

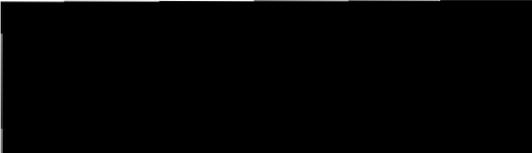
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Bv



FILE: [REDACTED]
LIN 03 239 50401

Office: NEBRASKA SERVICE CENTER

Date: **MAR 20 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a treatment coordinator. 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, that it had not established that the beneficiary has the qualifications as stated on the labor certification petition and denied the petition accordingly.

Counsel had indicated on appeal that he was submitting a legal brief and additional evidence within thirty days, despite a request made by the AAO, none was received.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour (\$41,600.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on February 3, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested annual reports, 2001, 2002, and 2003 federal tax returns, or audited financial statements, and additionally audited profit/loss statements, complete bank account records (checking and savings statements from the priority date) and personnel records. The director requested the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003, as well as the petitioner's "recurring household expenses."¹

Consistent with the regulation at 8 CFR § 204.5(l)(3)(ii), the director requested evidence that the beneficiary has two years experience as treatment coordinator in the form of letters from current or former employers.

In response to the director's requests counsel submitted copies of the following documents: an explanatory letter; a letter from petitioner; a statement of personal living expenses; one schedule from the petitioner's personal tax return; approximately 147 pages of bank statements; certificates of completion of the beneficiary's occupational education; and, two W-2 statements

The director denied the petition on June 21, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel asserts that the beneficiary was a treatment coordinator employed by the petitioner since May 21, 1998; and, the petitioner's personal assets, business cash flow, Schedule C statements, business checking accounts, and, depreciation are all evidence of the ability to pay the proffered wage.

As additional evidence to accompany the appeal, counsel submitted a letter and statements from an accountant; a Schedule C statement for tax year 2002; four W-2 statements; a 2001 personal tax return for the beneficiary; and, certificates of completion from the Professional Center of Studies, [REDACTED] Odontology for [REDACTED]. There is also a letter that the beneficiary was a dentist in a clinic in the city of Cochabama, Bolivia "in 1988 until 1992."

¹ The I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet her living costs, the director requested petitioner submit a statement of recurring household expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary as a dental technician prior to April 24, 2001 through January 31, 2003. According to petitioner in a letter dated March 23, 2004, the beneficiary was then employed as a treatment coordinator from February 2003 to March 23, 2004. In 2001 the petitioner paid the beneficiary \$31,115.00,² in 2002, \$28,425.00; and, in 2003, \$26,660.00. Since the proffered wage is \$41,600.00 per year, these payments are less than the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, 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. Texas 1989). No precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* 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 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 (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 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner is sole proprietor. There is no information concerning the number of members in her family, and, since the petitioner has not submitted complete copies of her personal income tax returns (IRS Form 1040) including the first page, no evidence was submitted concerning the petitioner's adjusted gross income. Therefore it is not possible to determine if the sole proprietor could support herself and her family for an entire year on what remains after reducing adjusted gross income by the amount required to pay the proffered wage. Also, the petitioner submitted an incomplete statement of personal expenses that did not provide the petitioner's monthly household expenses.

The record of proceeding contains bank statements from the petitioner's checking accounts with substantial average monthly balances. However, without the personal tax returns requested by the director, it is not possible to determine the petitioner's adjusted gross income of which cash is one component.

² Another W-2 for 2001 was submitted that evidenced income from another corporation.

No tax returns were submitted by the petitioner to demonstrate the petitioner's ability to pay the proffered wage of \$41,600.00 per year from the priority date of April 24, 2001.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. No tax returns were submitted by the petitioner to demonstrate the petitioner's adjusted gross income.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel cites no legal precedent for the contention, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1040, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel asserts that the petitioner's personal assets are evidence of the ability to pay the proffered wage. We reject the petitioner's assertion that the petitioner's assets, personal or business, should have been considered in the determination of the ability to pay the proffered wage. The petitioner's assets include depreciable assets that the petitioner uses in her business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel contends that business cash flow and Schedule C statements are evidence of the ability to pay the proffered wage. In generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of assets. A cash flow statement, used with the

³ 8 C.F.R. § 204.5(g)(2).

balance sheet and income statement, present an analysis of the financial health of a business. As stated already, it is the petitioner's adjusted gross income that is probative of the ability to pay the proffered wage. The profit or loss stated on Schedule C is one component of adjusted gross income.

The petitioner has submitted unaudited financial statements. The unaudited financial statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of petitioner. The unsupported representations are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited financial statements are of little evidentiary value in this matter.

The second contention of counsel in the appeal of the Director's decision is that CIS incorrectly applied the standard for determining whether the beneficiary met the experience requirement prior to the filing of the labor certification application and did not take into account the nature of the proffered position required by case law and regulation. The Director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

The petitioner has presented evidence as recounted above of the beneficiary's qualification and work experience to support the petition. The director in his decision determined that the beneficiary had not met the minimum requirements of two years experience as a treatment coordinator stated in the certified Alien Employment Application. Reviewing his decision reveals, and the record shows, that the beneficiary has not satisfied the requirements of regulation 8 C.F.R § 204.5(1)(3)(ii). Neither job verification letter from either the petitioner nor the dental clinic located in the City of Cochabama, Bolivia, state beneficiary's dates of employment/experience, number of hours worked per week, and number of weeks per year worked in a complete fashion that would enable a reviewer to determine if beneficiary had attained the requisite two years of experience stated in the certified ETA 750A. The petitioner stated in her letter dated March 23, 2004 that the petitioner employed the beneficiary as a dental technician prior to April 24, 2001 through January 31, 2003. According to petitioner, the beneficiary was then employed as a treatment coordinator from February 2003 to March 23, 2004. The letter offered for prior experience as a treatment coordinator stated that the beneficiary was a dentist in a clinic in the city of Cochabama, Bolivia "in 1988 until 1992 after attaining completion of a number of professional certificates. No evidence was submitted evidencing two years experience as a treatment coordinator.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.