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

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 19 2005

EAC 03 013 52140

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail pet grooming business. It seeks to employ the beneficiary permanently in the United States as a store manager. 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.

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 or seasonal 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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is $22.67 per hour, which amounts to $47,153.60 annually. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in May of 1997 and continuing through the filing date of the ETA 750B.

The I-140 petition was submitted on September 30, 2002. On the petition, the petitioner claimed to have been established in 1985, to currently have three employees, to have a gross annual income of $108,000, and to have a net annual income of $43,503.

In support of the petition, an attorney who preceded counsel[1] submitted:

- The certified ETA 750;
- The petitioner's September 20, 2002 job offer;
- The petitioner's 2001 Schedule C showing a $3,503 net profit; and,

[1]The G-28 forms indicate that the two attorneys have offices at the same address but not that they are in the same firm.

- The translated letters of two former employers of the beneficiary certifying his experience totaled about four-and-a-half years combined.

In a request for evidence (RFE) dated July 31, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies 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 also specifically requested the petitioner's 2001 and 2002 Form 1040 returns; a statement of the petitioner's typical monthly household expenses for 2001 and 2002; copies of any Form W-2 Wage and Tax Statements the petitioner has issued to the beneficiary for 2001 and 2002; evidence of the prior holder of the proffered position, which existed previously, according to the petitioner.

In response to the RFE, counsel submitted:

- A CPA's October 1, 2003 letter in support of the claim of ability to pay;
- A copy of the petitioner's 2001 and 2002 Form 1040s
- A copy of the beneficiary's Form 1040 and Form W-2s for 2001 and 2002;
- A G-28 naming counsel as the petitioner's representative.

In a decision dated March 31, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits legal analysis and additional evidence, including an estimate of the petitioner's monthly household expenses for 2001 and 2002. Counsel states on appeal that with the newly submitted evidence of the petitioner's monthly expenses for each of 2001 and 2002, the record demonstrates the petitioner's ability to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the director specifically requested the documents that counsel submitted for the first time on appeal. Therefore grounds exist to preclude any documents from consideration on appeal. For this reason, only evidence in the record prior to the director's March 31, 2004 decision will be considered in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. As stated above, on the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in May 1997 and continuing through the filing date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary. Only the beneficiary's Form W-2's for 2001 and 2002 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's Actual Compensation	Proffered Wage	Wage Increase Needed to Pay The Proffered Wage.
2001	$22,345.94	$47,153.60	$24,807.66
2002	$28,773.00	$47,153.60	$18,380.60

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, she must establish the petitioner's ability to pay the amount of wage increase needed to reach the proffered wage amount. Thus, the petitioner needs to demonstrate her ability to pay $24,807.66 beyond what she did in 2001, and to pay $18,380.60 beyond what she paid the beneficiary in 2002.

As another means of determining the petitioner's ability to pay beyond what the Form W-2s showed, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than $20,000.00 where the beneficiary's proposed salary was $6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In his October 1, 2003 letter, the CPA refers to the petitioner and her husband's "substantial" assets, including bank accounts, equity investments evidenced by Schedule B of the returns, and land holdings "valued in the mid six figures, with about 80% equity." The record, however, does not include evidence of the petitioner's bank accounts nor of the value of her stock or real estate holdings, any of which could show the petitioner's ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The petitioner's tax returns for 2001 and 2002 show the amounts for adjusted gross income on line 33 as shown in the table below.

Tax Year	Adjusted Gross Income	Wage Increase Needed To Pay the Proffered Wage	Surplus or (Deficit)
2001	$55,575	$24,807.66	$30,767.34
2002	$36,538	$18,380.60	$18,157.40

The foregoing analysis shows the petitioner having a significant adjusted gross income remaining after the same is reduced by what the petitioner paid in wages to the beneficiary in 2001 and 2002. However, as is noted above, the petitioner must also demonstrate she can cover her own household expenses, for a family of two, from those surplus amounts before this office considers her ability to pay the proffered wage as having been established. Because counsel waited until the appeal before submitting information about the petitioner's monthly household expenses, this office will not consider as a part of the record the petitioner's monthly expenses.[2] *Soriano, supra.*

After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

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[2] Had the evidence been timely submitted, the AAO's decision would have been the same. Thus, the petitioner claims her household expense for 2001 were $1,895 a month, or $22,740 a year, which is less than the $30,767.34 available cited above as surplus in 2001. For 2002, however, she claims her monthly household expenses were $1,817, or $21,804 a year, which would create a shortfall in 2002.