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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Office: VERMONT SERVICE CENTER

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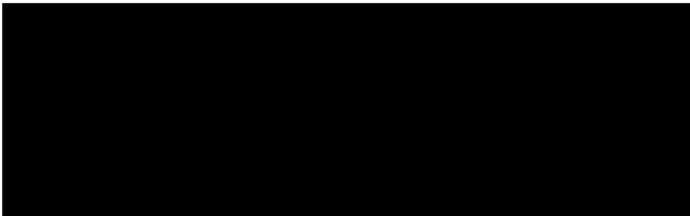
Petitioner:

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 construction 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 (DOL). 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 January 24, 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 October 22, 1998. The proffered wage as stated on the Form ETA 750 is \$32.22 per hour (\$67,017.60 per year). The Form ETA 750 states that the position requires two (2) years of experience in the proffered position.

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 appeal¹. Relevant evidence in the record includes [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 1998 through 2000, statements of [REDACTED] monthly expenses for 1998 through 2003, and copies of four checks to the beneficiary issued by the petitioner in May 2004. 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. The petitioner claimed to have been established in 1989, to have a gross annual income of \$1,457,269, to have a net annual income of \$91,976, and to currently employ 5 workers. On the Form ETA 750B, signed by the beneficiary, he did not claim to have worked for the petitioner.

On appeal, counsel submits a letter from the petitioner and asserts that the payment made as other cost reflected on line 39 of the schedule C could be used to pay the beneficiary the proffered wage, thus the petitioner has established its ability to pay the proffered wage.

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 beneficiary did not claim to have worked for the petitioner, however, the petitioner submitted copies of four checks issued by the petitioner to the beneficiary. These checks show that the petitioner paid the beneficiary \$1,288.80 weekly during the four weeks in May 2004. The petitioner established that it has been paying the beneficiary the full proffered wage since May 2004. However, the regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is October 22, 1998. Thus, the petitioner must show its ability to pay the proffered wage not only in May 2004, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 1998 through 2003 and in January through April 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, the petitioner is obligated to demonstrate that it could pay the proffered wage in 1998 through 2003 and in January through April 2004.

¹ 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).

Counsel submits a letter from the petitioner on appeal. In the letter dated February 4, 2005 the petitioner claimed that it paid \$564,077 in 1999 and \$974,981 in 2000 as "Other Cost" reflected on line 39 of the Form 1040 Schedule C, and this cost paid can be used to pay the beneficiary the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In addition, there is no evidence that the positions of the workers reflected in the other cost category of Schedule C involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them. Moreover, the statement attached to line 39 of the Schedule C shows that the petitioner's cost of goods sold is the other cost and it does not establish that the petitioner paid any compensation to any workers as the other cost. The petitioner cannot use the cost paid for materials to pay the beneficiary the proffered wage. Furthermore, the other cost occurred in 1999 and 2000 could not establish the petitioner's ability to pay in 1998 and 2001 through 2003 even if the petitioner proved that the other cost was paid as compensation to workers who performed the same duties as set forth on the Form ETA 750 in the instant case. Therefore, the petitioner failed to establish its continuing ability to pay the proffered wage as of the priority date through the examination of wages paid.

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 (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 (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 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. In response to the director's request for evidence (RFE) dated March 31, 2004, the petitioner's reliance on its gross receipt or sales reflected in the schedule C of the Form 1040 is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 1998 through 2000. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage from the year of the priority date:

- In 1998, the Form 1040 stated adjusted gross income of \$17,588.
- In 1999, the Form 1040 stated adjusted gross income of \$34,953.
- In 2000, the Form 1040 stated adjusted gross income of \$70,042.

² The line for adjusted gross income on Form 1040 is Line 33 for years 1998 through 2000.

In response to the director's RFE the petitioner submitted statements of the sole proprietor's monthly expenses, which include rent, gas, electricity, water, telephone, food, clothing and shoes, medical dental insurance, and other incidental expenses. According to the statements the sole proprietor's monthly expenses were \$1,285.00 (\$15,420 per year) in 1998, \$1,385.00 (\$16,620 per year) in 1999, \$1,485.00 (\$17,820 per year) in 2000, and \$1,585.00 (\$19,020 per year) in 2001, 2002 and 2003.

In 1998 and 1999 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage of \$67,017.60 in each of the years without taking the sole proprietor's personal living expenses into account; in 2000 the adjusted gross income was sufficient to cover the proffered wage, however, the surplus of \$3024.40 after paying the proffered wage from the adjusted gross income was not sufficient to cover the sole proprietor's personal living expenses that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage as well as its personal living expenses with the sole proprietor's adjusted gross income for 1998 through 2000.

CIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any evidence to show that the sole proprietor had other income and liquefiable assets to be used to pay the beneficiary the proffered wage and to cover the proprietor's personal living expenses. In the statements of the sole proprietor dated June 7, 2004 he indicated that he has total assets aside from furniture and clothing of \$20,000. However, the record does not contain any supporting evidence of these assets. In the statements the sole proprietor also mentioned that he owns real property which valued \$300,000 in 1998, \$350,000 in 1999, \$500,00 in 2000, \$600,00 in 2001, \$900,00 in 2002 and \$1,100,000 in 2003. The sole proprietor did not submit any evidence to support his ownership of the real property. 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)). Furthermore, the AAO does not generally accept a claim that the sole proprietor relies on the value of his real property to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. The petitioner's reliance on the sole proprietor's real property to demonstrate his ability to pay is misplaced.

The record before the director closed on June 14, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the sole proprietor's federal tax return for 2001, 2002 and 2003 should have been available. However, the petitioner did not submit the sole proprietor's tax returns for 2001 through 2003, nor did counsel explain why the tax returns were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 1998 through 2003.

Counsel's assertions cannot overcome 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.