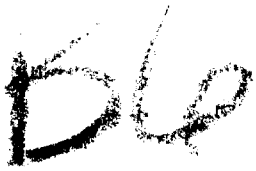
U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]



FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2004

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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a nursing home for seniors. It seeks to employ the beneficiary permanently in the United States as a management analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional evidence in support of the petitioner's ability to pay the proffered salary.[1]

Section 203(b)(3)(A)(i) of 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) provides 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 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)]

Eligibility in this case is based upon whether the petitioner's continuing financial ability to pay the wage offered has been established beginning as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is September 8, 1999. The beneficiary's salary as stated on the labor certification is $20.00 per hour, which amounts to $41,600 annually, based on a 40-hour week. The ETA 750B, signed by the beneficiary, states that the petitioner has employed the beneficiary since 1998.

The petitioner initially submitted no evidence of its financial ability to pay the beneficiary's proposed wage offer of $41,600. On October 9, 2002, the director requested the petitioner to submit evidence of its ability to pay the proffered wage through copies of its annual reports, audited financial statements or federal tax returns. The director advised the petitioner that if it had 100 employees or more, it could provide a statement from a financial officer of the organization that establishes the petitioner's ability to pay the proposed wage.

---

[1] The petitioner filed the appeal. As no withdrawal of representation is contained in the record, a copy of this decision will be provided to the petitioner's counsel.

In response, the petitioner submitted copies of the sole proprietors' Form 1040, U.S. Individual Income Tax Return for 1999, 2000, and 2001. The 1999 tax return shows that the sole proprietors filed a joint marital tax return and declared two dependents. Their adjusted gross income was -$2,804. This included a business income of -$133,604. The 2000 tax return shows the adjusted gross income at $46,444, including a business income of $15,544.

In 2001, the petitioner filed Form 1120S, U.S. Tax Return for an S Corporation. It indicates that the petitioner incorporated on September 26, 2000, but was inactive through December 31, 2000. The petitioner declared $474,686 as ordinary income in 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 18, 2003, denied the petition.

On appeal, the petitioner provides copies of the petitioner's Wage and Tax Statements (W-3s) showing the total salaries and wages that it paid in 1999, 2000 and 2001. Also offered is a copy of the beneficiary's 1999 W-2. It shows that the petitioner paid her $36,404.71. The record contains no other W-2s showing the beneficiary's wages in any other year. 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. Here, the beneficiary's wages were $5,195.29 less than the proffered wage in 1999. This amount could not be paid out of the petitioner's reported adjusted gross income of -$2,804.

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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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.

As noted above, the petitioner filed its federal tax returns as a sole proprietorship in 1999 and 2000. A sole proprietorship is not legally separate from its owner. Where the petitioner is a sole proprietorship, the sole proprietors' income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietors and their dependents must be reviewed when determining the petitioner's continuing ability to pay the beneficiary's proposed annual salary of $41,600. The sole proprietors must be able to demonstrate that they can sustain their individual living expenses as well as pay the beneficiary's proposed salary.

In the instant case, the petitioner submitted a letter from Anthony A. Thompson, a certified public accountant. He states that the petitioner would have been profitable in 1999, but had to declare some non-recurring losses from previous years because Medicare decided to reduce the petitioner's billings receivable. This assertion would be more persuasive if specific documentary support had been provided to demonstrate these non-recurring losses as

well as clarifying where these losses are reflected on Schedule C of the petitioner's 1999 tax return. It is further noted that even without considering any personal living expenses of the sole proprietors and their dependents, the proffered wage of $41,600 represented 89% of the sole proprietors' adjusted gross income in 2000. No evidence of the beneficiary's wages earned in 2000 is provided to balance against this consideration. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd,* 703 F. 2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner 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 about 30% of the petitioner's gross income. In this case, it is also implausible that the amount remaining in 2000, after considering living expenses, would be adequate.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage. In this case, although the petitioner established that it could pay the proffered salary in 2001, it has failed to demonstrate that it has had a continuing ability to pay the proffered wage beginning as of the priority date of September 8, 1999.

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.