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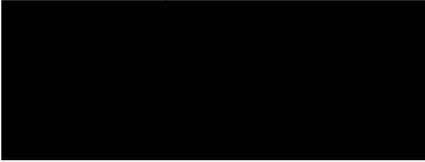


U.S. Citizenship  
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FEB 03 2015



FILE: WAC 03 015 51413 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a men's shoe manufacturing business. It seeks to employ the beneficiary permanently in the United States as a 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 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.

On appeal, counsel states that the director erred in his decision, and submits no further documentation.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
- (B) *Skilled worker.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The

minimum requirements for this classification are at least two years of training or experience.

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 February 8, 2001. The proffered wage as stated on the Form ETA 750 is nine dollars an hour, which amounts to \$18,720 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner did not provide any information on when it was established, its gross annual income, or number of employees. In support of the petition, the petitioner submitted its federal income tax form for 2001, with an accompanying Schedule C for a sole proprietor business. The petitioner submitted amendments to the ETA 750 prior to the filing of the instant petition with regard to the beneficiary's previous employer. The petitioner also submitted a letter from the beneficiary's previous employer.

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 March 3, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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. In particular, the director requested all schedules and tables that accompanied the already submitted federal income tax return. In his request for further evidence, the director also requested further information on the beneficiary's work experience, either in the United States or outside the United States.

Furthermore, the director noted that the petitioner was a sole proprietor, and requested that the petitioner submit a statement of monthly expenses for the petitioner's family that included the family's household living expenses, such as housing, car payments, insurance, and utilities. The director stated that if a sole proprietor would use personal assets to pay the wage, evidence must be submitted to verify that the petitioner is in possession of sufficient assets to pay a continuous wage. Finally, the director requested Form DE-6, a state of California quarterly wage and withholding tax document, for all employees for the last four quarters.

In response, the petitioner submitted a letter that outlined the business and personal expenses of the petitioner. According to this letter, the petitioner had business expenses of \$2,495 a month, and personal expenses of \$1,666.66 a month. The petitioner's yearly expenditures were \$29,940 for business expenses, and \$19,992 for personal expenses. The petitioner also submitted W-2 forms for four employees for the year 2002. The employees were identified as [REDACTED] and [REDACTED]. Furthermore the petitioner submitted an EasyPay quarterly recap of wages paid out by the petitioner for the period from October 4, 2002 to December 27, 2002. This document showed that the petitioner paid out \$28,729 in net pay during the quarter. Finally the petitioner submitted its 2002 federal income tax return with accompanying Schedule C, as well as its California state income tax return for 2002, and Schedule C for its federal income tax return for 2001. The petitioner also submitted a second letter from [REDACTED] Los Angeles, California, that again stated that the beneficiary had worked there fulltime since 1995.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, namely, February 8, 2001, and, on May 28, 2003, denied the petition. The director stated that the petitioner had not submitted the beneficiary's W-2 form, and the W-2 forms submitted were for four other employees. Therefore, the director did not find that the petitioner had employed the beneficiary. The director examined the petitioner's gross adjusted income as shown on petitioner's federal income tax returns for 2001 and 2002 and then examined the itemized list of the petitioner's business and personal expenses. The director determined that the petitioner did not have enough income to support his household and still add the beneficiary to the payroll at the proffered wage.

On appeal, counsel states that the director erred in his decision because he did not consider the fact that the petitioner's net profit of \$55,004 as shown on the petitioner's 2002 federal income tax return was the sum remaining after the petitioner deducted its total expenditures and the alien's wages. Counsel also states that the beneficiary's W-2 form was submitted apparently to Citizenship and Immigration Services (CIS) on or before May 6, 2003.<sup>1</sup>

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. Although counsel states that a W-2 form was submitted for the beneficiary prior to May 6, 2003, there is no such document in the record. The record does reflect that Oscar Franco, Jr., worked by the petitioner, but this individual lists a different residence than the beneficiary. Without more persuasive evidence, the petitioner has not established that it employed the beneficiary as of the priority date.

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 submitted its 2001 income tax return, with the accompanying Schedule C with the original petition. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing. With regard to the petitioner's 2001 federal income tax return, the petitioner filed as head of household with two dependents. The petitioner also submitted its 2002 federal income tax return. The 2001 and 2002 tax return documents reflect the following information:

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<sup>1</sup> May 6, 2003 is the date by which the petitioner had to respond to the director's request for further evidence.

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 10,554	\$ 51,118
Petitioner's gross receipts or sales (Schedule C)	\$ 14,780	\$ 59,779
Petitioner's wages paid (Schedule C)	\$ 0	0
Petitioner's net profit from business (Schedule C)	\$ 11,357	\$55,004

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$18,720 in 2001. The petitioner's 2001 adjusted gross income of \$10,554 is not sufficient to cover the proffered wage as of the priority date of February 8, 2001. Even if the W-2 form for [REDACTED] is accepted as that of the beneficiary, the total wages paid to him in 2002, namely \$3,142, would not cover the proffered wage. With regard to the petitioner's 2002 federal income tax forms, the petitioner has \$55,004 as a net profit, and appears to have sufficient funds to cover the proffered wage in 2002. However, the petitioner has not established that it had sufficient funds as of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, 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 (7<sup>th</sup> 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 his 2001 and 2002 federal income tax returns, the petitioner indicated that he was the head of a household and had two dependents. In response to the director's request for further evidence, the petitioner submitted a letter dated April 3, 2003 that itemized his personal and business expenses. According to the figures provided by the petitioner, the total for his personal expenses was \$1,666.66 a month, or \$19,992 a year. His business expenses totaled \$2,495 a month, or \$29,940 a year.<sup>2</sup> With regard to whether the petitioner had sufficient funds to cover the proffered wage and household expenses, as previously stated, in 2001, the petitioner had a net income of \$11,357. This sum would be insufficient to both cover the proffered wage of \$18,720 and the petitioner's household expenses. It should also be noted that the petitioner's list of personal expenses appears

<sup>2</sup> Business expenses do not come into this analysis of household expenses, as items such as rent or bills are normally included in Schedule C of the tax return.

incomplete. The itemized list contained no expenses for items such as food and clothing. While the petitioner, with a net profit of \$55,000 in 2002, may have been able to cover both the proffered wage and household expenses, the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date, namely, February 8, 2001.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and onward.

Although counsel asserts on appeal that the director erred because he did not consider that the petitioner's net profit of \$55,004 in 2002 as the sum available after the deduction of the petitioner's total expenses and the beneficiary's wages, and that the beneficiary's W-2 form is part of the record, these assertions are not well-founded. First, this net profit figure does not take into account the petitioner's personal expenses. More importantly, however, it does nothing to alter the fact that the petitioner did not demonstrate the ability to pay the proffered wage in 2001. Finally, even if this office were to accept that the W-2 form in the record does relate to the beneficiary, the evidence would still not demonstrate an ability to pay the proffered wage in 2001. Therefore, the director's decision does not appear erroneous, and shall stand.

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 with regard to the petitioner's ability to pay or to the beneficiary's qualifications to perform the duties of the position.

**ORDER:** The appeal is dismissed.