitioner, in this case, we do not find that the petitioner has sufficiently demonstrated that it has the continuing ability to pay the proffered wage of \$29,120.

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 may have 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 evidence shows that the petitioner paid compensation of \$19,608 to the named beneficiary in 2003. It is noted that the current beneficiary was substituted for the original beneficiary identified on the labor certification as [REDACTED]. Counsel asserts that this individual is shown on the 1099s as [REDACTED] and that the petitioner paid him \$20,639 in 2001 and \$25,501 in 2002. Counsel argues that these amounts should have been considered, apparently suggesting that Mr. [REDACTED] wages should be attributable to the beneficiary as the intended replacement. Counsel's contentions in this

regard 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). While it is noted that the beneficiary was substituted as an intended beneficiary for an immigrant visa, there is no direct evidence from the employer specifically documenting the termination of the original beneficiary or the type work performed by the original beneficiary. If that employee performed tasks other than the work of the proffered position, then the substituted beneficiary shall not be considered as his replacement and his wages shall not be viewed as funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual 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. As noted above, 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors provide summaries of their monthly household expenses.

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, starting with 2001, after paying household expenses, which would reasonably include the expenses of the dependents as noted by counsel, the remaining \$35,424 of adjusted gross income would be sufficient to pay the proffered wage of \$29,120, and thus demonstrate the petitioner's ability to pay this wage in 2001. In 2002, after paying household expenses of \$35,000, the remaining \$4,723 out of the adjusted gross income of \$39,723, would not be enough to cover the certified wage as it represents a \$24,397 shortfall. Based on these figures, and the evidence contained in the record, we conclude that is unlikely that the sole proprietor could have sufficient funds to pay this shortfall in 2002 as well as support herself and three dependents during the period under consideration.

We do not find that an approval based on *Matter of Sonogawa*, *supra*, is appropriate in this case. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the

petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner was established only three years before it filed this petition and only a few months before it filed the application for labor certification. Although the petitioner's relationship with CTR Corporation indicates a lucrative client, the evidence shown on the sole proprietor's two tax returns reflect a declining adjusted gross income. It cannot be found that these two returns contained in the record represent a framework of profitable years analogous to the *Sonegawa* petitioner. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its *continuing* ability to pay the proffered as of the priority date of the petition.¹

Beyond the decision of the director, it is noted that the petitioner, its sole proprietor, and the beneficiary share the same last name. While this may not be uncommon, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, in future proceedings, this issue may also merit further investigation, including consultation with the DOL.

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.

¹As the petitioner has not shown the continuing ability to pay the proffered wage to the instant beneficiary, this office need not address whether it is able to demonstrate the ability to pay the wages of other beneficiaries for which it had either pending petitions or approved petitions for which the beneficiaries had not yet adjusted status during the relevant period of analysis. If the petitioner attempts to revisit this case on motion, however, it must sufficiently demonstrate its ability to pay the proffered wages of all the beneficiaries of its relevant petitions.