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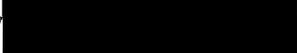
U.S. Citizenship  
and Immigration  
Services

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FILE: EAC-04-142-50476 Office: VERMONT SERVICE CENTER Date: **JUL 25 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 Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail beauty supplier. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 submits a brief.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2002. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$53,061, to have a net annual income of \$41,015, and to currently employ one (1) worker. The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The petition was filed with Form 1040 US Individual Income Tax Return filed by the sole proprietor for 2002 and 2003 pertinent to the ability to pay the proffered wage.

On August 26, 2004, the director determined that the petitioner had not demonstrated that it had the continuing ability to pay the proffered wage as well as to cover the sole proprietor's personal expenses from the priority date and denied the petition accordingly.

On appeal, counsel argues the submitted evidence has established the petitioner's ability to pay the proffered wage.

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 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 did not submit W-2 forms for the beneficiary and did not claim that it hired and paid the beneficiary the proffered wage.

The evidence indicates that the petitioner 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>1</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 2002 through 2003. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,800 per year.

In 2002, the Form 1040 stated adjustable gross income of \$6,978.

In 2003, the Form 1040 stated adjustable gross income of \$38,143.

The sole proprietor's adjusted gross income on Form 1040 was \$13,822 less than the proffered wage in 2002. Therefore, the petitioner had insufficient income to pay the proffered wage to the beneficiary for the year 2002. The sole proprietor's adjusted gross income on Form 1040 was \$17,343 more than the proffered wage in 2003. Therefore, the petitioner has sufficient income to pay the proffered wage to the beneficiary in 2003, however, the petitioner did not submit a statement of monthly expenses for the sole proprietor's household. Therefore, the AAO cannot determine whether the sole proprietor could meet her living expenses with \$17,343 in 2003.

CIS will consider the sole proprietorship's income and her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets. The petitioner should address this issue in any subsequent proceedings.

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<sup>1</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.

The sole proprietor's adjusted gross income in 2002 was not sufficient to pay the proffered wage. The adjusted gross income for 2003 reported in tax returns demonstrated the petitioner's ability to pay the proffered wage, however, failed to establish that the surplus would cover the sole proprietor's living expenses in 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

On appeal counsel argues that the instant petition should have been approved pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner.

Counsel cites to *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the totality of circumstances should be considered when assessing a sole proprietor's ability to pay. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). CIS and the AAO do consider the totality of circumstances when analyzing a petitioning entity's ability to pay. In the present case, the petitioner had \$50,638 in gross receipts and paid out \$0 in wages and salaries during the year in which the priority date was established although it claimed that it employed one employee. The petitioner did not submit the living expenses for the sole proprietor, nor did the petitioner provide evidence to show the sole proprietor has additional liquefiable assets to pay the proffered wage and to cover the personal living expenses. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability, and its ability to pay the proffered wage.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date of April 26, 2001. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel's assertion on appeal cannot overcome the director's decision. 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.