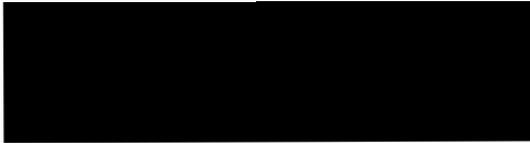




U.S. Citizenship
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BU

FILE: WAC 04 239 53247 Office: CALIFORNIA SERVICE CENTER Date: **JAN 22 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a block/stone wall mason. 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.

The record shows that the appeal is properly filed and 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 June 8, 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 CFR § 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 11, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$28.06 per hour (\$58,364.80 per year). The Form ETA 750 states that the position requires two years experience.

¹ 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

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 March 25, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signature(s), and audited financial statements from April 11, 2001, to present.

In response to the director's request, counsel submitted incomplete copies (without the Form 1040 returns filed) of the petitioner's U.S. federal tax returns Form 1040 for the years 2002, 2003 and 2004.

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 appeal². Counsel submits complete copies of the petitioner's U.S. federal tax returns Form 1040 for the years 2001, 2002, 2003 and 2004.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1983 and to currently employ eight workers.

On appeal, counsel asserts the "Petitioner [sic] Personal taxes and resubmitting the business taxes that clearly shows that the Petitioner is making more than enough money to cover Beneficiary [sic] wages.'.

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 Sonegawa*, 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 he employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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."

² 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).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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, 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, the sole proprietor supports a family of five to two individuals in the years for which tax returns were submitted. The tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> |
|---------------------------------------|----------------------------|--------------|--------------|--------------|
| Adjusted gross income (Form 1040) | \$ 86,660.00 ³ | \$ 62,012.00 | \$109,260.00 | \$ 67,710.00 |
| Gross receipts or sales (Schedule C) | \$575,000.00 ⁴ | \$560,354.00 | \$506,591.00 | \$667,507.00 |
| Wages paid/cost of labor (Sch. C) | \$257,120.00 ⁵ | \$201,060.00 | \$147,756.00 | \$185,814.00 |
| Net profit from business (Schedule C) | \$ 74,307.00 ⁶ | \$ 39,643.00 | \$ 88,395.00 | \$ 80,590.00 |
| Net profit from business (Schedule C) | \$ <2,736.00> ⁷ | \$ 42,392.00 | \$ 36,593.00 | \$ 14,109.00 |

In 2001, 2002 and 2004, the sole proprietorship's adjusted gross incomes of \$86,660.00, \$62,012.00, and, \$67,710.00 respectively fail to cover the proffered wage of \$58,364.80 per year, and his family's reasonable

³IRS Form 1040, Line 33, 34 or 35 depending upon the year of the tax return.

⁴IRS Form 1040, Schedule C, Line 1.

⁵IRS Form 1040, Schedule C, Part II, Line 26 or Part III, Line 37.

⁶IRS Form 1040, Schedule C (masonry), Line 31.

⁷IRS Form 1040, Schedule C (medical sales), Line 31. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

living expenses.⁸ It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and personal living expenses.

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.

⁸ Schedule A as submitted with the petitioner's Form 1040 tax return each year listed personal deductible expenses such as medical and dental services, home mortgage interest, charitable contributions as follows: 2001, \$23,365.00; 2002, \$14,283.00; 2003, \$17,884.00; 2004, \$24,202. As already stated, the I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, all of the family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally includes the following: food, car payments (whether leased or owned), installment loans, insurance (auto, household, 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. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the schedule a statements to the returns.