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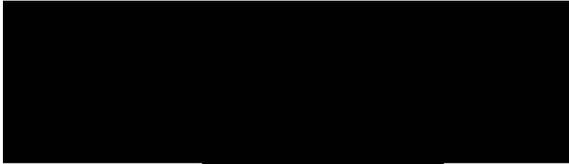
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FILE:

EAC-03-258-55458

Office: VERMONT SERVICE CENTER

Date: JUN 27 2006

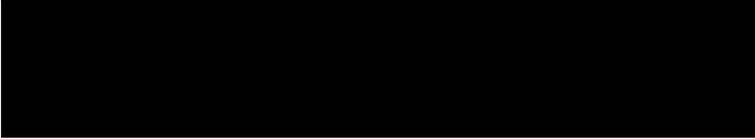
IN RE:

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:



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 Wiemann".

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 residential renovations and additions, including carpentry, firm. 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, 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.<sup>1</sup>

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.57 per hour, which amounts to \$40,705.60 annually.

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<sup>1</sup> The AAO notes that another I-140 petition, with the same petitioner and the same beneficiary, was filed with the Nebraska Service Center on May 17, 2006, prior to the adjudication of the I-140 petition on appeal in this case.

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>2</sup> Relevant evidence submitted on appeal includes a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2004, a copy of the owner's Form W-2 Wage and Tax Statement for 2004, copies of the Form W-2 Wage and Tax Statements of the owner's wife for 2002 and 2004, a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2004, and a copy of the beneficiary's Form 1099-MISC Miscellaneous Income for 2004.<sup>3</sup> 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, 2002, and 2003, copies of the owner's Form W-2 Information for 2002 and 2003, copies of the beneficiary's Form 1099-MISC Miscellaneous Income for 2002 and 2003, copies of the Form W-2 Wage and Tax Statements of the petitioner's other employees for 2002, and the owner's list of monthly expenses for 2001, 2002, and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that the petitioner's profit in 2001 is more than the proffered wage, expenses for home office cannot be considered, depreciation can be considered, the petitioner's owner has discretion to make a judgment that he can pay the full proffered wage, and CIS is predicting the owner's real estate income. Counsel also states that the beneficiary received more than the proffered wage in 2004 and the petitioner's owner received a salary in 2002 and 2004.<sup>4</sup>

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 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 2001 and continuing through the date of the ETA 750B.

The record contains copies of the beneficiary's Form 1099-MISC Miscellaneous Income. The beneficiary's Form 1099's for 2002, 2003, and 2004 show compensation received from the petitioner, as shown in the table below. There is no evidence of compensation for 2001.

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<sup>2</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).

<sup>3</sup> The evidence was submitted along with the "[Petitioner's] Motion to Further Supplement [its] Brief in Support of Appeal."

<sup>4</sup> These two assertions were stated by counsel in the two separate motions to supplement the brief.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2001	\$0.00	\$40,705.60	\$40,705.60
2002	\$15,000.00	\$40,705.60	\$25,705.60
2003	\$18,000.00	\$40,705.60	\$22,705.60
2004	\$41,000.00	\$40,705.60	\$0.00

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

Counsel states that the beneficiary was paid \$41,000.00 in 2004. The evidence in the record, as shown above, does indicate that the beneficiary received more than the proffered wage in 2004. However, the petitioner must establish that it has the ability to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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, 2003, and 2004. The record before the director closed on August 25, 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. On appeal, counsel submits the federal tax return of the petitioner's owner for 2004, and the AAO will take the newly submitted tax return into consideration.

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. The 2001 return is missing page one. The 2002 return shows one dependent son, and the household size of the petitioner's owner is three persons. The 2003 and 2004 returns show two dependent sons, and 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>5</sup> The owner's tax returns show the following amounts for adjusted gross income. The record includes the owner's list of monthly expenses for 2001, 2002, and 2003, and calculations based on the list 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	\$70,496.00 <sup>6</sup>	\$55,920.00	\$40,705.60*	-\$26,129.60
2002	\$33,113.00	\$61,548.00	\$25,705.60**	-\$54,140.60
2003	\$34,496.00	\$61,548.00	\$22,705.60**	-\$49,757.60
2004	\$26,982.00	No Information	\$0.00**	\$26,982.00

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

\*\* Crediting the petitioner with the compensation actually paid to the beneficiary in 2002, 2003, and 2004.

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 that "[t]he 2002 and 2004 income tax returns establish that [the petitioner's owner] during those years also received a salary from the business, further establishing the [the petitioner's ability to pay]." The record includes copies of the owner's Form W-2 Information for 2002 and 2003 and a copy of the owner's Form W-2 Wage and Tax Statement for 2004. Thus, the owner also received a salary from the business in 2003. The Adjusted Gross Income, which CIS looks at in determining the petitioner's ability to pay the proffered wage, takes into account the owner's salary, and the amounts for Adjusted Gross Income in 2002 and 2003 are less than

<sup>5</sup> For the Form 1040 U.S. Individual Income Tax Return for 2002, Adjusted Gross Income is listed on line 35. For the Form 1040 U.S. Individual Income Tax Return for 2003, Adjusted Gross Income is listed on line 34. For the Form 1040 U.S. Individual Income Tax Return for 2004, Adjusted Gross Income is listed on line 36.

<sup>6</sup> Counsel states that the owner cannot locate page one of his Form 1040 U.S. Individual Income Tax Return for 2001 and submits the owner's 2001 state income tax return. The owner's adjusted gross income is also listed on line 34, page two of the Form 1040.

the amounts needed to pay the owner's household expenses and the wage increase needed for the proffered wage in 2002 and 2003. The fact that the owner received a salary, in and of itself, is not sufficient to establish the petitioner's ability to pay the proffered wage.

Counsel states that "[i]n 2001, the business . . . had a profit of \$41,791.00, more than sufficient to pay the beneficiary's prospective wage." The figure used by counsel is the figure for the owner's net profit from business listed on the Schedule C. The Adjusted Gross Income, which CIS looks at in determining the petitioner's ability to pay the proffered wage, takes into account the owner's profit from business. Thus, the AAO has already considered the petitioner's net profit. Moreover, the petitioner has to establish its ability to pay the proffered wage and also pay its owner's household expenses. As shown above, the petitioner's Adjusted Gross Income in 2001 is less than the owner's household expenses and the wage increase needed to meet the proffered wage.

Counsel states that "expense for home office" can be considered, referring to the figure for "expenses for business use of your home" on the Schedule C. As stated above, the owner's Adjusted Gross Income takes into consideration the owner's business income, and the instructions on the Form 1040 specifically state that the owner's business income is to be the figure for net profit, which subtracts the owner's expenses for home office.

Counsel mentions depreciation. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) 719 F. Supp. at 537.

Counsel states that "[CIS] is also not giving sufficient weight to the discretion of the [petitioner's owner], as a profitable carpenter, to make a judgment that he could successfully and profitably hire the [b]eneficiary on a full-time basis." The regulation at 8 C.F.R. § 204.5(g)(2) states that "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." Thus, the AAO will not consider the owner's judgment when the evidence in the record does not indicate that the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel states that "[CIS] is concluding what income from the [owner's] real estate properties will be in the future." Counsel appears to be referring to the director's observation that the owner's loss on his real estate rental property as shown on the owner's tax returns impacted the owner's overall income. The Adjusted Gross Income, which CIS looks at in determining the petitioner's ability to pay the proffered wage, takes into account the loss on the owner's rental property. Moreover, CIS is not speculating on what the income on the owner's real estate rental property will be in the future. Rather, CIS is looking at income or loss from the owner's rental property for the years in question.

The record includes copies of the Form W-2 Wage and Tax Statements of the owner's wife for 2002 and 2004. The figure for salary and wages on line 7 of the owner's 2002 jointly filed tax return is \$32,627.00. According to the owner's Form W-2 Information for 2002, he received \$32,627.00.00. According to the Form W-2 of the owner's wife for 2002, she received \$32,626.89. Since the 2002 tax return is a jointly filed tax return, both wages should have been reflected on line 7. However, it appears that only one of their wages is reflected on their 2002 tax return. Similarly, the figure for salary and wages on line 7 of the owner's 2004 jointly filed tax return is \$33,512.00. According to the owner's Form W-2 for 2004, he received \$33,512.00. According to the Form W-2 of the owner's wife for 2004, she received \$33,512.03. Again, it appears that only one of their wages is reflected on their 2004 tax return. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not contain any evidence explaining the inconsistencies between the owner's tax returns and both the Form W-2's and the Form W-2 Information.

The record includes copies of the Form W-2 Wage and Tax Statements of the petitioner's other employees for 2002. Salaries and wages paid to other employees are irrelevant to the issue at hand because they do not show whether or not the petitioner has additional funds to pay the beneficiary the proffered wage. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the proffered wage to the beneficiary at the priority date of the petition and continuing to the present. This does not appear to be the case here because the record does not provide evidence that the petitioner has replaced or will replace other employees with the beneficiary. There is likewise no evidence that the position of those other employees involves the same duties as those set forth in the Form ETA 750.

The record contains a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2004. The beneficiary's income as stated on his 2004 tax return will not be considered because the tax return does not contain information regarding from whom the beneficiary received the income or whether the amount is a combination of wages paid by different employers. Additionally, if the income as listed on the beneficiary's tax return did originate from the petitioner, it would have already been reflected on the beneficiary's Form 1099 for 2004. Furthermore, the record shows that the petitioner paid the beneficiary more than the proffered wage in 2004.

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 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.