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U.S. Citizenship
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Services

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FILE:

WAC 06 120 50177

Office: TEXAS SERVICE CENTER

Date:

OCT 17 2007

IN RE:

Petitioner:

Beneficiary:



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

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration and entry of a new decision.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original July 28, 2006 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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.34 per hour or \$23,587.20 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's statement, a statement from the petitioner's owner, and copies of property tax statements for the petitioner's owner. Other relevant evidence in the record includes copies of the petitioner's 2001 through 2005 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, copies of the 2003 and 2004 Forms W-2CM, Wage and Tax Statements, for the Commonwealth of the Northern Mariana Islands, issued by the petitioner's office in Saipan, MP on behalf of the beneficiary, a copy of the petitioner's monthly expenses,² and copies of the petitioner's bank statements for the period November 13, 2005 through June 13, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1040 reflect adjusted gross incomes of \$17,860, \$51,970, \$63,872, \$56,056, and \$67,410, respectively. The petitioner's Schedule Cs for those years also reflect gross receipts of \$181,749, gross profit of \$56,462, wages of \$18,463, net profit of \$6,403, and cost of labor of \$71,052 in 2001; gross receipts of \$238,240, gross profit of \$74,480, wages of \$16,864, net profit of \$29,856, and cost of labor of \$82,560 in 2002; gross receipts of \$420,426, gross profit of \$120,560, wages of \$5,000, net profit of \$30,497, and cost of labor of \$167,564 in 2003; gross receipts of \$451,155, gross profit of \$128,449, wages of \$17,815, net profit of \$15,416, and cost of labor of \$198,297 in 2004; and gross receipts of \$451,576, gross profit of \$130,566, wages of \$18,641, net profit of \$18,641, and cost of labor of \$164,280 in 2005.

The 2003 and 2004 Forms W-2CM, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$7,729.30 in 2003 and \$6,008.35 in 2004.

The petitioner's bank statements for the period November 13, 2005 through June 13, 2006 reflect balances ranging from a low of \$2,061.00 to a high of \$38,569.97.

The statement from the petitioner's owner maintains:

- 1) In 2001, I had assets sufficient to pay the \$5,277.30 shortfall for the salary of the beneficiary.
- 2) In particular, I owned (and still own):

Lot 192 T100/84 Dededo, Guam valued at	\$567,385.00
Lot 8/829 Dededo, Guam valued at	\$152,559.00
P15.45-1AB-1-2 Dededo, Guam valued at	\$ 21,785.05
L2105-R-2 Dededo, Guam valued at	\$ 99,467.90
L7 T 178/86 Machanao, Guam valued at	\$ 13,773.90
	\$855,970.85

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).

² The petitioner's monthly expenses are entitled "GR Construction Monthly Expenses", and, therefore, the AAO assumes these monthly expenses are actually for the company and not the petitioner's owner as needed.

In addition, I had cash on hand in excess of \$5,277.30 in 2001. See list of bank accounts and TCDs on page 2 of Schedule B.

In 2001, I had sufficient assets to pay the offered wage.

The property tax statements confirm the assessed value of the above properties.

On appeal, counsel asserts that “the salary amount was short \$5,277.30 for only one year out of five relevant years. For the relevant year, the petitioner had in excess of \$5,277.30 cash on hand and had \$855,970.85 value in assets available 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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted Forms W-2CM, issued by the petitioner (Saipan Office) on behalf of the beneficiary for the years 2003 and 2004. Therefore, the petitioner has established that it employed the beneficiary in 2003 and 2004.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$23,587.20 and the actual wages paid to the beneficiary. In 2001, 2002, and 2005, no evidence has been submitted which shows that the petitioner employed the beneficiary in those years. Therefore, in those years, the petitioner must show that it had sufficient funds to pay the entire proffered wage of \$23,587.20. In 2003 and 2004, the petitioner submitted Forms W-2CM showing that the petitioner compensated the beneficiary \$7,729.30 in 2003 and \$6,008.35 in 2004. Therefore, the difference between the proffered wage of \$23,587.20 and the actual wages paid to the beneficiary of \$7,729.30 was \$15,857.90 in 2003, and the difference between the proffered wage of \$23,587.20 and the actual wages paid to the beneficiary of \$6,008.35 was \$17,578.85 in 2004.

As an alternative means of determining the petitioner’s ability to pay the proffered wage, CIS will next examine the petitioner’s net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

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 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 supported a family of two in 2001 through 2005. In 2001 through 2005, the sole proprietor's adjusted gross incomes were \$17,860, \$51,970, \$63,872, \$56,067, and \$67,410, respectively. However, although requested by the director, the record of proceeding does not appear to contain a list of the sole proprietor's personal monthly recurring expenses, but appears to contain a list of the business' monthly expenses. Therefore, the AAO cannot determine if the sole proprietor had sufficient funds to support a family of two after paying the proffered wage of \$23,587.20.³

³ It is noted that in her denial the director used the list of monthly expenses contained in the record and reported that the petitioner had established its ability to pay the proffered wage in 2002 through 2005, but not in 2001. The AAO is not convinced that the expenses listed in the record of proceeding are the personal expenses of the petitioner's owner. Instead, the AAO believes the expenses listed are those of the petitioner itself. Therefore, the AAO cannot, at this time, concur with the director that the petitioner has established its ability to pay the proffered wage of \$23,587.20 in 2002 through 2005.

On appeal, counsel claims that “the salary amount was short \$5,277.30 for only one year out of five relevant years. For the relevant year, the petitioner had in excess of \$5,277.30 cash on hand and had \$855,970.85 value in assets available to pay the proffered wage.”

In the instant case, the bank statements provided represent what appears to be the sole proprietor’s business checking account, and these funds are most likely shown on Schedule C of the sole proprietor’s returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a “totality of circumstances” analysis.

Counsel states that the adjudicator denying the visa petition was unaware of the other assets of the petitioner which were not reflected on the tax return, \$855,970.85 in real estate. However, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. Therefore, the AAO will not consider the real estate property of the petitioner’s owner when determining the petitioner’s ability to pay the proffered wage of \$23,587.20.

The director must afford the petitioner reasonable time to provide evidence of its ability to pay the proffered wage, to include the sole proprietor’s personal monthly recurring expenses, any personal assets of the petitioner’s owner such as checking accounts, savings accounts, CDs, Money Market Funds, etc. and any other evidence the director deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s July 28, 2006 decision is withdrawn. The petition is remanded to the director for further consideration and for entry of a new decision, which is to be certified to the AAO for review.