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FILE: EAC-03-167-50072 Office: VERMONT SERVICE CENTER Date: JUN 01 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 carpentry/remodeling company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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.

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

As set forth in the director's August 13, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.85 per hour, which amounts to \$43,368.00 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes an affidavit from the petitioner's owner and copies of Form 1099 miscellaneous income statements for subcontractors of the petitioner. Other relevant evidence in the record includes copies of the individual federal tax returns of the petitioner's owner for 2001, 2002 and 2003, and copies of Form 1099 miscellaneous income statements of the beneficiary for 2001 and 2002.

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).

On appeal, counsel states that an affidavit of the petitioner's owner submitted on appeal states that at least one half of the amounts paid each year by the petitioner to subcontractors could have been saved if the beneficiary had been on the petitioner's payroll. Counsel states that if the petitioner is given credit for amounts actually paid to the beneficiary in 2001 and 2002, and credit for half of the amounts paid to subcontractors in 2001, 2002 and 2003, the adjusted gross income of the petitioner's owner is sufficient to establish the petitioner's ability to pay the proffered wage in each of those years.

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 evaluating whether a job offer is realistic, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary did not claim to have been employed by the petitioner.

Fed record contains copies of Form 1099 Miscellaneous Income statements of the beneficiary for 2001 and 2002, which show non-employee compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$5,327.00	\$43,368.00	\$38,041.00
2002	\$37,200.00	\$43,368.00	\$6,168.00
2003	not submitted	\$43,368.00	\$43,368.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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 corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001, 2002 and 2003. The record before the director closed on June 7, 2004 with the receipt by the director of the petitioner's submissions in response to a request for evidence (RFE) which had been issued by the director on April 15, 2004. As of June 7, 2004, the federal tax return of the petitioner's owner for 2003 was the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner show his filing status as single and they show no dependents. Therefore the household size of the petitioner's owner is one person.

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 owner's tax returns show the amounts for adjusted gross income as shown in the following table:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$7,076.00	not submitted	\$38,041.00*	\$(30,965.00)
2002	\$11,689.00	not submitted	\$6,168.00**	\$5,521.00
2003	\$6,745.00	not submitted	\$43,368.00***	\$(36,623.00)

* Crediting the petitioner with the \$5,327.00 actually paid to the beneficiary in 2001

** Crediting the petitioner with the \$37,200.00 actually paid to the beneficiary in 2002

*** The full proffered wage, since the record contains no evidence of any compensation paid by the petitioner to the beneficiary in 2003

The amounts remaining after paying the beneficiary the full proffered wage would have been insufficient for the reasonable household expenses of the petitioner's owner in each of the years at issue.

The record contains an affidavit dated September 10, 2004 from the petitioner's owner, which was submitted for the first time on appeal. In the affidavit, the owner states that he has been unable to find persons qualified and legally authorized to work for him as employees and that he has therefore used outside subcontractors for much of the work of his company. He states that if he was able to put the beneficiary on his payroll, he would be able to eliminate at least half of his expenses on subcontractors. The owner states that the beneficiary worked for him as a subcontractor in 2001 and 2002, but that the beneficiary performed no work for the owner or his company in 2003.

In the affidavit, the owner also states that the duties to be performed by the beneficiary are not in addition to those being performed by subcontractors, as was stated by the director in her decision, but rather would replace some of the work done by those subcontractors.

With the affidavit, the owner submits copies of five Form 1099's showing payments to subcontractors in 2003. The owner states that he did not issue Form 1099's to all subcontractors, such as to companies. In her brief, counsel states that federal tax law requires the issuance of Form 1099's only to contractors who are individuals, but not to companies. In his affidavit, the owner states that his total expenses on subcontractors are shown on his federal tax returns and that in 2003 he paid \$46,250.00 to subcontractors.

The petitioner's owner states that if the beneficiary had been on the petitioner's payroll the petitioner could have saved at least half of its expenses on subcontractors. However, the affidavit fails to clarify whether the owner is referring to the petitioner's total expenses on subcontractors or only to the amounts paid to subcontractors other than the beneficiary.

The Schedule C's attached to the owner's Form 1040 tax returns show expenses for subcontractors of \$127,664.00 in 2001, \$47,860.00 in 2002, and \$46,250.00 in 2003. The amounts paid to the beneficiary were \$5,327.00 in 2001 and \$37,200.00 in 2002. For 2001, only about 4% of the expenses for subcontractors were paid to the beneficiary, but for 2002, about 78% of the petitioner's expenses for subcontractors were payments to the beneficiary.

Subtracting the amounts of \$5,327.00 paid to the beneficiary in 2001 and \$37,200.00 paid to the beneficiary in 2002 yields figures for the amounts paid to other contractors of \$122,337.00 in 2001 and \$10,660.00 in 2002, along with the amount of \$46,250.00 in 2003, when the beneficiary performed no work for the petitioner.

If the beneficiary had been employed by the petitioner in 2001 a savings of 50% of the petitioner's expenses on other subcontractors would have resulted in the amount of \$30,203.50 remaining for the household expenses of the petitioner's owner, after paying the full proffered wage to the beneficiary. That amount would be considered a reasonable amount for the expenses of a one-person household. However, for 2002, only \$10,660.00 was spent on other subcontractors, and a savings of 50% of that amount would result in the amount of only \$10,351.00 remaining for the household expenses of the petitioner's owner after paying the full proffered wage to the beneficiary, an amount insufficient for the owner's household expenses. For the year 2003, \$46,250.00 was spent on other subcontractors. A savings of 50% of that amount would be insufficient to allow any amount to remain for the owner's household expenses, since the amount remaining in 2003 after paying the full proffered wage would be a negative figure, -\$13,498.00.

For the foregoing reasons, even if it were assumed that the petitioner would have saved 50% of its expenses on other subcontractors in each of the years 2001, 2002 and 2003 if the beneficiary had been on its payroll, the information on the owner's tax returns would establish the petitioner's ability to pay the proffered wage only in the year 2001, but not in 2002 or 2003.

In her brief, counsel presents calculations based on information in the affidavit of the petitioner's owner and information on his tax returns. Counsel asserts that her calculations show sufficient funds to pay the full proffered wage to the beneficiary, after crediting the amounts actually paid to the beneficiary and the amounts paid by the petitioner to subcontractors. However counsel's figures assume that all of the amounts paid to subcontractors would have been available to pay the proffered wage, whereas in his affidavit the owner claims potential savings of only 50% of the petitioner's expenses on subcontractors if the beneficiary had been on the petitioner's payroll. In addition, counsel's figures fail to make any allowances for the reasonable household expenses of the petitioner's owner. As noted above, where the petitioner is a sole proprietorship, the financial resources of the petitioner's owner must be shown to be sufficient to pay the full proffered wage and also to pay the owner's reasonable household expenses. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the RFE the director requested copies of any Form W-3's showing payments by the petitioner to its employees and subcontractors. In response, as noted above, the petitioner submitted copies of five Form 1099-MISC Miscellaneous Income statements. Counsel in her brief states that Form 1099's are required to be issued only to contractors who are individuals, but not to companies. Counsel's summary of the law on that point is consistent with the Internal Revenue Service instructions to the Form 1099-MISC, which state that, generally, payments made to corporations need not be reported on the Form 1099-MISC. See Internal Revenue Service, *Instructions for Form 1099-MISC, Miscellaneous Income* (2001), at 1, available at <http://www.irs.gov/pub/irs-prior/1099--misc.pdf>. Although counsel's statement appears to be an adequate explanation for the absence of Form 1099-MISC's for subcontractors which are corporations, that fact does not relieve the petitioner from its burden of proof in the instant petition. The petitioner was free to submit other forms of evidence showing its payments to subcontractors which are corporations, but the petitioner did not do so.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2001. The director found that that amount failed to establish the petitioner's ability to pay the proffered wage in 2001. The director noted that the petitioner's return for 2001 showed expenses of \$127,664.00 paid to contractors, but noted that the record contained no listing of the amounts paid to individual subcontractors. The record before the director did not include the affidavit of the petitioner's owner or the Form 1099's issued to some of the petitioner's subcontractors for 2003, evidence which was submitted for the first time on appeal. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.