



U.S. Citizenship  
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FILE:



SRC 03 193 51832

Office: TEXAS SERVICE CENTER

Date: DEC 21 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction, painting and maintenance firm. It seeks to employ the beneficiary permanently in the United States as a painter/supervisor. 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 maintains that the petitioner has established the petitioner's continuing financial ability to pay the certified 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, 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$996 per week, which amounts to \$51,792 per year. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary claims employment with the petitioner as a painter/supervisor to "present," but does not states the date that he started.

At the outset, it is noted that the petitioner named on the ETA 750 and on the Immigrant Petition for Alien Worker (I-140) is "All Janitorial Services, Inc.," signifying that it is a corporation. The petitioner, however, reports its financial information as a sole proprietorship on Schedule C, Profit or Loss from Business, of the sole proprietor's individual tax return. A sole proprietorship is an *unincorporated* business with one owner possessing all the net worth. *See Barron's Accounting Handbook* 689 (3<sup>rd</sup> ed. 2000) (Emphasis added). The same employer identification number is given on the copies of Schedule C of the tax returns submitted to the record, but the name appearing on Schedule C is merely "All Janitorial Services," thus raising the question whether the corporate petitioner's financial information has actually been submitted and/or why it has been represented as a sole proprietorship to the Internal Revenue Service (IRS), when it may be a corporation. It is

incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Although the AAO concurs with the director's decision to deny the petition for the reasons explained below, if the corporate petitioner seeks to file other employment-based petitions with this supporting documentation, this issue should be explored. For the purpose of this review, this discussion is based on the assumption that the petitioner's financial information is contained on Schedule C of the sole proprietor's tax returns.

With the petition, the petitioner submitted an incomplete copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001, consisting only of Schedule C. As this evidence was deemed insufficient, on June 5, 2004, the director requested additional documentation pertinent to the petitioner's ability to pay the proffered wage of \$51,792 per year. She instructed the petitioner to submit annual reports, complete federal tax returns, or audited financial statements for the "past two years," including Wage and Tax Statements (W-2s), Form 1120s (U.S. Corporation Income Tax Return), or Form 941s (Employer's Federal Quarterly Tax Return) showing payment of employees.

In response, the petitioner, through counsel, submitted copies of the sole proprietor's individual tax returns for 2001 and 2002, including Schedule C. The petitioner did not provide a copy of its 2003 tax return. Counsel's transmittal letter claims that the petitioner is a sole proprietorship and not a corporation, but refers to the petitioner's corporate status in the letter's heading. The tax returns for 2001 and 2002 reflect that the sole proprietor filed jointly with his spouse and claimed two dependents. They contain the following information:

	2001	2002
Gross receipts or Sales (Schedule C, Profit or Loss from Business)	\$265,847	\$227,063
Gross income (Schedule C)	\$265,847	\$227,063
Total Expenses (Schedule C)	\$187,533	\$161,686
Business Net Profit (Schedule C & Form 1040, line 12)	\$ 52,898	\$ 65,377
Adjusted Gross Income (Form 1040, line 33)	\$ 49,296	\$ 60,895

The petitioner also submitted a copy of a Form 1099, Miscellaneous Income issued to the beneficiary for \$57,623.50 in nonemployee compensation for 2001 and a copy of the beneficiary's individual tax return for 2001. It confirms that the beneficiary provided painting services in the gross amount of \$57,624 to the petitioner's business before deducting expenses for other labor and supplies as cost of goods (Schedule C, line 3) of \$40,599.<sup>1</sup> Additionally, the petitioner provided seven other 2001 Form 1099s, representing compensation paid to other contractors during that period.

The director denied the petition on August 23, 2004. She determined that the sole proprietor's tax returns did not demonstrate the petitioner's continuing financial ability to pay the proffered wage to beneficiary

<sup>1</sup> The tax returns of the sole proprietor and the beneficiary's tax return show that the beneficiary's spouse shares (part) of the same last name with the sole proprietor. It is unclear what this may signify, but it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, this issue may also merit further investigation, including consultation with the DOL if further petitions are filed involving the same parties.

beginning on the priority date. She noted that the nonemployee compensation paid to the beneficiary did not constitute only payment for an individual's labor, but compensation for providing supplies and other labor costs as demonstrated by the beneficiary's tax returns.

On appeal, counsel asserts that the beneficiary has worked for the petitioner as an independent contractor from 2001 to the present. She asserts that the sole proprietor paid \$136,079 to all independent contractors he employed in 2001, including the beneficiary's compensation of over \$57,624. She claims that the total salaries and wages of \$117,464 claimed on the Schedule C of the sole proprietor's 2002 tax return also represents compensation paid to independent contractors, including the beneficiary. In 2003, counsel maintains that the sole proprietor reported the petitioning business' net profit as \$72,978, with \$162,680 paid to independent contractors including the beneficiary. Counsel asserts that these amounts demonstrate the petitioner's ability to pay the proffered wage of \$51,792. She also claims that the petitioner has continuously employed the beneficiary and paid in excess of \$57,623.50 in compensation in each of the years of 2001, 2002, and 2003. Counsel argues that funds used to pay the all of these other independent contractors, including the beneficiary, collectively represent money that would be available to pay him as an employee. She contends that the director erroneously relied on the figures in the beneficiary's tax return rather than concentrating on the petitioner's federal tax returns as set forth in 8 C.F.R. § 204.5(g)(2).

Counsel's assertions are not convincing. 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. In the instant case, the only first-hand evidence that has been submitted suggesting any work relationship between the petitioner and the beneficiary during the pertinent period is the 2001 documents from the petitioner and the beneficiary. None of counsel's claims about the beneficiary's compensation paid in 2002 or 2003 are supported by any W-2s or Form 1099s contained in the record, and no financial information consisting of a federal income tax return or audited financial statement has been provided relating to the 2003 data of the petitioner or sole proprietor. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). Moreover, in this regard, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although counsel is correct in stating that the regulation at 8 C.F.R. § 204.5(g)(2) emphasizes a petitioner's federal tax returns, audited financial statements or annual reports as the main focus of establishing its continuing financial ability to pay the proffered wage. In this case, however, the beneficiary's tax return raises a real question as to whether the nonemployee compensation of \$57,624 paid to the beneficiary as an independent contractor by the petitioner should be considered as a dollar-for-dollar equivalent to monies available to pay the proffered wage to him directly as an employee, when as shown by the beneficiary's own tax return, the beneficiary provided not only his own services, but the services of other laborers and supplies. In such a case, it would seem appropriate to question whether these additional supplies and labor of \$40,599 wouldn't also accrue to the petitioner in addition to paying the additional funds needed to satisfy the full certified wage of \$51,792. Simply contending that the examination must be limited to the figures of the petitioner's tax return does not resolve this issue. It cannot be concluded that the director erred in reviewing the nature of the compensation paid to the beneficiary in 2001 as well as looking at the level of the amount.

Nor does the record corroborate counsel's assertion of the beneficiary's projected replacement of all independent contractor costs incurred by the sole proprietor in each of the 2001-2003 years. First, as stated above, there is no evidence in the record related to 2003. Second, the only evidence regarding the 2002 payment of wages is the figure of \$117,464 appearing on line 26 of Schedule C of the sole proprietor's 2002 tax return. The record does not show whether it was paid as compensation to independent contractors. Whether the beneficiary could have or will replace all other independent contractors is unsupported by the record, in view of the fact, that, at least in 2001, the documentation shows that he was simultaneously employed along with these other individuals, so his replacement for their services is not convincing. Further, if they provided any services other than painter/supervisor, then the beneficiary could not replace them. The labor certification was approved for the specific position of "painter/supervisor" at a certified wage.

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). Any emphasis on the petitioner's gross sales or receipts is misplaced. It is not reasonable to consider gross receipts without also considering the expenses incurred to generate the revenue.

If the petitioner is supposed to be a sole proprietorship, then it 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, individual assets and 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. As mentioned above, 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, even without considering any payment of household expenses, the beneficiary's proposed salary exceeds the sole proprietor's own adjusted gross income by \$2,496 in 2001. Even revising the sole proprietor's adjusted gross income upward to account for the \$17,025 in actual wage-related compensation paid to the beneficiary (\$57,624 - \$40,599) the proffered wage would represent 78 percent of the sole proprietor's adjusted gross income in 2001. It represents 85 percent of his adjusted gross income in 2002. It is improbable that the sole proprietor could support himself, his spouse and two dependents on such an available income. Based on a review of the evidence submitted to the underlying record and argument offered on

appeal, the petitioner failed to demonstrate that it had the continuing financial ability to pay the proffered wage beginning at 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.