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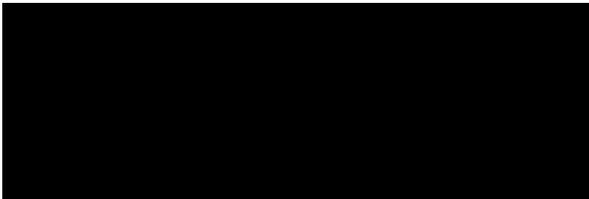
Petitioner:

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 gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a management trainee (assistant manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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, 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 April 27, 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 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).

The instant petition is for a substituted beneficiary.¹ Here, the original Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$18,200 per year).² The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition was submitted on December 12, 2005. On the petition, the petitioner claimed to have been established in 1995, and to currently employ two workers. The petitioner did not provide information about its gross annual income and net annual income on the petition. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on December 15, 2004, the beneficiary did not claim to have worked for the petitioner.

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 appeal.³ On appeal, counsel submits a brief, information regarding property owned by the petitioner and a copy of a Form I-797 approval notice for a separate immigrant visa petition filed by the petitioner on behalf of a different beneficiary. Other relevant evidence in the record includes [REDACTED]'s Form 1040 U.S. Individual Income Tax Return for 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the market value of the equity in the property owned by the petitioner established the petitioner's ability to pay the proffered wage and that a Form I-140 was previously approved and therefore, the denial for the same I-140 in substitution is erroneous.

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,

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED], Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm_96/fm_28-96a.pdf (March 7, 1996).

² Based on working 35 hours per week as set forth on the Form ETA 750A. The director was in error in calculating the annual proffered salary of \$20,800 in his decision. However, this error does not affect the ultimate outcome of the appeal.

³ 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).

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any evidence showing that it employed and paid the beneficiary from the priority date in 2001 onwards. Therefore, it failed to establish its ability to pay with wages already paid to the beneficiary.

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. Counsel's reliance on the business' gross income, gross profit and inventory reflected on Schedule C is misplaced. 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 (approximately thirty percent of the petitioner's gross income).

For a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Since adjusted gross income has already excluded the business expenses including depreciation, the petitioner needs to demonstrate that the adjusted gross income reflected on the sole proprietor's tax return covers the proffered wage and the sole proprietor's household living expenses. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001, the year of the priority date. The tax return for 2001 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$18,200:

In 2001, the Form 1040 stated adjusted gross income of \$23,211.

Therefore, in 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage with surplus of \$5,011 in that year without taking into account the sole proprietor's household living expenses. The petitioner did not submit a statement of monthly expenses for the sole proprietor's household. 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). The petitioner failed to establish that the sole proprietor could cover the business expenses and the proffered wage for the beneficiary as well as his household living expenses for 2001, the year of the priority date. However, it is unlikely that the sole proprietor's household of three can be sustained with the surplus of \$5,011 in 2001. Therefore, the evidence submitted demonstrates that the petitioner did not have the ability to cover its business expenses, to pay the proffered wage to the beneficiary and to sustain the proprietor's family of three in 2001.

⁴ The line for adjusted gross income on Form 1040 is Line 33 for 2001.

The record before the director closed on March 6, 2006 with the receipt by the director of the petitioner's submissions in response to his request for evidence (RFE). As of that date the sole proprietor's federal tax returns for 2002 through 2004 should have been available. However, the petitioner did not submit the sole proprietor's tax returns for 2002 through 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 2002 through 2004 because it failed to submit its tax returns or other regulatory-prescribed evidence for these years.

CIS will consider the sole proprietor's income and his or her 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 evidence showing the sole proprietor has additional liquefiable assets to be considered in determining the petitioner's ability to pay, such as available balances in savings accounts, money market accounts, certificates of deposits, or other similar accounts. On appeal, counsel submits information regarding property the sole proprietor owns and asserts that the sole proprietor has equity of \$101,648 in that property.⁵ However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his/her business and/or real property to show their ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, counsel's reliance on the sole proprietor's equity in his real property to demonstrate the petitioner's ability to pay is misplaced. The petitioner failed to demonstrate that the sole proprietor had extra liquefiable assets as part of the petitioner's ability to pay.

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 the personal expenses of the sole proprietor and his family as of the priority date through an examination of wages paid to the beneficiary, the proprietor's adjusted gross income or other liquefiable assets in 2001 through 2004.

Counsel notes on appeal that CIS approved an immigrant petition that had been previously filed on behalf of the original beneficiary. The director's decision does not indicate whether he reviewed the prior approved of the other immigrant petition. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N dec. 593,597 (Comm. 1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petition on behalf of the original beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affid*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.

⁵ Specifically, the petitioner submits a printout from the Allegheny County, Pennsylvania website showing that [REDACTED] own property located at [REDACTED]. The printout shows that the 2003 market value of the property was \$199,200. The petitioner also submits a printout from Alleghany Valley Bank showing mortgage loan information for [REDACTED]. The printout does not give a proper description for the property on which the mortgage is based. As of October 1, 2004, [REDACTED] had a principal balance due of \$97,552.98.

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.