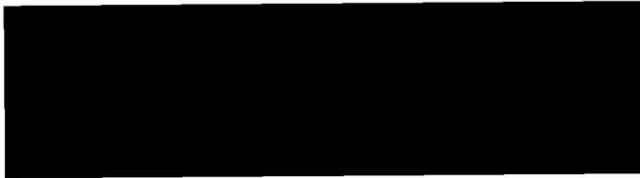




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

FILE: WAC 03 261 53795 Office: CALIFORNIA SERVICE CENTER Date: MAY 16 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:

SELF-REPRESENTED

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 on appeal. The appeal will be dismissed.

The petitioner is a smog inspection; repair; muffler/auto repair; and, computer diagnosis business. It seeks to employ the beneficiary permanently in the United States as an automobile tester. 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)(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 September 4, 2001. The proffered wage as stated on the Form ETA 750 is \$14.06 per hour (\$29,244.80 per year). The Form ETA 750 states that the position requires three years experience.

On appeal, the petitioner submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; a Washington Mutual statement; approximately 39 pages of bank statements; business tax receipts; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on June 28, 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, the petitioner asserts that that the director failed to take into account all the assets of the company, the personal assets of the petitioner, and, the "uncharacteristic and unusual operations of the company" including payments for equipments and machines as all evidence the ability to pay the proffered wage. Further, the petitioner offers its bank statements as further evidence of its ability to pay the proffered wage.

The petitioner has submitted the following documents to accompany the appeal statement: prior decisions of the AAO; a Washington Mutual statement; approximately 139 pages of bank statements; copies of business cards; U.S. Internal Revenue Service Form tax returns for 2001, 2002 and 2003; 22 photographs of the business's facility; three purchase agreements for equipment; equipment leasing invoices; 26 ALLDATA invoices; equipment leases and invoices; a letter from petitioner; and, documentation relating to the Alien Employment application job recruitment.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,244.80 per year from the priority date of September 4, 2001:

- In 2001, the Form 1040 stated adjusted gross income of \$14,185.00.
- In 2002, the Form 1040 stated adjusted gross income of \$14,599.00.
- In 2003, the Form 1040 stated adjusted gross income of \$16,299.00.

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.

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 sole proprietor supports a family of two. In 2001, 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$14,185.00, \$14,599.00, and, \$16,299.00 would not pay the proffered wage of \$29,244.80 per year. It is improbable that the sole proprietor could support himself and his family after reducing the adjusted gross incomes each of the years examined by the amount required to pay the proffered wage.

The petitioner asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,¹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner advocates the use of the cash balance of the business accounts and savings accounts to show the ability to pay the proffered wage. The petitioner's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner submitted copy of the certificate of deposit statement that represents the petitioner's personal savings from December 6, 1999 to July 7, 2004. The statement provided from Washington Mutual Bank, FA does not state a balance during the intervals between those dates. It does show deposits, withdrawals and accrued interests but no beginning balance or interim balances are shown. It does show a current balance of \$10,900.52 on July 7, 2004. Since there was no 2004 financial information such as a 2004 tax return, annual report or audited financial statements submitted, there is insufficient financial data to ascertain if the petitioner could utilize his savings in combination with taxable income to pay the proffered wage.

We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its 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 total 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.

The petitioner asserts that a purchase of equipment in an amount that demonstrates there was sufficient funds to pay the proffered wage. The petitioner cites no legal precedent for the contention, and, according to regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, the petitioner is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

¹ 8 C.F.R. § 204.5(g)(2).

We reject the petitioner's assertion that the petitioner's machinery, equipment assets and the cost of their acquisition or leasing should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its 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. The assets represent monies already expended by the corporation and, therefore, not an asset. Further, the petitioner's total 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. Purchases made in the ordinary course of business are not made in the "uncharacteristic and unusual operations of the company."

Counsel asserts that the denial of the petition and the inability to employ the beneficiary will result in a hardship to petitioner's business. Counsel's assertion is erroneous. Proof of ability to pay begins on the priority date, that is September 4, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an automobile tester will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Further, in line with the above assertion, counsel contends that since the petitioner received a labor certification because of a labor shortage of automobile testers, the petition should be approved. In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect which the grant of a visa would have on the employment situation. The CIS through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification, or the ability to pay the proffered wage that is the issue in this case. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2001, 2002 and 2003 since there are insufficient profits generated by the business to pay the proffered wage. In 2001, 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$14,185.00, \$14,599.00, and, \$16,299.00 would not pay the proffered wage of \$29,244.80 per

year. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner.

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

The petitioner's contentions cannot be concluded to outweigh the evidence presented in the tax returns 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.