

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

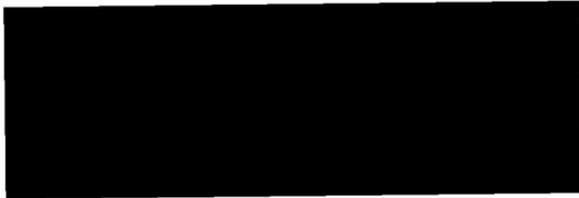
PUBLIC COPY

U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6



FILE: EAC 04 046 51035 Office: VERMONT SERVICE CENTER Date: SEP 15 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 on appeal. The appeal will be dismissed.

The petitioner is a residential cleaning business. It seeks to employ the beneficiary permanently in the United States as a supervisor janitorial service. 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 April 30, 2001.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$14.52 per hour (\$30,201.60 per year). The Form ETA 750 states that the position requires two years of experience.

The petitioner's business was established in 1995, and, he employed seven individuals at the time of preparation of the petition.

On appeal, counsel submits 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; a prior employment letter; and, a schedule C from U.S. Internal Revenue Service Form tax return for 2002 as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on July 19, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested, *inter alia*, evidence of petitioner's U.S. federal tax returns for 2001 and 2002. The director requested the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements. Further, since the I-140 petitioner's business is a sole proprietorship to determine the ability of the petitioner to pay the proffered wage and meet his living costs, the director requested petitioner submit a statement of recurring household expenses for the petitioner's family. This statement must indicate all of the family's household living expenses.<sup>2</sup>

In response to the request for evidence, counsel submitted copies of some of the requested documents.

The director denied the petition on November 18, 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.

---

<sup>1</sup> It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>2</sup> The petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet her living costs, the director requested petitioner submit a statement of recurring household expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

On appeal, counsel asserts that the director erred as a matter of fact and law,<sup>3</sup> and submitted a letter dated June 21, 2005, from petitioner's accountant.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,201.60 per year from the priority date of April 30, 2001:

- In 2001, the Form 1040 stated adjusted gross income of \$62,100.00.

Therefore in tax year 2001 the petitioner adjusted gross income was sufficient to pay the proffered wage of \$30,201.60 per year. The petitioner's personal expenses must also be considered.

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. Evidence was submitted to show that the petitioner employed the beneficiary. In 2001 and 2002, the petitioner paid the beneficiary \$19,653.00 and \$22,427.16 respectively.

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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports a family of three. No personal expense information was provided by the petitioner although requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).<sup>4</sup>

---

<sup>3</sup> Counsel's statement on appeal contains no specific assignment of error. Alleging that the director erred in some unspecified way is an insufficient basis for an appeal. Counsel or petitioner in this matter submitted no brief or explanatory statement.

<sup>4</sup> This is a critical failure by the petitioner in this case since the adjusted gross income of \$62,100.00 in tax year 2001 plus the wages paid of \$19,653.00 minus the proffered wage of \$30,201.60 leaves \$51,551.40 for payment of the petitioner's personal expenses in that year. However, since the petitioner has declined to present evidence of her personal expense, this determination cannot be made. We cannot speculate the evidence that might have been submitted on this issue. We note the director has previously requested this evidence.

The petitioner's accountant stated in a letter dated May 10, 2005, that upon receipt of the visa by the beneficiary, the beneficiary will be able not only to do his present job, but by the elimination of all present subcontractors and one employee, perform their jobs saving the petitioner their compensation and his/her wage.

He therefore argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Proof of ability to pay begins on the priority date, that is April 30, 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 a supervisor janitorial service will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Logically, if petitioner eliminates all subcontractors and one employee, she will have less need for a supervisor since her human resources will be reduced.

The evidence submitted does not establish 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 not met that burden.

**ORDER:** The appeal is dismissed.