identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3042
Washington DC 20529

U.S. Citizenship and Immigration Services

B6

FILE: EAC 02 218 50006 Office: VERMONT SERVICE CENTER Date: MAR 10 2005

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, Director
Administrative Appeals Office

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

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a barn boss. 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 erred by considering the tax returns in determining the petitioner's ability to pay the proffered wage.

The notice of appeal, filed September 8, 2003, indicates that a brief and/or evidence will be submitted to the AAO within 30 days. As nothing further has been received to the record, this decision will be based on the record as it currently stands.

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 March 12, 2001. The proffered wage as stated on the Form ETA 750 is $22.71 per hour, which amounts to $47,236.80 per year. The ETA 750B, signed by the beneficiary on February 20, 2001, indicates that the petitioner had employed her since July 1999.

On Part 5 of the visa petition, filed June 13, 2002, the petitioner claims that it was established in 1996, currently employs one worker, and has a gross annual income of $120,000.

The petitioner initially submitted no evidence of its ability to pay the proffered wage of $47,236.80 per year. On March 3, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically instructed the petitioner to submit either its 2000 and 2001 federal tax returns with all schedules and attachments, copies of the beneficiary's 2000, 2001, and 2002 Wage and Tax Statements (W-2s) showing how much the petitioner has paid her, or 2001 annual reports accompanied by audited or reviewed financial statements. The director also advised the petitioner that it could submit profit/loss statements, bank account records or personnel records, which would be considered as supplementary evidence.

In response, the petitioner, through counsel, submitted incomplete copies of the sole proprietor's individual federal tax returns consisting only of Schedule C, Profit or Loss from Business, for 2000 and 2001. In 2000, the petitioning business, a sole proprietorship reported a loss of $19,758. In 2001, it reported a loss of $5,914. No W-2s or other evidence relating to the petitioner's ability to pay the proffered wage was provided with these submissions. Counsel's cover letter advises that the petitioner no longer employs the beneficiary.

Based on the evidence that was submitted to the record including the losses reported on the 2000 and 2001 tax returns, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage. The director denied the petition on April 5, 2003.

On appeal, counsel merely states that the tax filings were provided to the director. Counsel then asserts "reliance upon such tax filings on the issue of ability to pay is an incomplete, and misleading, measure of the fiscal vitality of the petitioner, and of its ability to pay."

It is noted that counsel advanced no other argument and provided no other evidence to the record relevant to the petitioner's ability to pay the proffered wage. She cites no legal support for her proposition that a tax return may not be a measure of a petitioner's ability to pay and her claim is not persuasive.

As the director noted, the evidence that she elected to provide in response to the director's request for additional evidence was incomplete because it failed to contain the complete tax returns. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

First, 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. Wages less than the proposed wage offer will also be given relevant consideration. In this case, no evidence of payment of such wages was submitted to the record.

Second, 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 also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Contrary to counsel's claim, federal tax returns are specifically set forth in 8 C.F.R. § 204.5(g)(2) as one of the three basic forms of evidence sufficient to demonstrate a petitioner's ability to pay the proffered wage. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is also 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).

This case involves a petitioning business that is structured as 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. *See Ubeda v. Palmer, supra.*

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, as mentioned above, the petitioner failed to provide complete tax returns showing adjusted gross income and other data. The director could have denied the petition on these grounds alone. What little information that was presented on Schedule C indicates that the sole proprietorship posted two consecutive losses of $19,758 in 2000 and $5,914 in 2001. These losses do not support the petitioner's ability to pay the proposed wage offer of $47,236.80 per annum. The AAO concurs with the director's decision to deny the petition based on the insufficiency of the evidence submitted to demonstrate the petitioner's ability to pay the proffered wage. Therefore, the petitioner has not established that it has had the continuing ability to pay the full proffered wage beginning on 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.