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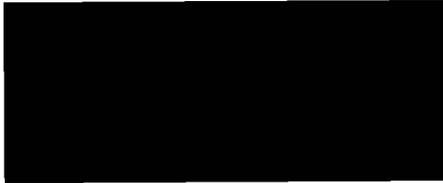
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 03 186 50002 Office: CALIFORNIA SERVICE CENTER Date: APR 02 2007

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a glass and related products installation firm. It seeks to employ the beneficiary permanently in the United States as a glazier supervisor. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 contends that it has demonstrated its continuing financial ability to pay the proffered wage.

The notice of appeal indicates that the petitioner requested an additional thirty days to submit a brief and/or additional evidence to this office. As nothing further has been received to the record,¹ this decision will be rendered on the record as it stands.

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.

Eligibility in this case rests upon the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on March 5, 2001. The proffered wage is \$651.32 per week, which amounts to \$33,868.64 per year set forth on Form ETA 750. On Form ETA 750B, signed by the beneficiary on February 27, 2001, the beneficiary claims to have worked for the petitioner since May 1994.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on June 5, 2003, indicates that the petitioner was established in April 1980, has a gross annual income of \$379,952 and currently employs eight workers.

¹ A recent fax inquiry elicited no response.

The record shows that the petitioner is organized as a sole proprietorship. Thus, it is a business in which it is operated in a single individual(s) personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In this matter, the record indicates that the petitioner files a U.S. Individual Income Tax Return jointly with his spouse and declares no dependents.

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$33,868.64, on June 7, 2004, the director issued a notice of intent to deny the petition advising the petitioner that its income tax return for 2001 and the beneficiary's Wage and Tax Statement (W-2) for 2001 were insufficient to demonstrate the ability to pay the proffered wage beginning at the priority date of March 5, 2001 and continuing until the present. The director also explained that the 1999 and 2000 financial information provided by the petitioner would not be examined as they predated the priority date of March 5, 2001 and were not as relevant as subsequent documentation. The petitioner was afforded an additional thirty days to provide evidence and/or argument to support the petition. In response, it provided a letter from its accountant, Bill D. Steele, CPA, who asserted that rather than examining the petitioner's adjusted gross income as shown on the individual Form 1040, it would be more appropriate to examine the glass shop's gross income as shown on Schedule C, Profit or Loss from Business that is filed with the income tax return. He also explained that the beneficiary's wages are reflected as part of the labor costs included in the calculation of the petitioner's income.

On August 19, 2004, the director issued a request for additional evidence including copies of the petitioner's income tax returns for 2002 and 2003, as well as a list of monthly household expenses. The petitioner provided copies of the requested documents. Together with the 2001 tax return, they contain the following information:

	2001	2002	2003
Gross Receipts or Sales (Schedule C)	\$400,051	\$426,165	\$432,566
Gross Income (Schedule C)	\$ 88,510	\$ 93,879	\$ 85,818
Total Expenses (Schedule C)	\$100,167	\$ 99,721	\$ 80,033
Business Net Profit (Schedule C)	-\$ 11,657	-\$ 5,842	\$ 5,785
Wages (Form 1040)	\$ 16,560	\$ 16,885	\$ 22,920
Business Income (Form 1040)	-\$ 11,657	-\$ 5,842	\$ 5,785
Rental Income (Form 1040)	\$ 13,099	\$ 7,481	-\$ 6,801
Adjusted Gross Income	\$ 18,002	\$ 18,524	\$ 21,915

The W-2s provided by the petitioner indicate that the petitioner paid \$17,693.07 in wages to the beneficiary in 2001 and \$14,726.80 in 2002.

The petitioner's itemization of monthly household expenses including housing costs, food, automobile payments, insurance and utilities, reflects \$1,860 per month.

The director denied the petition on November 30, 2004, noting that the petitioner's income must be applied toward his own living expenses before calculating the ability to pay the proffered wage. After deducting the yearly household expenses from the petitioner's adjusted gross income, the director concludes that the petitioner cannot

cover the full proffered salary of \$33,868.64 per year.

On appeal, the petitioner asserts that he does not have to show that he has actually been paying the full proffered wage during the beneficiary's employment, only that he has had the ability to pay the proffered salary. The petitioner states that the director should have considered the evidence of his personal assets of \$300,000 in determining the ability to pay the proffered wage.

The petitioner is not persuasive although he is correct in asserting that current regulations do not actually require the obligation to pay the wage offered in the ETA -750A to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification.²

It is noted that as the petitioner did not provide any specific documentation of any other cash or cash equivalent personal assets that would have been available to pay the proffered wage, no further consideration of this assertion will be made. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining a petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that wages less than the full proffered salary has been paid, those amounts will also be considered. In the instant case, as shown above, the difference between the \$17,693.07 in actual wages paid to the beneficiary in 2001 and the certified wage of \$33,868.64 is \$16,175.57. In 2002, the difference is \$19,141.84. Thus, the petitioner's ability to pay these differences will be examined.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will also examine the net taxable 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). Showing that the petitioner's business operation achieved a certain gross income is insufficient because it does not include consideration of the expenses incurred in order to generate such revenue. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

² This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant to DOL regulatory provisions or those applying to aliens with non-immigrant status.

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, personal cash or cash equivalent 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 as noted above, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 petitioner's household expense of \$1,860 per month or \$22,320 per year exceeds his reported adjusted gross income in each of the relevant years. It is not reasonable to conclude that this deficit could have covered any additional payment of \$16,175.57 in 2001 or \$19,141.84 in 2002 to establish his ability to pay the certified wage of \$33,868.64 in either of those years. Similarly, although the beneficiary's 2003 W-2 is not contained in the record, the petitioner's \$21,915 adjusted gross income reported in 2003 does not reflect sufficient funds to cover both the petitioner's household expenses as well as the beneficiary's proposed wage offer. Based on the financial data that was provided to the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.