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EAC-03-232-53589

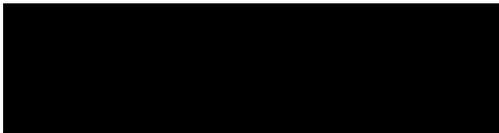
Office: VERMONT SERVICE CENTER

Date: JUN 08 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 construction firm. It seeks to employ the beneficiary permanently in the United States as a mason. 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 19, 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 9, 2001. The proffered wage as stated on the Form ETA 750 is \$893.20 per week, which amounts to \$46,446.40 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 appeal<sup>1</sup>. Relevant evidence submitted on appeal includes copies of bank statements from January 2001 to March 2001. Other relevant evidence in the record includes copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001 and 2002, copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 2001 and 2002, copies of the beneficiary's Form G-325A Biographic Information, a letter from the petitioner dated December 19, 2002, a list of the owner's monthly expenses for 2001 and 2002, and copies of bank statements from April 2001 to December 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that the beneficiary's income as listed on the beneficiary's Form 1040 U.S. Individual Income Tax Returns and bank statements of the petitioner's owner can be considered in determining the petitioner's ability to pay the proffered wage.

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 March 7, 2001, the beneficiary claimed to have worked for the petitioner beginning in May 2000 and continuing through the date of the ETA 750B. On the Form G-325A Biographic Information, the beneficiary also claimed to have worked for the petitioner beginning in May 2000. However, the record does not contain any Form W-2's, Form 1099's, or other evidence to show that the beneficiary received compensation from the petitioner.

Counsel states on appeal that "[t]he beneficiary submitted his individual income tax return for the year 2001 showing cash receipt of \$30,952.00. The petitioner was not able to provide either a W-2 form or 1099 form to the beneficiary in 2001 as the beneficiary did not have social security number at that time." Evidence supporting this assertion includes copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 2001 and 2002 and a letter from the petitioner dated December 19, 2002.

According to the beneficiary's tax returns, the beneficiary received \$20,065.00 as business income in 2001 and \$5,000.00 as business income in 2002. Those tax returns do not contain information regarding from whom the beneficiary received the income or whether those amounts are a combination of wages paid by different

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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).

employers. Additionally, according to the beneficiary's 2002 tax return, he received \$18,098.00 as wages in addition to \$5,000.00 as business income. The letter from the petitioner dated December 19, 2002 states that "[the beneficiary] has been working for our company since May 2000." It does not state the amount the beneficiary received from the petitioner in 2001. Thus, without additional evidence showing that the business income and the wages the beneficiary received did in fact originate from the petitioner, the AAO cannot assume that those amounts are wages paid to the beneficiary by the petitioner. Moreover, even if the AAO does consider the beneficiary's tax returns as evidence of wages paid to the beneficiary by the petitioner, the petitioner still cannot establish its ability to pay the proffered wage because the AAO looks at the amounts listed as business income, and those amounts are less than the proffered wage. A combination of the amounts listed as business income and the Adjusted Gross Income of the petitioner's owner for 2001 and 2002, after taking into consideration household expenses, would still be less than the proffered wage.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 September 25, 2004 with the receipt by the director of the petitioner's submissions in response to the request for evidence (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. A copy of 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 (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 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 two dependent sons. Therefore the household size of the petitioner's owner is four 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.<sup>2</sup> The owner's tax returns show the following amounts for adjusted gross income, and calculations based on the owner's list of monthly expenses for 2001 and 2002 show the following amounts for household expenses.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$28,595.00	\$44,416.00	\$46,446.40*	-\$62,267.40
2002	\$47,315.00	\$44,416.00	\$46,446.40*	-\$43,547.40
2003	No Information	No Information	\$46,446.40*	No Information

\* The full proffered wage, since the record contains no persuasive 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.

Counsel states on appear that "the Service was in error in deducting the proffered wage of \$46,440.40 from the petitioner's individual taxable income for the year 2001." As stated above, for sole proprietorship, CIS considers net income to be the figure for Adjusted Gross Income. Thus, the director erred in deducting the proffered wage from the petitioner's individual taxable income instead of the Adjusted Gross Income. However, because the record does not contain any persuasive evidence indicating that the beneficiary received compensation from the petitioner, the AAO, as shown above, deducted the full proffered wage and the owner's household expenses from the Adjusted Gross Income in determining the petitioner's ability to pay the proffered wage.

Counsel also states that "[c]onsidering the petitioner's average monthly bank balance of \$18,068.77 in 2001, it is evident that the petitioner had sufficient funds to cover the proffered monthly wage of \$3,870.00." The record contains copies of the owner's bank statements for his personal checking account from January 2001 to December 2001.

As a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, personal assets held in the name of the petitioner's owner, such as savings accounts, money market funds, or certificates of deposit, are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business. The AAO, however, will not consider checking accounts because it is likely that the owner's checking account serves as its business checking account, where cash and receipts indicated on the accounts are already reflected on the Schedule C of the owner's tax returns.

<sup>2</sup> On the Form 1040 U.S. Individual Income Tax Return for 2002, Adjusted Gross Income is the figure shown on line 35.

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 director erred in not requesting the petitioner's financial information for 2003 in the RFE. Nevertheless, the lack of the petitioner's financial information for 2003 is immaterial since the petitioner has also failed to establish its ability to pay the proffered wage in 2001 and 2002. Thus, 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.