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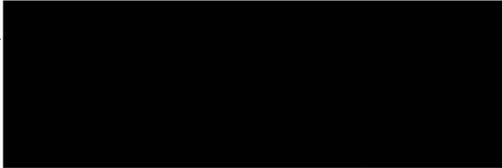
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007
WAC 00 276 54938

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

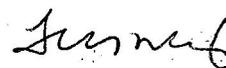
PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section
203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a care facility for the elderly. It sought to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on November 18, 1999. It was initially approved on October 26, 2000. The alien beneficiary filed an application to adjust her status to that of lawful permanent resident. The case was transferred to the district office for interview. Following the review of information relevant to her application to adjust to permanent resident status, the district office transferred the case to the service center for revocation of the immigrant visa. The director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on March 17, 2005. The director determined that the record did not indicate that certain tax returns submitted into the record, in an effort to document the petitioner's ability to pay the proffered wage, had been properly filed with the Internal Revenue Service (IRS). Thus, the director requested in the notice of intent to revoke that the petitioner provide copies of its 2000-2004 tax returns, certified by the IRS. The director also determined that the petitioner's claims as to the beneficiary's employment and payment of wages with the petitioner required clarification related to the validity of the job offer. The petitioner was afforded thirty days to offer such evidence or argument in opposition to the proposed revocation. The director also specifically requested other additional evidence to be provided with the petitioner's response relevant to this issue, as well as to the petitioner's ability to pay the proffered wage. The petition's approval was subsequently revoked based on the reasons set out in the notice of intent to revoke on August 5, 2004, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that it submitted a timely response to the director's notice of intent to revoke with all supporting documentation and that the petition should be approved.

Section 205 of the Act, states: "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

In this matter, at the outset, it is noted that the AAO finds that the primary reason that the petition should not be approved and that the revocation should be affirmed is that the petitioner has not met its underlying burden to establish its continuing ability to pay the proffered wage and that secondarily, as the director emphasized, some of the evidence relating to employment and payment of wages to the beneficiary is not persuasive. An

application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 regulation at 8 C.F.R. § 204.5(g)(2) provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests primarily upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is September 22, 1995. The beneficiary's salary as stated on the labor certification is \$8.58 per hour or \$17,846.40 per annum. As reflected in Part 5 of the I-140, the petitioner claims that it was established in 1991 and produces an annual gross income of \$47,441. The ETA 750B, signed by the beneficiary on September 12, 1995, does not claim that the petitioner had employed him.

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). Relevant to the petitioner's ability to pay the proposed annual wage offer of \$17,846.40, copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the year 1999 was originally provided in support of the I-140. In his notice of intent to revoke the I-140, the director also discusses copies of the sole proprietor's individual tax returns for 2002 and 2003 that were submitted in connection with the beneficiary's application for permanent residency and interview at the district office. These tax returns reflect that the sole proprietor filed his income tax returns jointly with his spouse and declared one dependent in each of those years. The 2002 and 2003 returns contain the following information:

Year	Wages	Adjusted Gross Income
2002 (orig.)	-0-	\$64,987
2002 (amended)	\$9,060	\$70,888
2003	\$17,915	\$61,290

Also contained within the materials provided to the district office are copies of documents related to the beneficiary's employment and payment of wages. The documents include:

- a) A letter dated November 1, 2000 addressed to the director and signed by the petitioner's owner in the original, stating that the beneficiary is employed by the petitioner on a "full time permanent basis" and "is earning \$8.58 per hour" and will continue to be employed once having obtained his legal permanent residency.
- b) Copies and originals of the petitioner's internal payroll documents dated from July 2002 to November 2003 showing payment of wages and deductions relating to the beneficiary's salary.
- c) Copy of a 2002 W-2 issued by the petitioner to the beneficiary for \$9,060.48
- d) Copy of beneficiary's individual tax return for 2002 showing wages of \$9,060, a refund of \$881, and signed April 15, 2003.
- e) Copies of refund checks from US Treasury to the beneficiary for \$881 (dated May 16, 2003) and \$153.76 (dated July 18, 2003).
- f) Copy of beneficiary's individual state tax return for 2002 showing wages of \$9,060, a refund of \$139.98 and signed April 15, 2003.
- g) Copy of state refund check for \$139.98, dated may 30, 2003.
- h) Copy of 2003 W-3 issued by the petitioner to the beneficiary for \$17,915.04.
- i) Copy of state quarterly wage report for last two quarters of 2002 showing \$4,530.24 wages paid in each quarter.
- j) Federal W-3 Transmittal of Wage and Tax Statements for 2002 showing \$9,060.48 wages paid.

The notice of intent to revoke the preference petition was issued on March 17, 2005. The director discussed how the district officer had requested evidence as to why no employee wages were listed as expenses on the petitioner's 2002 federal income tax return and evidence of the ability to pay the proffered wage. He summarized the petitioner's response that the error in omitting wages on the 2002 tax return had been inadvertent. The director determined that the petitioner was amending his tax returns to show wages paid to the beneficiary that had actually not been paid. The director also states that further investigation shows that the beneficiary received no wages in 2000, 2001 and 2002. He specifically requests the petitioner to provide copies of the state Employment Development Department (EDD) (Form DE-6) quarterly wage reports for the 3rd and 4th quarters of 2000, all quarters of 2001, 2002, 2003, 2004 and the 1st quarter of 2005.

The director also requests copies of the petitioner's federal income tax returns including all schedules and attachments that must be received in the sealed Internal Revenue Service envelope for the years 2000, 2001, 2002, 2003, and 2004.

In response, counsel provided copies of the state EDD reports as requested. No payment of wages was shown for the last two quarters of 2000, 2001, or the first two quarters of 2002. Payment of wages corresponding with other documentation provided for 2003 was submitted. Additionally, copies of the last three quarters of 2004 were provided showing cumulative wages of \$13,522.08 paid to the beneficiary. The first quarter of 2004 is not contained within these documents, however the first quarter of 2005 shows wages of \$4,392.96 paid to the beneficiary.

Counsel's transmittal letter states that the petitioner was not attempting to amend the 2002 tax return to show wages paid to the beneficiary that it had not actually paid. An affidavit by the owner, [REDACTED], is also provided. He states that the petitioner has employed the beneficiary in 2000 and 2001. He adds that the beneficiary was paid in cash because he did not have a social security number. Mr. [REDACTED] claims that the

beneficiary was paid \$12,000 in 2000 and \$12,000 in 2001. He also states that the petitioner has employed the beneficiary since 2000 as a cook. Mr. [REDACTED] also states that he amended the 2002 tax return because "I inadvertently forgot to include Mr. [REDACTED]'s earned income for this year."

Counsel also states that the petitioner could not officially put the beneficiary on the payroll until he had a social security number, which he applied for on October 4, 2001, after receiving his work authorization card on September 26, 2001. Copies of the social security application letter and the beneficiary's work authorization card are provided. Counsel also attaches an affidavit from "Shirley Sawyer," one of the residents at the petitioner's facility, who attests that she has lived there since September 2003, and that she knows that the beneficiary has been employed as a cook since that time.

Counsel concludes by stating that the state quarterly reports are being submitted, but that the tax returns have not yet been received from the IRS. Counsel requests additional time in which to submit the tax returns upon receipt, which will also address the concern that they were not properly filed. Counsel concludes by stating that the beneficiary has been employed and been paid wages by the petitioner on a full-time basis since 2000.

The director revoked the petition on April 21, 2005. The director did not find the petitioner's explanation as to the reason he filed an amended tax return for 2002 persuasive. He emphasizes that the record does not contain evidence that the amended tax returns were properly filed.

However, the director subsequently seems to dismiss the petitioner's request for additional time to provide the appropriate proof of filing because the state EDD records show that the petitioner paid no wages in 2000, 2001, and the first two quarters of 2002. The director also raises the issue of an inconsistent statement by the beneficiary about the commencement of his employment with the petitioner since 1995 and the petitioner's claim of his employment beginning in 2000. The director includes a discussion of the use of federal tax returns as a basis for determining the petitioner's ability to pay a proffered wage but, as noted above, apparently concludes that as the state records show no payment of wages in 2000, 2001 and the first two quarters of 2002, tax records are not necessary. The director appears to conclude that as the record failed to show that the petitioner had actually continuously employed and paid the proffered wage to the beneficiary since the filing of the preference petition, then the petition must fail because the petitioner has presumably failed to establish the requisite intent to engage the beneficiary according to the terms of the job offer.

On appeal, counsel reiterates his assertions presented with the petitioner's response to the notice of intent to revoke and states that the director must not have properly reviewed the response as the explanation was already provided. Counsel again cites the affidavit by Mr. [REDACTED] as to the employment and payment of wages to the beneficiary in 2000 and 2001 and emphasizes that as no social security number was available, the beneficiary was not on the payroll for 2000 and 2001 and would not have had his income reflected on the petitioner's tax returns and logically, would not have been reported on the state EDD forms. Counsel also renews his argument that the 2002 tax return was amended in order to include forgotten income. Counsel refers to Mr. [REDACTED]'s affidavit in support, but it is noted that this affidavit does not mention additional petitioner's income as a reason to amend the tax return, but only mentions the omission of wages paid to the beneficiary.

The director's finding that the petitioner's apparent failure to employ and pay the proffered wage to the beneficiary since the filing of the petition supports, even in part, the revocation of the approval of the petition, is withdrawn. The AAO notes that there is no requirement in the statute or regulations that a petitioner actually begin to employ and pay the beneficiary the proffered wage until he or she 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 labor certification.¹

However, we do view Mr. [REDACTED] unsupported statements relating to the amount of wages paid to the beneficiary to be unreliable in view of his November 1, 2000 letter affirming the contemporaneous employment of the beneficiary at \$8.58 per hour on a permanent full-time basis, which would amount to almost \$15,000 in compensation as of that date, in contrast to his subsequent affidavit claiming payment of \$12,000 in wages to the beneficiary in 2000. This lack of consistent corroboration of the beneficiary's employment and payment of wages during 2000 and 2001 is relevant to the petitioner's lack of reliable evidence of its ability to pay the proffered wage during this time.

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 have been paid, those amounts will also be considered. In the instant case, as mentioned above, Mr. [REDACTED] statements as to the beneficiary's actual employment and payment of wages in cash, do not, standing alone, provide sufficient reliability as to the employment and payment of wages to the beneficiary during 2000 and 2001. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is noted that Ms. [REDACTED] affidavit as to the beneficiary's employment would only be relevant to the period beginning September 2003 and provide no evidence relating to the wage which the petitioner paid the beneficiary beginning in September 2003.

With regard to the wages paid in 2002 and 2003, we accept the weight of the other documentation contained in the record such as the W-2s, tax returns of the beneficiary, refund checks, etc. rather than the explanation as to the facts surrounding the petitioner's motivation to amend the 2002 tax return. The petitioner established its ability to pay the proffered wage in 2003 providing a copy of the beneficiary's Form W2 issued by the petitioner which documents the payment of an amount slightly in excess of the proffered wage. The beneficiary's 2002 Form W2 shows that the petitioner paid him \$9,060.48, or \$8,854.56 less than the proffered salary during that year. As noted above, in 2004 the EDD records show a total \$13,522.08 paid to the beneficiary.

¹This does not affect otherwise existing obligations with regard to other pertinent non-immigrant or DOL regulations.

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, as mentioned above, 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 gross income reached a certain level, as asserted here, 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.

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 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, if this office were to rely on the information provided on the sole proprietor's amended individual 2002 tax return, it may be accepted, without examining reasonable living expenses of the petitioner which were never requested or provided, that the petitioner could provide an additional \$8,855 out of the amended \$70,888 in adjusted gross income set forth on that return. Thereby, the petitioner might be found to have established its ability to pay the proffered wage in 2002. However, the evidence is insufficient to render a positive determination as to the petitioner's ability to pay the proposed wage offer in 2000, 2001 or 2004 through the payment of wages and/or tax returns. This office recognizes that the director did not allow additional time to the petitioner to provide such returns prior to issuing his revocation. However, it is noted that nothing precluded the petitioner from providing on appeal or in the interim period since the filing of the appeal the 2000, 2001 and 2004 tax returns as requested by the director. It is noted that the petitioner failed to provide either copies of these tax returns from its own records or certified copies from the IRS. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the

director, the petitioner declined to provide copies of its tax returns for these three years. These tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and would have further revealed whether the petitioner had the ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Without such evidence or evidence of comparable reliability regarding the petitioner's financial circumstances during the years 2000, 2001 and 2004, this office cannot conclude that the petitioner has established its continuing ability to pay the proffered wage.

In this matter, the petitioner submitted no audited financial statements, federal tax returns, or annual reports for 2000, 2001 or 2004. Based on the financial data that was provided to the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage. The petitioner's failure to demonstrate its continuing ability to pay the proffered wage from the priority date onwards represents good and sufficient cause to revoke the approval of the instant petition.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

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.