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FILE: WAC-03-245-53786 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006

IN RE: Petitioner:
Beneficiary



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 cursive script, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company engaged in fabrication and repair of dental appliances. It seeks to employ the beneficiary permanently in the United States as a Dental-Laboratory Technician. 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 December 17, 2004 decision denying the petition, the issue raised on appeal 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. However, the evidence also raises an issue concerning the legal identity of the petitioner.

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 May 8, 2000. The proffered wage as stated on the Form ETA 750 is \$19.20 per hour, which amounts to \$39,936.00 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 in the form of a statement from [REDACTED] who is the person who signed the I-140 petition on behalf of the petitioner. No title for [REDACTED] is stated in the record. The petitioner submits no other evidence on appeal.

Relevant evidence in the record includes copies of Form 1040 U.S. Individual Income Tax Returns for 2000, 2001 and 2002, a copy of a Form 1120-A U.S. Corporation Short-Form Income Tax Return for 2003, and copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2002 and 2003.

On appeal, the petitioner states that the director failed to consider the gross income of the petitioning business as shown on the Schedule C's attached to the Form 1040 individual tax returns in the record. The petitioner also states that the business became a corporation in 2003.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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).

An initial issue concerns the petitioner's legal identity.

The ETA 750 was submitted on May 8, 2000 under the name Camacho Dental Laboratory. The evidence indicates that the employer which submitted the ETA 750 was a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of [REDACTED] for 2000, 2001 and 2002. Attached to each of those returns is a Schedule C, Profit or Loss from Business (Sole Proprietorship) showing the name of the business as Camacho Dental Laboratory.

The I-140 petition was submitted on August 28, 2003. On the I-140 petition, the name of the petitioner is Camacho Dental Laboratory. The items for the IRS tax number and for the petitioner's social security number were left blank on the petition.

In a statement dated January 4, 2005 submitted on appeal [REDACTED] states that in 2003 the petitioning business became a corporation. In that statement, [REDACTED] refers to the business as his own business, though the name [REDACTED] is different than the name [REDACTED] which appears on the Form 1040 tax returns mentioned above. [REDACTED] statement on appeal does not indicate whether the name [REDACTED] is another form of his own name or whether that name refers to a different person.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2002 and 2003. For the years 2001 and 2002 the Form W-2's show compensation from Camacho Dental Laboratory with the employer identification number stated as a number with the last three digits of "800." That number matches the employer identification number (EIN) on the Schedule C's attached to the Form 1040 individual tax returns in the record.

For the year 2003, the record contains two Form W-2's for the beneficiary. One of those W-2's shows compensation from Camacho Dental Laboratory with the same EIN as appears on the Form W-2's for 2001

and 2002. The other Form W-2 for 2003 shows compensation from Camacho Dental Lab, Inc., with an EIN ending in the three digits "698."

As noted above, the I-140 petition was submitted on August 28, 2003. As of that date, federal tax returns for 2003 were not yet available. In response to a request for additional evidence (RFE) issued on July 28, 2004, the petitioner submitted a copy of a Form 1120-A U.S. Corporation Short-Form Income Tax Return for 2003 of Camacho Dental Lab, Inc. The address of the corporation on the Form 1120-A is the same as the address of the sole proprietorship as shown on the Schedule C's attached to the Form 1040's in the record for 2000, 2001 and 2002. The EIN on the Form 1120-A ends in the three digits "698," a number matching the EIN on the beneficiary's Form W-2 from that corporation for 2003. On the Form 1120A, the corporation stated its date of incorporation as January 17, 2003.

The foregoing information is sufficient to establish that on or after January 17, 2003 the petitioning business, which had previously operated as a sole proprietorship, began operating as a corporation. The beneficiary's Form W-2's for 2003 show compensation in the amount of \$4,224.00 from the sole proprietorship and \$13,200.00 from the corporation, for a total of \$17,424.00. The percent of compensation received that year from the sole proprietorship was 24% and the percent received from the corporation was 76%. Those figures suggest that the conversion of the business to a corporation occurred around the beginning of the second quarter of the year, or around April 2003. Since the I-140 petition was submitted on August 28, 2003, the business was already incorporated by the time the I-140 petition was filed. As noted above, the petitioner failed to include its IRS tax number on the I-140 petition, which is another name for the employer identification number. Therefore the I-140 petition failed to adequately identify the legal entity submitting the petition.

The evidence discussed above indicates that the petitioner is a corporation and that it is a different legal entity from the employer which submitted the ETA 750, which was a sole proprietorship. The record contains no individual labor certification in the name of Camacho Dental Lab, Inc. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any I-140 petition filed under the preference category of INA § 203(b)(3) be accompanied by a labor certification. Therefore the instant petition could not be approved for Camacho Dental Lab, Inc., unless the evidence establishes that Camacho Dental Lab, Inc., is a successor in interest to the employer which obtained the labor certification.

The record in the instant case, however, does not establish that the petitioner qualifies as a successor-in-interest to the sole proprietorship which obtained the labor certification. That status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest.

In the instant petition, the statement of [REDACTED] on appeal fails to indicate whether he is the same person as Oscar Maravilla, the person who filed the Form 1040 tax returns with attached Schedule C's for Camacho Dental Laboratory as a sole proprietorship. The statement of [REDACTED] so fails to provide any information about the financial relationship between the sole proprietorship and the petitioning corporation.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage as of the priority date and in each of the other years at issue. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant case, even assuming that the evidence were sufficient to establish that Camacho Dental Lab, Inc. is a successor in interest to the sole proprietorship Camacho Dental Laboratory which obtained the ETA 750, the evidence fails to establish the ability of the predecessor company to pay the proffered wage during the relevant period.

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 May 1, 2000, the beneficiary claimed to have worked for the petitioner beginning in February 1990 and continuing through the date of the ETA 750B.

As noted above, the record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2002 and 2003. For 2001 and 2002 the W-2's are from the sole proprietorship. For 2003, the record contains two Form W-2's, one from the sole proprietorship and one from the petitioning corporation. The beneficiary's Form W-2's show compensation as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2000	not submitted	\$39,936.00	\$39,936.00
2001 sole prop.	\$17,160.00	\$39,936.00	\$22,776.00
2002 sole prop.	\$17,160.00	\$39,936.00	\$22,776.00
2003 sole prop.	\$4,224.00		
corp.	\$13,200.00		
total	\$17,424.00	\$39,936.00	\$22,512.00

The above information is insufficient to establish the ability of the sole proprietorship or of the petitioning corporation 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.

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). This is why CIS examines a sole proprietor's adjusted gross income as opposed to focusing solely on the business income stated on Schedule C.

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 sole proprietorship's owner show his filing status as single, with no dependents. Therefore the household size of the 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 following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	\$21,490.00	not submitted	\$39,936.00*	\$(18,446.00)
2001	\$27,139.00	not submitted	\$22,776.00**	\$4,363.00
2002	\$22,865.00	not submitted	\$22,776.00***	\$89.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the sole proprietorship to the beneficiary in 2000.

** Crediting the sole proprietorship with the \$17,160.00 actually paid to the beneficiary in 2001

*** Crediting the sole proprietorship with the \$17,160.00 actually paid to the beneficiary in 2002

In 2000 the amount remaining after paying the proffered wage is a negative figure. In 2001 and 2002 the amounts remaining are positive figures, but those amounts are insufficient to pay the reasonable household expenses of the sole proprietorship's owner.

In the year 2003, the evidence indicates that the sole proprietorship continued to employ the beneficiary for about the first quarter of the year. Nonetheless, the petitioner submitted no copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietorship's owner for 2003.

For the year 2003, the petitioner submitted a copy of a Form 1120-A U.S. Corporation Short-Form Income Tax Return of Camacho Dental Lab, Inc. That corporation is the petitioner, as shown in the discussion above.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. In the instant petition, the Form 1120-A shows adjusted gross income as shown in the table below.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2003	\$2,401.00	not applicable	\$26,736.00*	\$(24,335.00)

* Crediting the petitioner with the \$13,200.00 actually paid to the beneficiary by the petitioning corporation in 2003.

The foregoing information fails to establish the petitioner's ability to pay the proffered wage in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant case, however, the tax returns in the record for the years 2000, 2001 and 2002 are Form 1040 U.S. Individual Income Tax Returns, which contain no Schedule L's or other balance sheet information. Therefore it is not possible to calculate the net current assets of the sole proprietorship for those years. For the year 2003, the petitioner's Form 1120-A tax return includes balance sheet information in Part III, Balance Sheet per Books. The Part III balance sheet show the only current assets as \$8,032.00 in inventories and shows no current liabilities. The petitioner's net current assets for 2003 are therefore \$8,032.00. That amount is insufficient to establish the petitioner's ability to pay the \$26,736.00 wage increase needed in 2003 to raise the beneficiary's actual compensation to the proffered wage.

The record also contains a payroll statement dated September 17, 2004 showing wages paid to the petitioner's employees. That statement shows total wages for the year to date paid to the beneficiary of \$12,870.00. That payroll statement fails to establish the petitioner's ability to pay the proffered wage during 2004.

The record contains no other evidence relevant to the petitioner's financial situation.

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 his decision, the director failed to noted that the evidence indicates that the petitioner is a corporation which is a different legal entity than the employer which obtained the ETA 750 labor certification. The director incorrectly considered all of the financial evidence in the record as pertaining to the petitioner. Nonetheless, the director was correct in finding that the evidence failed to establish the ability of the sole proprietorship or of the corporation to pay the proffered wage during the relevant period. Despite the errors in analysis, 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 the petitioner 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.