U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 11 2005
WAC 03 207 54112

IN RE: Petitioner:
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 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 hardwood floor installer. It seeks to employ the beneficiary permanently in the United States as a floor-covering layer. 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. On appeal, counsel submits a brief and additional evidence.

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. 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).

Here, the Form ETA 750 was accepted on November 9, 1999. The proffered wage as stated on the Form ETA 750 is $50,939.20 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for tax years 2000, 2001, and 2002, and, copies of documentation concerning the beneficiary's qualification. Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on March 8, 2004, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

> Ability to Pay: ... The petitioner must demonstrate this ability [to pay the beneficiary's wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of the ability shall be either in the form of copies of annual reports, signed federal tax returns, or audited financial statements ....
>
> Monthly Expenses: The I-140 [petition and exhibits shows that] petitioner's business is a sole proprietorship. Therefore, submit a Statement of Monthly Expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: Housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other reoccurring monthly household expense. All items may be subject to verification.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date (and on appeal), counsel submitted or previously submitted the petitioner's Internal Revenue Service (IRS) Form 1040 tax returns for years 1999, 2000, 2001, 2002 and 2003, and other documentary evidence.

The director denied the petition on August 16, 2004 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $50,939.20 per year from the priority date.

- In 2003, the Form 1040 stated adjusted gross income[1] of $109,247.00.
- In 2002, the Form 1040 stated adjusted gross income of $58,454.00.
- In 2001, the Form 1040 stated adjusted gross income of $73,590.00.
- In 2000, the Form 1040 stated adjusted gross income of $199,835.00.
- In 1999, the Form 1040 stated adjusted gross income of $68,295.00.

Because the petitioner is structured as a as a sole proprietorship, income 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. In addition, they 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).

[1] IRS Form 1040, Line 34.

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 response to the above Request for Evidence concerning the petitioner's household expenses, petitioner submitted a monthly statement stating $4,459.89 per month (indicates $53,518.68 yearly).[2] Therefore for each year in which petitioner has submitted tax returns, subtracting the annualized living expenses of $53,518.68 from the adjusted gross income of the petitioner demonstrates the following:

- In 2003, the Form 1040 stated adjusted gross income[3] of $109,247.00. Subtracting $53,518.68 from that amount leaves $55,728.32 to pay the proffered wage of $50,939.20.
- In 2002, the Form 1040 stated adjusted gross income of $58,454.00. Subtracting $53,518.68 from that amount leaves $4,935.32 to pay the proffered wage of $50,939.20.
- In 2001, the Form 1040 stated adjusted gross income of $73,590.00. Subtracting $53,518.68 from that amount leaves $20,071.32 to pay the proffered wage of $50,939.20.
- In 2000, the Form 1040 stated adjusted gross income of $199,835.00. Subtracting $53,518.68 from that amount leaves $146,316,32 to pay the proffered wage of $50,939.20.
- In 1999, the Form 1040 stated adjusted gross income of $68,295.00. Subtracting $53,518.68 from that amount leaves $14,776.32 to pay the proffered wage of $50,939.20.

Counsel asserts, on appeal, but does not show detail, that approximately $7,200 of the $53,518.68 yearly household expenses is "actual" household expenses with the rest paid as business expenses. 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). Therefore from the tax returns and household expenses submitted by petitioner, petitioner could not pay the proffered wage in years 1999, 2001, and 2002 and meet household expenses.

In the instant case, the sole proprietor supports a family of three. In three years of tax returns, 1999, 2001, and 2002, the sole proprietorship's adjusted gross income does not cover the proffered wage of $50,939.20 per year. It is impossible that the sole proprietor could support himself for an entire year after reducing the adjusted gross income by the amount required to pay the proffered wage in addition to accounting for his expenses.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this instance, there is no evidence submitted petitioner has employed the beneficiary.

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[2] There is a caveat on the exhibit indicating that "many monthly expenses are paid through the petitioner's business."

[3] IRS Form 1040, Line 34.

Counsel asserts in his brief accompanying the appeal that petitioner receives additional income from a rental business. Insofar as the petitioner receives income, it is reflected on the petitioner's tax returns and it has been considered in the above discussion. If counsel is asserting that this income is not included as income, then in that case there is no document presented into evidence that has evidentiary value stating additional off-tax return income available to pay the proffered wage. Petitioner has submitted an unaudited profit and loss statement to demonstrate additional income. According to the regulation 8 C.F.R. § 204.5(g)(2) cited above, only audited financial statements are acceptable as evidence in the determination of petitioner's ability to pay the proffered wage from the priority date.

Counsel has made the contention that the petitioner's business has sustained growth and that it is a viable entity. However, there are no parallels in the subject case to the precedent case *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). From the adjusted gross income reflected on the petitioner's tax returns and household expenses submitted by petitioner, petitioner could not pay the proffered wage in years 1999, 2001, and 2002 and meet household expenses. Contrary to counsel's assertions, taxable income for three out of the five years examined has remained more or less the same. In those years, petitioner's income did not grow and it was in fact down by 50% from its high in 2000. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, which is not is the case here.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999, 2001 or 2002 were uncharacteristically unprofitable years for the petitioner. 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.