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U.S. Citizenship
and Immigration
Services

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BC

FILE: [REDACTED]
SRC 06 048 50559

Office: TEXAS SERVICE CENTER Date: OCT 24 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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom tailor service. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 22, 2002. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year.

The Form I-140 petition was submitted on December 1, 2005. The spaces on that form reserved for the petitioner to report its gross and net annual incomes were left blank. On the Form ETA 750, Part B, signed by the beneficiary on September 9, 2002, the beneficiary claimed to have worked for the petitioner since September 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the joint 2000 and 2001 Form 1040 U.S. Individual Income Tax Return of [REDACTED] and his spouse, (2) the 2002, 2003, 2004, and 2005 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] (3) monthly statements pertinent to the checking account of Emiel [REDACTED] (4) a letter dated October 28, 2002 from the county clerk of Harris County, Texas, and (5) a letter dated April 30, 2006 from [REDACTED]. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

A Schedule C attached to [REDACTED] 2001 tax return shows that he owned a "Taylor Shop" called [REDACTED] during that year. A Schedule C attached to [REDACTED] 2000 tax return shows that he owned a sole proprietorship during that year too. This office presumes that the sole proprietorship [REDACTED] owned during both years was the petitioning tailor business. Those returns also demonstrate that [REDACTED] and his wife, Panna,³ had three dependents during those years.

During 2000 the petitioner returned net profit of \$72,663. The adjusted gross income of [REDACTED] during that year, including the petitioner's profit offset by deductions, was \$67,529. The petitioner declared no wage expense during that year.

During 2001 the petitioner returned net profit of \$58,800. The adjusted gross income of [REDACTED] during that year, including the petitioner's profit offset by deductions, was \$54,646. The petitioner declared no wage expense during that year.

This office notes that because the priority date of the instant petition is October 22, 2002, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Schedules C attached to the 2002, 2003, 2004, and 2005 tax returns of [REDACTED] show that during those years he held the petitioning tailor business as a sole proprietorship. [REDACTED] was single during all three years. During 2003 and 2004 he had no dependents. During 2005 [REDACTED] claimed his parents, [REDACTED] as dependents.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner's owner's family name is spelled both "[REDACTED]" in various places in the record.

³ In various places in the record [REDACTED] name is spelled "[REDACTED]"

The petitioner returned a net profit of \$12,466 during 2002. At the end of that year [REDACTED] declared adjusted gross income of \$11,585, including the petitioner's profit offset by deductions. The petitioner declared no wage expense during that year.

The petitioner returned a net profit of \$4,866 during 2003. At the end of that year [REDACTED] declared adjusted gross income of \$14,325, including the petitioner's profit. The petitioner declared no wage expense during that year.

The petitioner returned a net profit of \$3,619 during 2004. At the end of that year [REDACTED] declared adjusted gross income of \$7,086, including the petitioner's profit. The petitioner declared no wage expense during that year.

The petitioner returned a net profit of \$2,713 during 2005. At the end of that year [REDACTED] declared adjusted gross income of \$21,961, including the petitioner's profit. The petitioner declared no wage expense during that year.

In his April 30, 2006 [REDACTED] stated that the profits of the business are low because his health prevents him from attending to the business personally and his son "does not know any thing [sic] about it." [REDACTED] further stated that he needs the beneficiary's assistance because she "is an expert" and that if he is permitted to employ her the petitioner's "income is going to be higher."

The October 28, 2002 letter from the Harris County Clerk's office acknowledges receipt of a certificate of assumed name, indicating that [REDACTED] does business under the name '[REDACTED]'. This appears to indicate that on or about that date [REDACTED] took over the petitioning business.

The director denied the petition on May 12, 2006.⁴ On appeal, the petitioner asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁵

⁴ A notation on the file copy of the decision of denial indicates that it was mailed on June 28, 2006. The reason for the delay is unknown to this office.

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The petitioner's owner asserted that, because of the beneficiary's expertise, hiring the beneficiary would increase the petitioner's profit such that it would then be able to pay the proffered wage. The beneficiary indicated on the Form ETA 750B, however, that she has worked for the petitioner since September 2001. As the petitioner apparently already employs the beneficiary, how approval of the instant petition could increase the petitioner's profits is unclear. Absent any such indication no amount of that postulated increased profit will be included in the analysis pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 examine whether the petitioner employed 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, although the beneficiary claimed on the Form ETA 750B to have worked for the petitioner since September of 2001, the petitioner's 2001, 2002, 2003, 2004, and 2005 tax returns, specifically the Schedules C, state that the petitioner paid no wages during those years. The petitioner has not, therefore, demonstrated that it paid the beneficiary any wages during the salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the adjusted gross income⁶ figure on the petitioner's owner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁶ For the purpose of analyzing the petitioner's ability to pay the proffered wage, adjusted gross income is considered analogous to net income.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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 tax returns, rather than gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$20,800 per year. The priority date is October 22, 2002.

During 2002 [REDACTED] declared adjusted gross income of \$11,585. That amount is insufficient to pay the proffered wage. The petitioner submitted no other evidence of additional funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 [REDACTED] declared adjusted gross income of \$14,325. That amount is insufficient to pay the proffered wage. The petitioner submitted no other evidence of additional funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 [REDACTED] declared adjusted gross income of \$7,086. That amount is insufficient to pay the proffered wage. The petitioner submitted no other evidence of additional funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 [REDACTED] declared adjusted gross income of \$21,961. Although that amount exceeds the annual amount of the proffered wage, if the [REDACTED] had been obliged to pay the proffered wage to the beneficiary out of that amount, he would have been left with only \$1,160 with which to support his household of three during that year. Although the record contains no schedule of expenses or budget for [REDACTED] to believe that he could support his household for a year on that amount is unreasonable. The petitioner submitted no other evidence pertinent to the petitioner's ability to pay the proffered wage during 2005. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on December 1, 2005. On that date the petitioner's owner's 2006 tax return was unavailable. On December 20, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On March 2, 2005 that same request was mailed again. On March 22, 2006 the service center issued another request for evidence in this matter, again requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On all of those dates the petitioner's owner's 2006 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The Form ETA 750 labor certification application was submitted on October 22, 2002. The record indicates that on or about October 28, 2002 [REDACTED] acquired the petitioning tailor business. When he submitted the instant petition, however, [REDACTED] implied that the business was his. At what point the business transferred is unclear.⁷

If the business transferred after the priority date, however, then the new owner must demonstrate that he is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). He must submit proof of the change in ownership and of how the change in ownership occurred. He must also show that he assumed all of the rights, duties, obligations, and assets of the original employer. The evidence submitted does not show when the business transferred or how, and the petition should have been denied on this additional basis.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

⁷ The evidence appears to show that [REDACTED] owned the business during some part of 2002 and that [REDACTED] owned it during the latter part of 2002. If this is so, then the petitioner is obliged to show that the petitioner had the ability to pay the proffered wage during the period when [REDACTED] owned it and during the period when [REDACTED] owned it.

ORDER: The appeal is dismissed.