

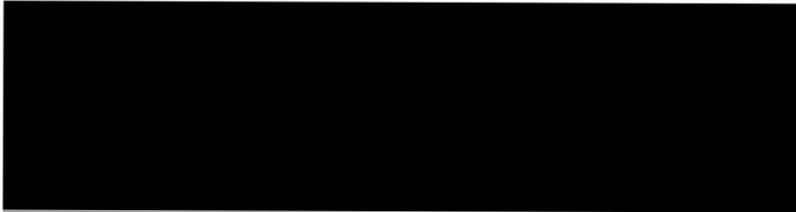


U.S. Citizenship
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FILE: WAC 04 122 50789 Office: CALIFORNIA SERVICE CENTER Date: MAR 24 2006

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, Director
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 remanded.

The petitioner is an architecture firm. It seeks to employ the beneficiary permanently in the United States as an architectural drafter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief;
- The petitioner's Form 1120S for 2003; and,
The petitioner's owner's Form 1040 for 2002 and 2003.

The regulation 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, 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. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$18.74 per hour (\$38,979.20 per year).

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2001 and in part of 2002, as a C-corporation in part of 2002, and as an S-corporation in 2003. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$367,669, and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on March 27, 2001, the beneficiary claimed to have worked for the petitioner since September 1998.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;
- The original certified ETA 750;
- Counsel's advice that the petitioner changed from sole proprietorship to C corporation on August 24, 2001;
- The petitioner's Form 1040 for 2001, and the petitioner's Form 1120-A for 2002;
- Certified copies of pages from the petitioner's articles of incorporation; and,
- The beneficiary's Form 1099 MISC for 2001, 2002 and 2003.

The director denied the petition on September 7, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director found that for 2001, the petitioner was a sole-proprietor business and must demonstrate his ability to pay both the pro-rated proffered wage of \$29,984, and the owner's yearly household expenses, imputed at \$15,260 under Federal Poverty Guidelines for a family of three, for a total of \$45,244. Starting with the petitioner's \$37,980 in adjusted gross income, the director deducted \$15,260 in household expenses, leaving the petitioner with only \$22,720 with which to pay the pro-rated proffered wage of \$29,984. The director, noting the beneficiary's Form 1099 MISC showed he received \$26,875 for the year,¹ and determined that the \$22,750 remaining of his net income after spending \$15,260 on household expenses, would not cover the proffered wage he had to pay for 2001. Accordingly, the director found that for 2001, the petitioner had not established its ability to pay the proffered wage.

The director stated that the petitioner's Form 1120-A for 2002 net income was -\$3,098. He also found the beneficiary's wages from Form 1099 MISC for 2002 were \$5,329.20 less than the proffered wage. Accordingly, the director found the petitioner had not established its ability to pay the proffered wage for 2002.

For 2003, the director found that the beneficiary's Form 1099 MISC wages were \$429.20 below the proffered wage. Accordingly, the director found the petitioner had not established its ability to pay the proffered wage for 2003.

On appeal, counsel states that for 2001 the petitioner's proffered wage obligation was \$29,984, and after deducting \$26,875 for wages paid to the beneficiary, the petitioner would only need to show it could pay the \$3,109 difference between the wages paid and proffered wage. Counsel calculates the petitioner's available income for the year to be \$37,980 in net income, and uses the director's determination of \$15,260 in imputed expenses for a family of three, which leaves a surplus of \$22,750, more than enough to pay the \$3,109. Counsel asserts the director disregarded the beneficiary's wages for 2001, which was included as "Outside Labor" expense on the petitioner's Form 1040 Schedule C.²

For 2002, counsel asserts that the petitioner operated as a sole proprietor and "started activating his business under the corporation – OML Consultants, Inc., which was dormant until September 2002."³ Referring to the petitioner's Form 1040 for 2002, counsel notes an adjusted gross income of \$57,254, and asserts the petitioner paid the beneficiary's total salary out of the sole proprietorship accounts, referring to the "two 1099 forms totaling \$33,560."⁴ Counsel asserts, therefore, that the petitioner has established its ability to pay the \$39,979 proffered wage by applying the entire \$33,650 in wages the beneficiary received, leaving a deficit of \$5,329, which the petitioner has the ability to pay from his \$57,254 in adjust gross income, even accounting for the petitioner's yearly household expense of \$15,260.

¹ It does not appear that the director figured in the beneficiary's wages received in 2001 in determining the petitioner's ability to pay.

² Schedule C lists \$198,613 in expenses total for "Outside Services."

³ Schedule D of the petitioner's California corporate income tax return for 2002 indicates the corporation began doing business October 1, 2002.

⁴It is noted that the beneficiary's Form 1099 for 2002 listing \$23,560 in wages was from the petitioner as sole proprietor while the other \$10,000 was from the petitioner as corporation. Counsel notes Schedule C from the petitioner's Form 1040 for 2002 lists \$198,613 in labor expenses under "Outside Services." We note, however, that the petitioner as a C-corporation also lists \$84,093 spent on "Outside Services" on Statement 1 of its Form 1120-A.

For 2003, counsel asserts that the petitioner's Form 1120S shows gross income of \$1,092,217, and ordinary income of \$105,784, from which the petitioner paid the beneficiary \$38,550, which left the petitioner with a deficit of only \$429.20 below the proffered wage, which counsel asserts it could pay out of its \$105,785 net income.

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 (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 (approximately thirty percent of the petitioner's gross income).

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 establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003.

Instead, the petitioner paid partial wages in the amounts of \$26,875 in 2001, \$33,650 in 2002, and \$38,550 in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage. Additionally, during the periods the petitioner operated as a sole proprietor, in 2001 and 2002, the petitioner must show he could support his family of three.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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); *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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record contains copies of Form W-2 Wage and Tax Statements and Form 1099 MISC showing wages the beneficiary received from the petitioner, as shown in the table below.

Year	Proffered Wage	Wages Paid	Difference
2001	\$38,979 ⁵	\$26,875	\$12,104
2002 ⁶			
1-1 to 9-30	\$29,233	\$23,650	\$5,573
10-1 to 12-31	\$9,775	\$10,000	(\$25)
2003	\$38,979	\$38,550	\$429

The petitioner's tax returns show the amounts for taxable income as shown in the table below.

Tax Year	Net Income	Difference Proffered/Paid	Surplus
2001	\$37,980	\$12,104	\$25,876
2002			
1-1 to 9-30	\$57,254	\$5,573	\$51,681
10-1 to 12-31	-\$3,098	N/A ⁷	N/A
2003	\$105,784	\$430	N/A

The foregoing establishes that the petitioner had sufficient net income to pay the proffered wage in 2003, when it first operated as a Subchapter S corporation. In 2001, when it operated as a sole proprietorship, the evidence is unclear, without more evidence, to show that the petitioner would be able to support a family of three on \$25,876 in Los Angeles, California. In 2002, while the petitioner operated as sole proprietor through September 30, he earned sufficient net income to support a family of three. When the petitioner operated as a C-corporation for the last three months, the evidence shows the petitioner paid the beneficiary at a rate slightly more than the proffered wage.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue set for concerning the petitioner's ability to pay the proffered wage for 2001. The director may request any additional evidence considered pertinent. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

⁵Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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.

⁶We determine the petitioner's ability to pay the proffered wage in two phases during 2002, when the petitioner operated first as a sole proprietorship and then as a C corporation. We allocate the wages paid according to the two Form 1099 MISC for 2002, which indicate the wages the petitioner paid as a sole proprietor and as a corporation.

⁷"Not Applicable."

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.