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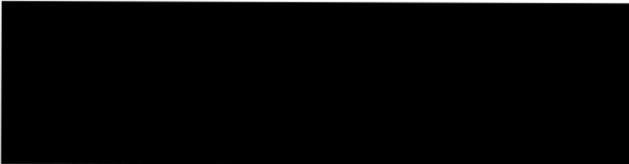
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 16 2006
EAC 04 102 54173

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to
§ 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a grocery and meat stores sole proprietorship. It seeks to employ the beneficiary permanently in the United States as a meat-cutter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.67 per hour (\$28,433.60 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

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; U.S. Internal Revenue Service Form tax returns for 2001, and 2002; and, the beneficiary's photographs.

The director denied the petition on September 22, 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.

On appeal, counsel asserts that the petitioner has presented evidence to prove its ability to pay the proffered wage, and, the director ignored the additional evidence submitted. Further, counsel asserts that the petitioner's net current assets are greater than the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: an explanatory statement from the petitioner's bookkeeper with a financial statement for the petitioner's fiscal year ending December 31, 2001.

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. No evidence was submitted to show that the petitioner employed the beneficiary. According to the certified Alien Employment Application, the beneficiary was unemployed from January 1996 to present (i.e. April 21, 2001 which is the date of signing the Form 750, Part B).

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); *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).

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.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,433.60 per year from the priority date of April 27, 2001:

- In 2001, the Form 1040 stated adjusted gross income¹ of \$11,447.00.
- In 2002, the Form 1040 stated adjusted gross income of \$24,006.00.

Counsel asserts that the petitioner has presented evidence to prove its ability to pay the proffered wage. In the instant case, the sole proprietor supports himself. In 2001 and 2002, the sole proprietorship's adjusted gross incomes of \$11,447.00 or \$24,006.00 do not cover the proffered wage of \$28,433.60 per year, or the personal living expenses for an year for the petitioner and payment of the proffered wage.

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. According to regulation,² copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that the petitioner has presented evidence to prove its ability to pay the proffered wage, and, the director ignored the additional evidence submitted. Further, counsel asserts that the petitioner's net current assets are greater than the proffered wage.

As above stated, the financial data submitted by the petitioner were two tax returns stating adjusted gross incomes for 2001 and 2002 of \$11,447.00 or \$24,006.00 respectively. Since there is no evidence that the petitioner employed the beneficiary, those sums are less than the proffered wage of \$28,433.60 per year.

Further counsel stated that the director ignored the additional evidence submitted. There is no evidence submitted that the director ignored any evidence in the record of proceeding. Further, counsel asserts that the petitioner's net current assets are greater than the proffered wage. The form of business the petitioner has chosen is a sole proprietorship. A review of the Form 1040 tax returns submitted demonstrates that the tax returns do not express current assets, current liability, or their calculated result, net current assets.

Counsel contends that the financial statements submitted state assets of \$44,602.00 comprised of (according to the balance sheet submitted) cash, inventories and good will. Counsel states that the business' inventory and cash assets in combination with other assets are evidence of the ability to pay. "Current assets" consist of items having (in most cases) a life of one year or less, such as *cash*, marketable securities, *inventory*, and, prepaid expenses. It is duplicative of the petitioner's finances to combine net current assets with the taxable income and loss as stated above.

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 management. The unsupported representations of management 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.

Counsel asserts that the petitioner may demonstrate its ability to pay the proffered wage by the amount listed as "goodwill" on the petitioner's tax return. The AAO does not agree. Goodwill is regarded as an intangible asset based on a business's reputation, customer based, and other such factors, and is not, by definition, an

¹ IRS Form 1040, Line 33.

² 8 C.F.R. § 204.5(g)(2).

asset that will be converted to cash within one year. *See Barron's Dictionary of Finance and Investment Terms* 239, 243 (5th Ed.).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the tax return as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.