

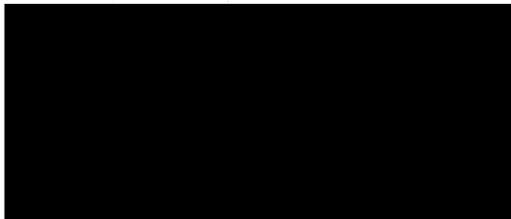
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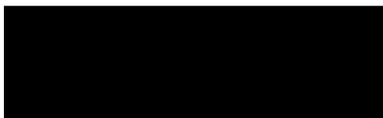
**U.S. Citizenship
and Immigration
Services**

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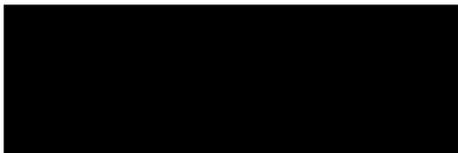
FILE: EAC 03 215 52434 Office: VERMONT SERVICE CENTER Date: AUG 14 2006

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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and a subsequent motion to reopen was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a shoe making and repair company. It seeks to employ the beneficiary permanently in the United States as a custom shoemaker. 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, as a sole proprietor, 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. Accordingly, the director denied the petition.

On appeal, counsel states the director overlooked materials submitted with the petitioner's response to the director's request for further evidence. Counsel submits additional documentation.¹

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, 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, 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 \$9.45 an hour, or an annual salary of \$19,656. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1999.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner did not indicate when it was established. The petitioner did claim to have two employees, and a gross annual income of \$116,453. In

¹ Current counsel was hired by the petitioner and submitted a response to the director's request for further evidence. The director erroneously mailed her decision to former counsel. Current counsel's appeal to the decision was untimely filed; however, counsel's explanation for the late filing, contained in the record, is found reasonable.

support of the petition, the petitioner submitted Schedule C from its 2001 IRS Form 1040 which indicated the petitioner had a net profit of \$16,710.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 13, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2001 federal tax return, with all accompanying schedules and tables. The director also stated that the petitioner could alternatively provide annual reports for tax years 2001 and 2002, accompanied by audited or reviewed financial statements. The director also requested that if the petitioner employed the beneficiary in 2001, to provide copies of the beneficiary's W-2 Form. The director also request evidence to establish that the beneficiary possessed the required two years of work experience as a shoemaker and repairer as of the April 2001 priority date, as stipulated by the Form ETA 750.

In response, new counsel submitted copies of the petitioner's Forms 1040 for 2001, 2002, and 2003. Counsel noted that the petitioner was a sole proprietor and stated that the tax returns also contained Schedules C. These documents indicated that the petitioner had three dependents, including himself, and had an adjusted gross income of \$63,621 in 2001, \$62,162 in 2002, and \$58,073 in 2003. Included with the petitioner's 2001 federal income tax return is a W-2 Form for the sole proprietor's wife. This document indicates that the sole proprietor's wife earned \$47,785.87 in tax year 2001, in addition to receiving a distribution refund from the New York City Employees Retirement system of \$909.01.

Counsel also submitted the beneficiary's income tax return, filed on Form 1040 for tax years 2001, 2002, and 2003. The beneficiary is also structured as a sole proprietor and indicated on his Schedules C that he worked as a subcontractor for the petitioner. On his Schedules C, the beneficiary indicated his gross receipts or sales as \$11,200 in 2001, \$18,200 in 2002, and \$15,000 in 2003.² Finally counsel submitted the beneficiary's Work Record Book from Armenia. The translation of this document indicated the beneficiary had worked from 1989 to 1993 with the Maer Shoe Cooperative, Republic of Armenia.

On November 10, 2004, the director denied the petition. In her denial, the director stated the petitioner's 2001 federal income tax return indicated the petitioner had a net profit of \$63,621.³ The director further stated that while this amount appears sufficient to pay the proffered wage, Citizenship and Immigration Services (CIS) was not convinced that a married couple with one child living in Staten Island, New York, could afford to pay the proffered wage after all monthly expenses are taken into consideration. The director outlined these expenses as rent or mortgage payments, food, utilities, clothing, transportation, insurance, and medical costs, among others.

On appeal, counsel states the adjudicating officer failed to carefully review the sole proprietor's 2001 federal income tax return. Counsel states that the total income of the sole proprietor and his wife was \$64,802 and the adjusted gross income is \$63,621. Counsel draws attention to the 2001 W-2 Form for the petitioner's wife,

² The petitioner's Schedule C for 2003 indicates that that the sole proprietor paid a subcontractor \$15,982 during the tax year, although no further documentation is provided as to the subcontractor.

³ This figure is the petitioner's adjusted gross income, line 33, page 1, Form 1040.

and states that she is employed by the City of New York. Counsel then states: "It is a known fact that an employee of the City of New York, as part of his/her benefits package, receives health insurance coverage. Any contributions made towards such medical coverage are automatically subtracted from the employee's salary." Counsel further states: "In addition, according to Schedule A, Itemized Deductions of 2001 Income Tax Return of the petitioner, \$7,907 was paid out for mortgage interest and \$1,147 was paid for real estate taxes. These amounts were deducted from the Gross Income of the petitioner and his spouse and are not part of the 2001 Adjusted Gross Income."

Counsel then points out that the Federal poverty guidelines published in February 16, 2001 state that poverty guidelines for a family size of three was \$14,630. Counsel submits a copy of the published Federal Poverty Guidelines for 2001 to the record. Counsel states that in 2001 the petitioner and his wife earned \$48,991 above the federal poverty guidelines for their family size. Counsel further states that if the petitioner were to pay the beneficiary the proffered wage of \$19,656, the petitioner would still have \$43,965 in adjusted gross income. Counsel states that this figure is still \$29,335 above the poverty guidelines, and could be applied towards the petitioner's food, utilities, clothing and transportation expenses. Counsel also states that the petitioner had money in a bank account that could have been used to pay the proffered wage. Finally counsel states that CIS also failed to consider that the employment of a fulltime employee would have added to the gross sales of the petitioner and thereby increased the petitioner's annual net profit. Counsel resubmits the petitioner's 2001 federal income tax return, the petitioner's wife's W-2 Form.

It is noted that the director's comment with regard to the cost of living for a couple and one child living in Staten Island, New York, is not based on any legal or statutory analysis found on the record. Thus, it is withdrawn.

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 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. The beneficiary indicated on the ETA 750 Form that he had worked for the sole proprietor since May 1999, and his Forms 1040 indicate that he received payments from the petitioner as a subcontractor. However, the record is not clear as to the actual payments made by the petitioner and received by the beneficiary. For example, the beneficiary's 2001 Form 1040 indicates he was paid \$11,201, while the sole proprietor's 2001 federal income tax return indicates on Schedule C, Other Costs of Goods Sold, a payment of \$7,926 for transportation, freight and delivery subcontractor. If the sole proprietor paid the beneficiary, there is a discrepancy between the payments made and the payments claimed. During tax year 2003, the sole proprietor's tax return indicates a payment of \$15,982 to a subcontractor while the beneficiary's Schedule C indicates gross receipts of \$15,000. Thus, the record is confused as to payments made by the petitioner and monies received by the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further explanation for discrepancies between monies paid and monies received, the sole proprietor has not established that he employed the beneficiary and any wages paid to the beneficiary. Thus, the sole proprietor cannot establish

that he both employed the beneficiary and paid him a salary equal to or greater than the proffered wage of \$19,656.

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).

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).

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 and his wife filed jointly on a Form 1040. The sole proprietor supports himself, his wife, and one child. As previously stated, the petitioner's adjusted gross income in the years 2001, 2002, and 2003 are the following: \$63,621 in 2001, \$62,162 in 2002, and \$58,073 in 2003. As stated previously, although the record reflects some evidence that the sole proprietor employs the beneficiary, this evidence is not clear enough to establish specific wages as of the April 30, 2001 priority to the present. Therefore the sole proprietor has to establish that he can both pay the proffered wage and pay household expenses for himself and two dependents. When the entire proffered wage of \$19,656 is subtracted from the sole proprietor's adjusted gross income for tax years 2001, 2002, and 2003, the following funds remain: \$43,965, \$42,506, and \$38,417.

It is noted that in his request for further evidence, the director did not identify the petitioner as sole proprietor and request information on the sole proprietor's personal household expenses. Nevertheless, even without such information, as illustrated previously, the sole proprietorship's adjusted gross income for any of the years from 2001 to 2003, minus the proffered wage of \$ 19,656, leaves a substantial amount of adjusted gross income to support a household of three family members. Counsel's comments on mortgage interest payments and real estate taxes already being included in the sole proprietor's tax returns as deductions, and health insurance of the sole proprietor and his dependents being covered by his spouse's employment does not

address such monthly expense items as clothing, food, personal transportation, and school costs. However, it does appear reasonable that the sole proprietor and his two dependents could meet such expenses with the funds identified above, namely, \$43,965, \$42,506, and \$38,417.

Thus, the petitioner has established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his two dependents, based on his adjusted gross income. Therefore, the petitioner has established that it had the ability to pay the proffered wage as of the priority date and continuing through 2002. The director's decision is withdrawn and the petition is approved.

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 met that burden.

ORDER: The appeal is sustained.