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U.S. Citizenship
and Immigration
Services

B6



FILE: WAC-02-282-50843 Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

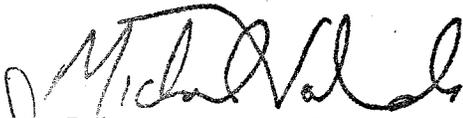
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a dance studio. It seeks to employ the beneficiary permanently in the United States as a dance instructor. 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 submits a brief statement asserting that the director failed to consider previously submitted evidence.

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), also 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 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 March 16, 2000. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its Schedule C, Profit or Loss From Business statement, to the sole proprietor's U.S. individual income tax return, for 2000 and 2001. The petitioner did not submit the sole proprietor's complete Form 1040, U.S. Individual Income Tax Return.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 16, 2002, 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. The director specifically requested evidence from the year 2000 onwards and Form 1040 and W-2s for the beneficiary as well.

In response, the petitioner submitted the sole proprietor's Form 1040, U.S. Individual Income Tax Returns, with the petitioner's accompanying Schedules C, Profit or Loss From Business statements, for the years 2000, 2001, and 2002.

The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$10,435	\$10,935	\$17,752
Petitioner's gross receipts or sales (Schedule C)	\$75,581	\$84,286	\$93,138
Petitioner's wages paid (Schedule C)	\$21,600	\$21,600	\$21,600
Petitioner's net profit from business (Schedule C)	\$11,229	\$11,766	\$19,102

The petitioner also submitted the beneficiary's Form 1040, U.S. Individual Income Tax Returns for 1999¹, 2000, 2001, and 2002. Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary, were attached to each tax return for each year. The tax returns and W-2 forms demonstrate that the beneficiary was actually employed by the petitioner and received compensation in the amount of \$21,600 in 2000; \$21,600 in 2001; and \$21,600 in 2002.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 20, 2003, the director again requested additional evidence pertinent to that ability. The director requested information about the sole proprietor's living expenses and other assets.

In response, the petitioner indicated that the sole proprietor's spouse received additional income from family-owned assets in Korea and from another business in the U.S. called [REDACTED]. A letter from [REDACTED] Group, Tax Consultants, was submitted along with an unaudited "profit(loss) statement" for 2003. Additionally, the petitioner submitted the sole proprietor's bank statements for a checking account held at Well Fargo bank for February through May 2003. That account reflects an ending average balance of \$8,703.13².

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 8, 2003, the director issued a notice of intent to deny. The director stated that the combination of the sole proprietor's adjusted gross income and wages actually paid to the beneficiary are sufficient to pay the proffered wage but fail to leave enough money to provide for the sole proprietor's living expenses.

In response, the petitioner's counsel stated that the sole proprietor "operated a home business, [REDACTED] since 1999. This business has generated a steady monthly income of \$4,000 to \$18,000. . . . The [p]etitioner has relied on the income of this home business to pay all of her family's personal expenses." Attached to counsel's letter were Bank of America bank statements in the sole proprietor's name and Universal Financial Education Funding for various months from 1999 through 2003. The ending balances in this account range from a low of \$1,030.15 to a high of \$3,820.39.

¹ Evidence preceding the priority date in 2000 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² The ending balances for each of the three months added together and divided by three.

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, and, on August 19, 2003, denied the petition.

On appeal, counsel states that the “denial notice did not discuss any of the evidence we submitted on the August 5, 2003 response. Please review the evidence submitted previously and reconsider the denial issued by [Citizenship and Immigration Services (CIS)].”

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 established that it employed and paid the beneficiary \$21,600 in 2000, 2001, and 2002. Since the proffered wage is \$31,200, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$9,600 in each year.

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 unaudited financial statements that counsel submitted in response to the director’s request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner’s financial condition and ability to pay the proffered wage, those statements must be audited.

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 three. In 2000, the sole proprietorship's adjusted gross income of \$10,435 barely covers the remaining proffered wage of \$9,600. It is improbable that the sole proprietor could support herself and her family on \$835 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2001, the sole proprietorship's adjusted gross income of \$10,935 also barely covers the remaining proffered wage of \$9,600. It is improbable that the sole proprietor could support herself and her family on \$1,335 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2002, the sole proprietorship's adjusted gross income of \$17,752 covers the remaining proffered wage of \$9,600. It is improbable that the sole proprietor could support herself and her family on \$8,152 in Los Angeles, California for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Thus, the AAO concurs with the director that the petitioner would need to evidence alternative sources of liquifiable assets or income to bolster its continuing ability to pay the proffered wage. In the instant case, the sole proprietor's assets are too modest to overcome its poor financial showing.

The petitioner did not evidence its assets from Korea as counsel asserted. 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). 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner maintains an average ending balance of \$8,703.13 in a checking account held at Wells Fargo. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balance for three months in 2003 is not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. Additionally, these bank statements only reflect additional funds in 2003 and not at the time of filing the petition. 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).

Finally, counsel's assertion that the sole proprietor receives additional income of \$4,000 to \$18,000 per month from Universal Financial Education Funding is not reflected by the bank statements submitted that show bank balances ranging from a low of \$1,030.15 to a high of \$3,820.39. The AAO also notes the omission of reporting this additional income on Schedule C of the sole proprietor's individual income tax returns. *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.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2000, 2001, or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, or 2002. Therefore, the petitioner has not established that it 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.