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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

DEC 07 2004

FILE: WAC 02 287 52212 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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.

for Michael Valdez

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 is a Mexican bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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.

On appeal, counsel asserts that the director reviewed the wrong evidence in reaching his decision to deny the petition.

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, 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 26, 2001. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which amounts to $24,024 annually. The ETA 750B, signed by the beneficiary on January 17, 2001, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the preference petition, the petitioner claims to have been established in 1994, to have a gross annual income of $207,827, and to employ five workers.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. It shows that the sole proprietor filed jointly with her spouse and declared no dependents. She reported $15,647 in adjusted gross income, including $10,230 in business income derived from the petitioning business. Schedule C, Profit or Loss From Business, shows that the petitioning business had $207,827 in gross receipts or sales, $87,251 in gross income, and total expenses of $77,021, including $23,400 in wages paid. The net profit of $10,230 is carried forward to page 1 of the tax return and is reflected as the sole proprietor's business income on line 12.

On March 25, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proposed wage offer of $24,024. The director requested the petitioner to submit Internal Revenue Service (IRS) computer printouts of the federal tax returns filed by the petitioner from 2001 to the present. The director also requested the petitioner to provide a summary of the sole proprietor's monthly household expenses.

In response, the petitioner, through counsel, submitted an itemization of monthly living expenses for the sole proprietor's household. It shows a total of $4,932 per month expended for living expenses. Counsel also submitted IRS printouts of tax returns for 2000 through 2002. However, they contain data from the alien beneficiary's tax returns, rather than the petitioner's information.

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 June 3, 2003, denied the petition.

On appeal, counsel asserts that the director erroneously considered the beneficiary's tax information, rather than the petitioner's. Counsel submits a copy of Schedule C, Profit or Loss From Business of the sole proprietor's 2001 tax return and a copy of Schedule C from the sole proprietor's 2002 tax return. Counsel claims that if the petitioner's gross income of $207,827 in 2001 and $194,395 in 2002, respectively, were considered, then the petitioner's financial ability to pay the proffered wage has been demonstrated.

Counsel's assertion is unpersuasive. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, there is no indication that the petitioner has previously employed the beneficiary.

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).

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. 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. 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 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 the instant case, although the AAO concurs with counsel that the director erroneously considered the IRS computer printouts of the beneficiary's tax information in analyzing the facts of the case, the record supports the director's denial of the petition. The proffered wage is $24,024 annually. Even without considering the sole proprietor's estimated monthly living expenses of $4,932 per month, the sole proprietorship's 2001 adjusted gross income of $15,647 is, at the outset, $8,377 less than the proffered salary. It cannot be concluded that the sole proprietor could support herself and her spouse on -$8,377 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Counsel mischaracterizes the petitioner's gross receipts or sales figures, as shown on line 1 of Schedule C of the 2001 and 2002 tax returns, as "gross income" on appeal. Moreover, consideration of gross income (line 7 of Schedule C) is not appropriate without considering the total expenses incurred in order to generate such revenue. As noted above, in a sole proprietorship, CIS considers a sole proprietor's individual cash assets and liabilities, as well as the business net profit or loss reflected on line 29 of Schedule C of the individual tax return. This record of proceeding fails to establish the petitioner's ability to pay the proffered wage in 2001 as shown on the sole proprietor's 2001 tax return. As the petitioner failed to submit a complete copy of the 2002 tax return, or other forms of evidence required by 8 C.F.R. § 204.5(g)(2) for 2002, it cannot be concluded that the petitioner has demonstrated its financial ability to pay the proffered salary beginning on the priority date of January 26, 2001 and continuing until the present.

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.