

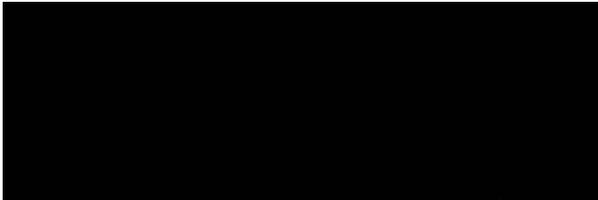
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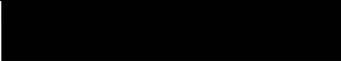
U.S. Citizenship  
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FILE:



EAC 03 183 52129

Office: VERMONT SERVICE CENTER

Date: MAR 30 2006

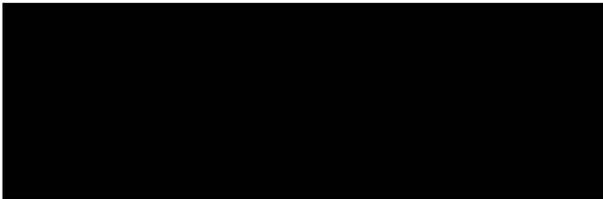
IN RE:

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.

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a drywall installer. 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 statement and additional evidence.

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 granting 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$800 per week, which equals \$41,600 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 15 workers. The petition states that the petitioner's gross annual income is \$1.5 million and that its net annual income is \$150,000.<sup>1</sup>

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Cotuit, Massachusetts.

With the petition counsel submitted no evidence to demonstrate the petitioner's ability to pay the proffered wage. Therefore, on April 19, 2004, the Vermont Service Center issued a request that the petitioner submit

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<sup>1</sup> The tax returns subsequently submitted do not support the petitioner's statement of its net and gross income.

evidence establishing its continuing ability to pay the proffered wage beginning on the priority date. That request asked the petitioner to “Submit an itemized list of all of your monthly expenses . . . .”

In response counsel submitted a 2002 Form 1099 Miscellaneous Income statement and a letter dated July 14, 2004. The Form 1099 shows that during 2002 the petitioner’s paid the beneficiary wages of \$21,069.50. In the letter counsel stated that the amount was less than the annual amount of the proffered wage because the petitioner employed the beneficiary for only part of that year. Neither counsel nor the petitioner submitted the requested budget.

The director determined 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, on September 15, 2004, denied the petition.

On appeal, counsel submits (1) a copy of the petitioner’s owner’s 2001 Form 1040 U.S. Individual Income Tax Return, including a Schedule C, (2) a copy of the petitioner’s Form 1120S, U.S. Income Tax Return for an S Corporation, (3) a copy of a 2001 Form 1099, and (4) a statement.

The Schedule C attached to the 2001 Form 1040 U.S. Individual Income Tax Return shows that that the petitioner’s owner held the petitioner as a sole proprietorship during that year. During that year the petitioner returned a net profit of \$36,565. The petitioner’s owner declared adjusted gross income of \$27,074, including the petitioner’s profit reduced by deductions. The return also shows that the petitioner’s owner and his wife had two dependents during that year.

The 2002 Form 1120S, U.S. Income Tax Return for an S Corporation shows that the petitioner was held as a corporation during that year, having incorporated on January 28, 2002, and that the petitioner reports taxes pursuant to the calendar year and cash convention accounting. During 2002 the petitioner reported ordinary income of \$29,063. At the end of that year the petitioner had \$17,927 in current assets and \$0 in current liabilities, which yields net current assets of \$17,927.

The 2001 Form 1099 shows that during that year the petitioner paid non-wage compensation of \$23,867.50 to the beneficiary.

In his statement counsel asserts that the evidence provided demonstrates the petitioner’s continuing ability to pay the proffered wage beginning on the priority date.

The petitioner having been held as a sole proprietorship during 2001 and as a corporation during 2002 complicates the analysis of the petitioner’s ability to pay the proffered wage.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner’s owner is obliged to satisfy the petitioner’s debts and obligations out of his own income and assets, the petitioner’s owner’s income and assets are properly considered in the determination of the petitioner’s ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The amount the petitioner actually paid to the beneficiary during a given year, \$23,867.50 during 2001, will also be included in the calculation of the funds available to a sole proprietorship petitioner to pay the proffered wage during that year. This analysis will be applied during 2001, when the petitioner was held as a sole proprietorship.

In determining the petitioner's ability to pay the proffered wage during 2002, when the petitioner was held as a corporation, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 2002 and paid him \$21,069.50 during that year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show a corporate petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities

projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$41,600 per year. The priority date is April 30, 2001.

During 2001 the petitioner paid the beneficiary \$23,867.50. The petitioner must demonstrate the ability to pay the \$17,732.50 balance of the proffered wage during that year. The petitioner's owner declared adjusted gross income of \$27,074 during 2001, including the petitioner's profit. If the petitioner's owner had been obliged to pay the balance of the proffered wage out of that amount he would have been left with \$9,341.50 with which to support his family of four during that year.

Notwithstanding that it was requested by CIS on April 19, 2004, no evidence was submitted pertinent to the petitioner's owner's household expenses. To expect that he could support his family on \$9,341.50, however, is unreasonable. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary \$21,069.50. The petitioner is obliged to demonstrate that it was able to pay the \$20,530.50 balance of the proffered wage during that year. The petitioner declared ordinary income of \$29,063. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record in this matter raises an issue that was not discussed in the decision of denial.

During 2001 the petitioner was held as a sole proprietorship. During 2002 it was held as a corporation. Clearly, a new company, a corporation, was formed with the name of the previous sole proprietorship. When an existing, approved Form ETA 750 is to be used by a company other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation assumed all of the rights, duties, obligations, and assets of the sole proprietorship.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.



**ORDER:** The appeal is dismissed.