U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: EAC 03 101 52152 Office: VERMONT SERVICE CENTER Date: SEP 06 2005

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: SELF-REPRESENTED

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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. 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 submits additional evidence and claims that it has the continuing financial ability to pay the proffered wage.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is $34.40 per hour, which amounts to $71,552 annually. The ETA 750B, signed by the alien beneficiary on March 12, 2001, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, it is claimed that the petitioner has an annual income of $149,173. With the petition, filed in February 2003, the petitioner submitted a copy of a Form 1040, U.S. Individual Income Tax Return for 2001. It shows that [redacted] filed the tax return jointly with his spouse and claimed two dependents. It also reflects that [redacted] reported $138,055 as his adjusted gross income, which includes a net business income of $143,173. This amount reflects the net profit (line 31) stated on Schedule

C, Profit or Loss from Business. Schedule C indicates that [redacted] business name is "Century Construction." His principal business or profession is given as a "mason/contractor."

On December 12, 2003, the director requested additional evidence relating to [redacted] immigration status in the United States. The director also requested that he submit a itemized list of all of his monthly expenses for 2001.

[redacted] response included an itemized list of monthly expenses which totaled $13,468 or $161,616. It included some "non-personal" items such as $5,490 for "employees."

The director denied the petition on May 17, 2004, concluding that the ability to pay the beneficiary's proffered annual salary of $71,552 had not been shown because [redacted] monthly expenses of $161,616 exceeded his reported adjusted gross income.

On appeal [redacted] submits a revised list of monthly expenses and states that he misunderstood the director's December 2003 request. He adds that he erroneously included some of his business expenses among the expenses requested. His revised list of monthly expenses totals $5,886 per month or $70,632 per year. Based on this amended list, [redacted] contends that the monies remaining could pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 no evidence that the petitioner 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).

If the evidence indicates that the petitioner is a sole proprietorship, then CIS will also examine additional factors. A sole proprietorship is 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).

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, the final decision as to the petitioner's ability to pay the proffered salary cannot be accurately made because the evidence is inherently contradictory regarding the structure of the petitioner. The labor certification was issued to Century Construction Inc. The Immigrant Petition for Alien Worker (I-140) was filed by "Century Construction, Inc." Both documents clearly reflect that the petitioner is a corporation. Yet the petitioner offered the individual tax returns of a sole proprietor named "Century Construction." Rather than question the petitioner or ask for an explanation, the director merely requested a list of itemized monthly expenses for 2001.

If the petitioner had established that it is a sole proprietorship, the adjusted gross income of the sole proprietor, minus his annualized personal expenses would be sufficient to pay the wage, however, the record of proceeding does contain conflicting information regarding the status of the petitioner.

The record needs to be more fully developed so that the petitioner can fully address the issue of its financial ability to pay the proffered wage and explain why individual tax returns were provided rather than either corporate federal tax returns, annual reports, or audited financial statements. The director's request for evidence should have addressed this issue rather than merely ask for itemized monthly expenses for 2001 and should have clarified that the petitioner's financial information should cover the entire relevant period, not just 2001.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(1) and (2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.