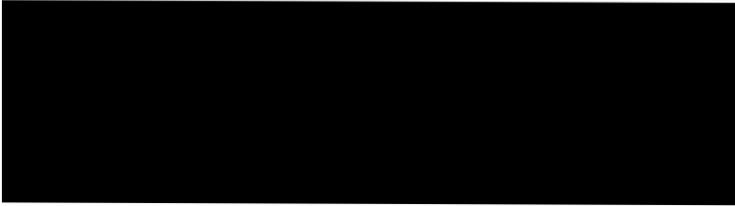




U.S. Citizenship
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FILE: WAC-04-098-51793 Office: CALIFORNIA SERVICE CENTER Date: MAY 09 2006

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, 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 sustained. The petition will be approved.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a plasterer and stucco mason. 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, the petitioner submits a brief statement and/or additional evidence¹.

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 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 November 2, 2001. The proffered wage as stated on the Form ETA 750 is \$24.13 per hour or \$50,190.40 per year. The Form ETA 750 states that the position requires three (3) years experience in the job offered. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner².

The evidence in the record of proceeding shows that the petitioner is akin to a sole proprietorship and its fiscal year is based on calendar year. The petition was filed with Form 1040 US Individual Income Tax Return filed by the owners of the petitioner for 2001 and 2002 pertinent to the ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 3, 2004, the director issued a request

¹ 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).

² Counsel submits payroll records for the second and third quarters of 2005 showing that the petitioner hired and compensated the beneficiary.

for evidence (RFE) pertinent to that ability. The director requested evidence of the petitioner's ability to pay the proffered wage for years 2001 to the present, especially a tax return for 2003, monthly expenses for the sole proprietor's household, the beneficiary's W-2 forms for 2001 through 2003, and Form DE-6 Quarterly Wage Report for the last 4 quarters. In response, the petitioner submitted Form 1040 for 2003 and monthly expenses for the sole proprietor.

On October 14, 2004, the director determined that the petitioner failed to establish its ability to pay the beneficiary's proffered wage from the priority date to the present based on the adjusted gross incomes reflected on the sole proprietor's individual tax returns and denied the petition accordingly.

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 submit W-2 forms or any other compensation documents for the beneficiary and did not claim that he hired and paid the beneficiary the proffered wage.

The evidence shows that the petitioner is a sole proprietorship. The record contains copies of the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2001 through 2003. The record before the director closed on September 24, 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.

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).

For a sole proprietorship, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$50,190.40 per year from the priority date.

In 2001, the Form 1040 stated adjustable gross income of \$24,728.

³ The line for adjusted gross income on Form 1140 is Line 33 for most years, such as 2001 in the instant case, however, every year may be different, for instance it is Line 34 for 2003, and Line 35 for 2002.

In 2002, the Form 1040 stated adjustable gross income of \$44,760.
In 2003, the Form 1040 stated adjustable gross income of \$47,584.

The petitioner submitted the sole proprietor's monthly expenses in response to the director's RFE. The statement of monthly expenses shows that the sole proprietor's household needs \$3,414 per month or \$40,968 per year. The sole proprietor's adjusted gross income reflected on Form 1040 is not sufficient to pay the proffered wage for years 2001 through 2003 even without taking the owner's personal living expenses into account. Therefore, the petitioner did not establish that the owner could cover his existing business expenses, pay the proffered wage as well as sustain himself and his dependents for the years 2001 through 2003.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that that the petitioner paid to subcontractors as cost of labor; that to exorbitant costs of outside contractor/plasterers, the petitioner filed the labor certification application to replace these subcontractors with the beneficiary; the amount already paid to subcontractors may be added back to the petitioner's ability to pay the proffered wage. The evidence in the record does not name these subcontractors, however, counsel submits a letter from the owner of the petitioner verifying its intent to hire the beneficiary as an in-house plasterer to substitute those subcontractors to perform the same job and the same duties as set forth on the ETA 750. The petitioner also submitted invoices showing payment to subcontractors for painting the wall and ceiling, baseboards doors and opening. Schedule C attached to the Form 1040 for 2001 through 2003 evidences that the petitioner paid subcontractors \$89,670 in 2001 and \$99,595 in 2002, and paid labor cost of \$106,700 in 2003, which is greater than the proffered wage of \$50,190.40 for each of the years. In the case where the petitioner has established that the beneficiary will be replacing other workers/subcontractors performing the duties of the proffered position, the wages already to those workers/subcontractors may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that in the instant case the petitioner has submitted sufficient evidence to establish that it had the ability to pay the proffered wage as of the priority date of the petition and continuing to present.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.