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FEB 28 2005



FILE: WAC 03 017 53692 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

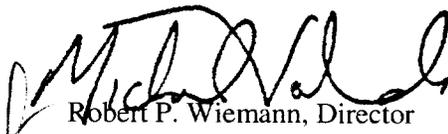
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 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 marble/granite tile installation firm. It seeks to employ the beneficiary permanently in the United States as a marble setter. 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, the petitioner, through counsel, submits additional financial information, asserting that the business had extra expenses during one of the years under consideration.

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 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 April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$19.55 per hour, which amounts to \$40,664 annually. The ETA 750B, signed by the beneficiary on March 29, 2001, indicates that the petitioner has not employed the beneficiary.

The petitioner is structured as a sole proprietorship. On Part 5 of the visa petition, the petitioner states that it was established in 1992 and currently has five employees. In support of its ability to pay the proffered wage, the petitioner initially 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 his spouse and reported one dependent. He claimed an adjusted gross income of \$79,795, including a net business income reflected on Schedule C, Profit or Loss from Business, of \$76,802.

On March 28, 2003, the director requested additional evidence from the petitioner in support of its ability to pay the proposed wage offer of \$40,664 per year. The director instructed the petitioner provide copies of its last four quarters of its state quarterly wage reports, including the names and social security numbers of all of its employees. The director also requested additional evidence of the petitioner's ability to pay the proffered wage from 2002 to the present and advised the petitioner to submit copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted payroll records and copies of its last four state quarterly wage and withholding reports, which itemized the wages paid during 2002. The alien's name is not included among the workers listed on the petitioner's state wage reports. The petitioner also resubmitted a copy of the sole proprietor's 2001 federal tax return.

On June 25, 2003, the director again requested additional evidence related to the petitioner's ability to pay the proffered wage. The director advised the petitioner to submit copies of 2002 financial information in the form of annual reports, federal tax returns, or audited financial statements. The director also requested copies of the petitioner's current valid business licenses and asked the petitioner to explain a discrepancy in dates that were submitted as evidence that the beneficiary has the required four years of work experience as set forth on the approved labor certification.

Included in the petitioner's response is a copy of the sole proprietor's 2002 individual income tax, signed on February 27, 2003 by the sole proprietor and his spouse. The tax return shows that the sole proprietor continued to file jointly with his wife and claimed one dependent. He declared an adjusted gross income of \$16,779, including a net business income of \$22,076.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition on September 30, 2003.

On appeal, counsel submits no additional argument but provides two letters from the sole proprietor, both dated October 10, 2003. The first letter explains that the petitioner's income was lower in 2002 because he sustained labor and materials expenses before for which he was not paid until 2003. The second letter is accompanied by a copy of an invoice issued by Park Industries to the petitioner in November 2001 for an automatic edge shaper and polisher, priced at \$77,000. This invoice is also accompanied by a copy of a cashier's check from the petitioner to Park Industries for \$48,925 as a second payment. In the second letter, the sole proprietor explains that his net profit for 2001 would have been higher if he had not purchased this piece of machinery. He states that he can only amortize the cost of this equipment over ten years, rather than deduct the entire amount for the year purchased. Counsel also submits copies of the petitioner's internally generated unaudited profit and loss statements for 2001, 2002 and 2003.

The AAO cannot disagree with the director's decision in denying the petition, although the record would have been more developed if the director had requested and the petitioner had provided a summary of the sole proprietor's actual household living expenses.

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 the instant case, there is nothing in the record to suggest that the petitioner has employed the alien beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine, if the petitioner has elected to submit federal tax returns, 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 unaudited financial statements that counsel submitted with the appeal are not persuasive evidence of the petitioner's ability to pay the proffered salary. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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. 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). Part of the consideration of whether a sole proprietor can sustain himself and his family would be a review of monthly household living expenses if submitted to the record.

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, the sole proprietor supports a family of three. In 2001, the proffered wage of \$40,664 represents 51% of the sole proprietor's adjusted gross income of \$79,795. Although he has a smaller family than the *Ubeda* petitioner, without knowledge of the petitioner's actual monthly household expenses showing that he could support himself and his family on the remaining amount of income after deducting the proffered wage, it is not clear that he had the ability to pay the proffered wage in 2001. The petitioner's argument that he purchased an expensive piece of machinery in 2001 is recognized, but does not dictate a different conclusion in reviewing the petitioner's ability to pay the proffered wage during this period. Replacing or purchasing new equipment could also be asserted as a predictable business expense taken in the ordinary

course of running a marble/granite installation business, and not the kind of unique circumstance as illustrated, for example, by *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor, from the submission of two tax returns, has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Similarly, the petitioner's explanation that reimbursement in 2003 for labor and materials costs incurred 2002 does not qualify as the kind of unique and unpredictable kind of expense that would be uncommon to the petitioner's construction-related business.

Even if the petitioner's ability to pay the proffered wage in 2001 was conceded, it remains that the proffered wage of \$40,664, even without consideration of any living expenses, exceeded the sole proprietor's 2002 adjusted gross income of \$16,779, by \$23,885. It is very unlikely that the sole proprietor and his family could sustain themselves on -\$23,885 after paying the proffered wage in 2002. Therefore the petitioner has failed to establish an ongoing ability to pay the certified salary of \$40,664 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the certified wage beginning at the priority date. Based on the evidence contained in the record and submitted on appeal, the AAO cannot conclude that the petitioner has clearly demonstrated this continuing financial ability through the federal tax returns and other evidence submitted to the record.

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.