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**U.S. Citizenship
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FILE: [REDACTED]
EAC-04-081-54065

Office: VERMONT SERVICE CENTER

Date: JUN 05 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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 construction works firm. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 16, 2004 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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act 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:

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 \$15.00 per hour, which amounts to \$31,200.00 annually.

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 appeal¹. No new evidence was submitted on appeal. Relevant evidence in the record includes a letter from the petitioner dated September 16, 2004, copies of four checks from the petitioner's owner to the beneficiary, and copies of the Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner for 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner states on appeal that gross income can be considered, the beneficiary would help with the expansion of the petitioner, the director failed to state the reason the request for evidence (RFE) was issued, and lack of specific evidence cannot justify a denial.

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 23, 2001, the beneficiary claimed to have work for the petitioner beginning in February 2001 and continuing through the date of the ETA 750B. The record, however, does not contain any Form W-2's, Form 1099's, or other evidence to show that the beneficiary received compensation from the petitioner in 2001, 2002, and 2003. The letter from the petitioner dated September 16, 2004 also states that "[b]ecause [the beneficiary] did not have a Social Security number until this time, he could not file tax returns for years 2001, 2002 and 2003. Also for that reason he was not issued W-2 forms for those years."

The record contains four checks from the petitioner's owner to the beneficiary dated August 13, 2004, August 20, 2004, August 27, 2004, and September 3, 2004. Those four checks are not enough to show that the petitioner has the ability to pay the annual proffered wage in 2004 because even though the checks, each in the amount of \$600.00, show that the beneficiary was paid the weekly proffered wage from August 13, 2004 to September 3, 2004, the checks do not indicate that the beneficiary was paid or how much the beneficiary was paid before August 13, 2004 and after September 3, 2004.

The petitioner states that "[i]t must be considered, however, that [the beneficiary] did perform work for our company in previous years and was, of course, paid for his services." As stated above, the record does not contain any evidence showing that the beneficiary received compensation from the petitioner in 2001, 2002,

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).

and 2003. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also states that “the lack of [prior Form W-2’s] cannot, in ou[r] opinion, justify the decision to deny our petition.” The AAO does not only look at documentary evidence showing that the beneficiary was employed at a salary equal to or greater than the proffered wage in determining the petitioner’s ability to pay the proffered wage. Rather, as demonstrated below, the AAO also looks at other evidence available in the record. The director also did not base her denial on the lack of Form W-2’s because the decision also discusses the individual tax returns of the petitioner’s owner. Thus, the petitioner’s assertion is without merit.

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 and 2002. The record before the director closed on October 12, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the federal tax return of the petitioner’s owner for 2004 was not yet due. Therefore the owner’s tax return for 2003 is the most recent return available. The Form 1040 U.S. Individual Income Tax Return of the petitioner’s owner for 2003 does not appear in the record.

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 are joint returns of the owner and his spouse. Those returns show no dependents. Therefore the household size of the petitioner’s owner is 2 persons.

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.² The owner's tax returns show the following amounts for adjusted gross income.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$5,504.00	No Information	\$31,200.00*	-\$25,696.00
2002	\$23,945.00	No Information	\$31,200.00*	-\$7,255.00
2003	No Information	No Information	\$31,200.00*	No Information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage and pay its owner's living expenses in 2001, 2002, and 2003.

The petitioner states that based on the gross income as reflected on its U.S. Individual Income Tax Returns for its owner for 2001 and 2002, it had more than sufficient funds to pay the proffered wage in 2001 and 2002. As stated above, the court in *K.C.P. Food Co., Inc. v. Sava* held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure 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. Thus, the AAO will not look at the petitioner's gross income.

The petitioner states that "it must be considered that some of the funds allocated for [other business] expenses might have been used for wage payments in case of need," and "other possible sources of business financing were not even considered . . . and no such additional evidence was ever requested." The record does not contain any evidence indicating that funds allocated for expenses on its owner's tax returns would have been available or that there were other possible sources of funding, and the petitioner's assertions 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). Moreover, CIS is not required to request additional evidence, and the petitioner had three opportunities to submit evidence: with the I-140 petition, in response to the RFE, and on appeal. In addition, the petitioner has the burden of proof in this proceeding. Section 291 of the Act, 8 U.S.C. § 1361.

The petitioner states that "it must be considered that the continuous full-time employment of such highly skilled worker as the beneficiary . . . will allow us to expand our operations." The petitioner is urging the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, no detail or documentation has been provided to explain how the beneficiary's employment as a cabinetmaker will significantly increase profits for a construction works firm. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

² For the Form 1040 U.S. Individual Income Tax Return for 2002, the adjusted gross income is the figure shown on line 35.

The petitioner states that “the [RFE] issued in our case failed to clearly state the reasons for such action and did not provide us with [the] request for information that was needed for approval of our petition.” First, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence in adjudicating the petitioner’s I-140 petition. Second, even if the RFE should have indicated the reason for its issuance, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal, and no new evidence was submitted on appeal.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. 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 petitioner’s assertions on appeal fail to overcome the decision of the director.

The AAO notes that on the Form ETA 750B, the beneficiary claimed to have worked as a cabinetmaker for 40 hours per week in Tashkent City, Uzbekistan from February 1988 to March 1998. A letter from the Tashkent Construction Company corroborates this information. According to evidence submitted with a previous I-140 petition that was denied on August 11, 1999, the beneficiary claimed to have gone to the Bakulev Institute of Cardiovascular Surgery located in Moscow, Russia in 1990 and started his research at the Department of Surgery in Moscow, Russia. Thus, evidence in the record appears to indicate that the beneficiary worked full-time as a cabinetmaker in Tashkent City, Uzbekistan while at the same time worked as a scientific worker in Moscow, Russia. This issue should be addressed in any future proceedings.

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.