

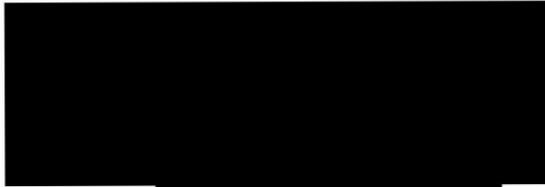
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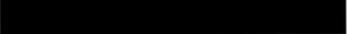
U.S. Citizenship
and Immigration
Services

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Bt

FILE:



Office: TEXAS SERVICE CENTER

Date:

JUN 02 2008

SRC 07 105 53452

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:



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 employment based 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 dismissed.

The petitioner is a real estate finance firm. It seeks to employ the beneficiary permanently in the United States as a public relations specialist. As required by statute, an 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.

On appeal, the petitioner, through counsel, asserts that the discretionary nature of certain of the petitioner's expenses exceeded the proffered wage and demonstrated its financial ability to pay the proffered salary.

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).

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 at 8 C.F.R. § 204.5(g)(2) states:

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. 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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 17, 2003. The proffered wage as stated on the labor certification is \$27.25 per hour, which amounts to \$56,680 per year. On Part B of the ETA 750, signed by the beneficiary on April 3, 2003, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, filed on February 16, 2007, the petitioner states that it was established on January 1, 1996, currently employs more than five (contract) workers and reports an annual gross income of more than \$350,000.

The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$56,680 per year as of the April 17, 2003, priority date and in response to the director's request for evidence, dated July 9, 2007, the petitioner provided copies of its sole proprietor's U.S. Individual Income Tax Return for 2003, 2004, and 2005. The returns reflect that the sole proprietor filed as a single person and claimed no dependents in 2003 and 2005 and filed as a head of household in 2004 and claimed his daughter as a dependent. The returns also contain the following information:

	2003	2004	2005
Wages	n/a	n/a	n/a
Taxable interest	n/a	n/a	\$32
Gross Income (Schedule C, Profit Or Loss from Business)	\$461,180	\$322,693	\$365,631
Total Expenses (Schedule C)	\$447,159	\$299,436	\$339,110
Business Income (Profit or Loss—Line 31 of Sched. C and line 12 of Form 1040)	\$ 14,021	\$ 23,257	\$ 26,521
Adjusted Gross Income ¹	\$ 13,030	\$ 21,614	\$ 24,679

The petitioner also provided a summary of the sole proprietor's monthly household living expenses that totaled \$4,000 per month, annualized to \$48,000 per year.

The director denied the petition on October 10, 2007. He reviewed the evidence submitted by the petitioner including his estimate of household expenses, reported adjusted gross income for the years 2003, 2004 and 2005 and noted that they did not demonstrate that there were sufficient funds to cover the beneficiary's proposed wage offer of \$56,680 and support the petitioner's continuing ability to pay the proffered wage. The director rejected counsel's assertion that certain business deductions claimed on Schedule C of the income tax returns such as "other expenses" (line 27), "contract labor" (line 11), "wages" (line 26), and "depreciation" (line 13) represented discretionary spending that was available to pay the proffered wage to the beneficiary.

It is noted that an additional submission was received from the petitioner after the director rendered his decision on October 10, 2007. It included a copy of the sole proprietor's individual income tax return for 2006. He filed as a single person and claimed no dependents. The sole proprietor reported no wages, taxable interest of \$163, and an adjusted gross income of \$27,187. Schedule C reflects that the business reported gross income of

¹ Adjusted gross income is shown on line 34 of the Form 1040 in 2005, on line 36 in 1004 and on line 37 of the Form 1040 in 2005.

\$448,014, total expenses of \$418,935 and a net profit of \$29,079 that was carried forward to line 12 of the Form 1040 as net business income and included in the calculation of the sole proprietor's adjusted gross income.

On appeal, the petitioner, through counsel, reiterates his previous assertions and maintains that some of the cited business expenses shown on Schedule C such as contract labor and outside services were discretionary, were not based on any ongoing commitment to a specific employee and could have been paid to the beneficiary. Counsel also asserts that the 2006 tax return was submitted prior to the director's decision and should have been considered. He further contends that even without considering depreciation deductions that the cumulative discretionary expenses shown on Schedule C reflected funds that far exceeded the proffered wage and demonstrated the petitioner's ability to pay the proposed wage offer of \$56,680.

Counsel's assertions are not persuasive. In determining a petitioner's ability to pay a certified wage, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as noted by the director, there is no evidence that the petitioner has employed the beneficiary.

If there is no evidence that a petitioner may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will 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). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng Chang* at 536.

When a petitioner is a sole proprietorship, additional factors will be considered. 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. As noted above, the business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return (line 12). 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). Such petitions often include a summary of household expenses. In this case, the petitioner indicated that the sole proprietor's expenses were \$4,000 per month, annualized to \$48,000 per year. The petitioner did not provide documentation of other cash or cash equivalent current assets not reflected on the sole proprietor's individual tax returns.

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 this case, counsel's generalized assertion on appeal that various cumulative business expenses such as contract labor or outside services taken as deductions on Schedule C of the income tax returns were essentially discretionary in nature and would have been available to pay the proffered wage to the beneficiary is not supported by the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, these services or labor have not been individually identified. Moreover, as noted by the director, they represent monies already expended and therefore are not considered to be available to pay the proffered wage to the beneficiary. Additionally, there is no evidence that any of these expenditures represented specific services or labor that involved the same duties of the proffered position of the beneficiary as a public relations specialist such as those described in the Form ETA 750. In any case, if other services or labor were performed, then the beneficiary's services would not be considered as a replacement.²

The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

In the instant case, although the sole proprietor's family is substantially smaller than the one described by the court in *Ubeda*, it is noted that in all of the relevant years, the beneficiary's proposed wage offer of \$56,680 exceeds the sole proprietor's adjusted gross income even without considering household expenses of \$48,000 per year. In 2003, the proffered wage exceeds the sole proprietor's adjusted gross income by \$43,650; in 2004, the adjusted gross income is \$35,066 less than the proposed wage offer; in 2005 the adjusted gross income is \$32,001 less than the proffered salary; and in 2006, the sole proprietor's adjusted gross income is \$29,493 less than the proffered wage.

In this matter, the evidence does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

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.
