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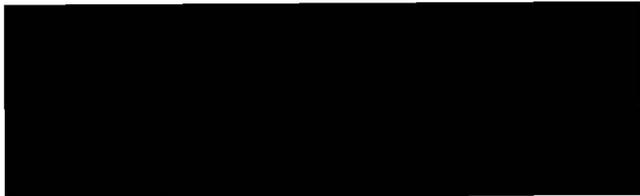
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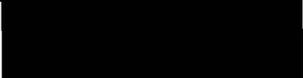
U.S. Citizenship
and Immigration
Services

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FILE:



EAC 06 121 53069

Office: VERMONT SERVICE CENTER

Date **OCT 28 2008**

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:

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
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 law office. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 sole proprietor did not have sufficient adjusted gross income to pay both the beneficiary's proffered wage and the petitioner's household expenses. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 20, 2006 decision, the single issue in this case is whether or not the petitioner, as a sole proprietorship, has the 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 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. . . . 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 the [Citizenship and Immigration Service].

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. *See* 8 C.F.R. § 204.5(d). 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.35 per hour, or \$31,928 per year. The Form ETA 750 states that the position requires the completion of grade school and high school and two years of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On the I-290B form submitted to the record, the sole proprietor states that he has presented evidence of substantial business profit for the year in which the petition was filed. On appeal, the sole proprietor submits a statement and a copy of page five and six of a FAX dated December 26, 2014. The first page provides figures for tax years 2001 to 2007 for a property located at [REDACTED], Centreville, Virginia. The owner is identified as [REDACTED]. In his statement the sole proprietor describes this page as the Fairfax County assessment of the value of the real estate property owned by the petitioner. The sole proprietor notes that in January 1, 2002, the sole proprietor's real estate assessment was \$579,401, and that by January 1, 2004, the value was \$710,415. The second page of the FAXed document is a copy of a document from New Century Mortgage Corporation for the same property on [REDACTED]. On appeal, the sole proprietor states that if his mortgage was subtracted from the lowest assessed value of the sole proprietor's real estate property for tax year 2002, the sole proprietor ends with a net asset value of \$54,109.70, and utilizing the same analysis, a net asset value of \$123,639.70 in 2003. The sole proprietor also states that the real estate property in question was sold for one million dollars in 2005.

With the initial petition, the sole proprietor submitted his Forms 1040, U.S. Individual Income Tax Return for tax years 2002 and 2003, with accompanying Schedules C. In response to the director's Request for Further Evidence (RFE) dated June 21, 2006, the sole proprietor submitted its Form 1040 for tax year 2001, with Schedule C, and an itemized list of monthly expenses for tax years 2001 to 2003. Based on these documents, the sole proprietor had monthly expenses of \$6,700 in tax year 2001, \$6,900 in tax year 2002 and \$7,100 in tax year 2003.² The record also contains the sole proprietor's Form 1040 for tax year 2004 apparently submitted as a part of the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status.

On appeal, the sole proprietor also stated that the director's decision was flawed in its analysis that the petitioner's business income would remain unchanged with the hiring of a new employee. The sole proprietor states that the new employee would increase productivity and profits for the petitioner.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in May 1999 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

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

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Based on these figures, the sole proprietor's annual household expenses would be \$80,400 in 2001, \$82,800 in 2002, and \$85,200 in 2003.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Therefore the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority and through 2004.

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 supports a family of six individuals. The tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 182,851	\$ 56,704	\$ 63,285
Petitioner's gross receipts or sales (Schedule C)	\$ 417,320	\$ 209,528	\$ 236,137

Petitioner's wages paid (Schedule C)	\$ 33,375	\$ 56,809	\$ 40,703
Petitioner's net profit from business (Schedule C)	\$ 190,386	\$ 61,015	\$ 68,096
2004			
Proprietor's adjusted gross income (Form 1040)	\$ 97,003		
Petitioner's gross receipts or sales (Schedule C)	\$ 229,983		
Petitioner's wages paid (Schedule C)	\$ 35,857		
Petitioner's net profit from business (Schedule C)	\$ 106,885		

In the priority year 2001, the sole proprietorship's adjusted gross income was sufficient to cover the proffered wage of \$31,928 and the sole proprietor's annual household expenses of \$80,400 in 2001. Thus the sole proprietor has established its ability to pay the proffered wage as of the 2001 priority date. However, in tax years 2002 and 2003, the sole proprietor had adjusted gross income \$56,704 (2002) and \$63,285(2003). These sums are not sufficient to cover both the beneficiary's proffered wage of \$31,928 and the sole proprietor's annual household expenses of \$82,800 in 2002, and \$85,200 in 2003. With regard to tax year 2004, the sole proprietor did not submit a specific itemized list of expenses. Therefore the record does not establish whether the petitioner had sufficient adjusted gross income to pay both the beneficiary's proffered wage and the sole proprietor's annual household expenses. For illustrative purposes, the AAO will utilize the sole proprietor's annual household expenses for tax year 2003 of \$85,200 when considering the sole proprietor's ability to pay the proffered wage and its household expenses in tax year 2004. Since the sole proprietor's adjusted gross income was \$97,003 in tax year 2004, the sole proprietor could not both pay the proffered wage of \$31,928 and the suggested household expenses during tax year 2004, based on the sole proprietor's adjusted gross income.

Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, except for the 2001 priority year.

On appeal, the sole proprietor states that the assessment of its real estate property minus its mortgage payment should be utilized to identify the sole proprietor's net assets. First the AAO notes that the document submitted to the record on appeal does not state anywhere that it is from the Fairfax County assessment office, or name the sole proprietor as the owner of the described property. Thus the AAO would give no evidentiary weight to this document. Further as the director correctly stated in his decision, the sole proprietor's real state property is not usually viewed as evidence of a sole proprietor's financial resources, as real estate property is not readily liquifiable, and thus is not considered available to the petitioner. The AAO notes that while the sole proprietor's other financial assets such as brokerage accounts, savings accounts or certificate of deposits could be considered when considering the sole proprietor's ability to pay the proffered wage, no such evidence has been submitted to the record. The sole proprietor has not provided any further evidence to further establish its ability to pay the proffered wage.

The sole proprietor also notes on appeal that the hiring of a new employee would increase productivity and profits for the sole proprietor; however, the sole proprietor provides no further detail or documentation to explain how the beneficiary's employment as a secretary will significantly increase profits for a law office. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the 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.