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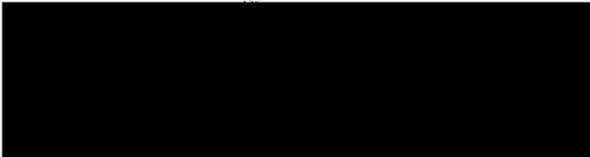
Date: NOV 21 2006

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a flooring company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 19, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 C.F.R. § 204.5(d). 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$23.15 per hour (\$42,133 per year<sup>1</sup>). The Form ETA 750 states that the position requires three (3) years of experience in the proffered position.

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<sup>1</sup> Based on working 35 hours per week per the Form ETA 750.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. Relevant evidence in the record includes [REDACTED] Form 1040 U.S. Individual Income Tax Return for 2001 through 2003, a statement of monthly expenses for [REDACTED] household, a letter from [REDACTED] accountant and an information sheet on [REDACTED] real property. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have a gross annual income of \$100,000, and to have a net annual income of \$78,000. The petitioner did not provide information about the date established and current number of employees on the form. On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that it had and has adequate funds to financially support the instant petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. 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 (7<sup>th</sup> Cir. 1983).

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<sup>2</sup> 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).

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).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33<sup>3</sup>, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2003. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2001, the Form 1040 stated adjustable gross income of \$54,472.

In 2002, the Form 1040 stated adjustable gross income of \$57,681.

In 2003, the Form 1040 stated adjustable gross income of \$43,563.

Counsel submitted a statement of monthly expenses for the sole proprietor in response to the director's request for additional evidence in January 2005. The petitioner's total expenses, including food, utilities, car payment, auto insurance, cable TV and Internet, cloths, child support, medical, life insurance, mortgage payment, and property and school tax are almost \$3,117 per month, or \$37,404 per year for the family of 2.<sup>4</sup>

In 2001, the petitioner's adjusted gross income on Form 1040 was \$54,472, which was sufficient to pay the beneficiary the proffered wage of \$42,133, however, the surplus of \$12,339 after paying the proffered wage from the adjusted gross income would not be sufficient to meet the sole proprietor's household living expenses of \$37,404 per year. The petitioner's adjusted gross income was \$57,681, which was sufficient for the proffered wage, but \$21,856 less than the combination of the proffered wage and the living expenses for 2002. The petitioner's adjusted gross income was \$43,563, which was just sufficient for the proffered wage, but \$35,974 less than the combination of the proffered wage and the living expenses for 2003. Therefore, the sole proprietor did not demonstrate that he had sufficient adjusted gross income to pay the beneficiary the proffered wage and to sustain his family in 2001, 2002 or 2003. The petitioner failed to establish its ability to pay through the adjusted gross income for these three years.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. If the sole proprietor had other liquefiable assets of \$25,065 in 2001, \$21,856 in 2002 and \$43,563 in 2003, the petitioner still can establish its ability to pay the proffered wage and the household living expenses as well.

In the instant case, the record of proceeding does not contain any documents showing the petitioner's liquid assets. Instead, on appeal counsel submits a letter from the petitioner's accountant and documents concerning the sole proprietor's real estate holdings as evidence of the petitioner's ability to pay the proffered wage. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his homes to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage.

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<sup>3</sup> The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

<sup>4</sup> It is noted that some amounts in the statement are inconsistent with documents in the record of proceeding, such as mortgage payment and property and school tax reflected on the sole proprietor's tax returns.

Furthermore it is impossible for the petitioner to establish his ability to pay the proffered wage in 2001, 2002 or 2003 with the real estates even if the sole proprietor liquidates such assets now.<sup>5</sup> Therefore, counsel's reliance on the sole proprietor's real properties to demonstrate his ability to pay is misplaced.

Counsel's assertions cannot over the director's decision and the evidence submitted does not establish that the petitioner has 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 not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).