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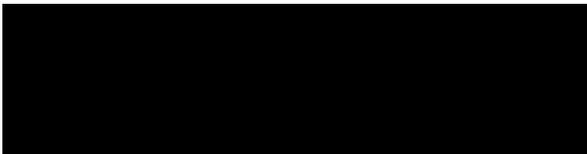
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2005
WAC 03 227 50820

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.

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an adult care facility. It seeks to employ the beneficiary permanently in the United States as a residence 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 found 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 and additional 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 granting 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 March 29, 2002. The proffered wage as stated on the Form ETA 750 is \$500 per week, which equals \$26,000 per year.

On the petition, the petitioner stated that it was established on November 10, 1986 and that it employs five workers. The petition states that the petitioner's gross annual income is \$94,687 and that its net annual income is \$65,047. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Tucson, Arizona.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on December 16, 2003, the California Service Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested that if the petitioner had employed the beneficiary is provide copies of the Form W-2 Wage and Tax Statements showing wages it paid to the beneficiary.

In response, counsel submitted copies of 2002 and 2003 W-2 forms showing that the petitioner paid the beneficiary \$1,085 and \$12,600 during those years, respectively. Counsel also provided the 2002 and 2003 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. Those returns include corresponding Schedules C indicating that the petitioner is owned as a sole proprietorship.

The 2002 Schedule C shows that the petitioner suffered a loss of \$5,041 during that year. The 2002 Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owner and owner's spouse had no dependents during that year, and declared adjusted gross income of \$7,090 during that year, including the petitioner's loss.

The 2003 Schedule C shows that the petitioner suffered a loss of \$18,775 during that year. The 2003 Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owner and owner's spouse had no dependents during that year, and declared adjusted gross income of \$5,027 during that year, including the petitioner's loss.

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 March 22, 2004, denied the petition.

On appeal, counsel asserts that the petitioner's owner and owner's spouse have various savings and investments that they could use to pay the proffered wage. In a brief filed to supplement the appeal counsel argued that the petitioner's owner's assets should have been included in the determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the petitioner, and therefore the petitioner's owner, received tax-free income of \$65,047 during 2002 and \$79,089.68 during 2003, and that this amount, too, should have been considered.

In support of the assertion of tax-free income counsel submitted a 2002 Form 1099 showing that the PIMA Health System in Arizona paid the petitioner's owner and owner's spouse \$65,047.08 during that year. The petitioner's 2002 Schedule C shows that this amount was apparently included in the petitioner's Line 1 Gross Receipts, but was listed at Line 2, Returns and Allowances, and subtracted, citing section 131 of the IRS code, prior to reaching Line 7, Gross Income. That return appears to show, then, that the \$65,047.08 was, as counsel asserts, tax-free.

The 2003 return, similarly, shows that \$79,089.68 was exempted from taxation, again citing section 131 of the IRS code.

In addition, counsel submitted an investment activity and value summary showing that as of March 31, 2002 the petitioner's owner and owner's spouse had \$16,136.23 in an investment account, and another summary showing that on December 31, 2003, the petitioner's owner and owner's spouse had \$45,897.80 in a different account.

The tax returns submitted show that, consistent with counsel's assertion, the petitioner's owner received, through the petitioner, \$65,047.08 in tax-free income during 2002 and \$79,089.68 during 2003. No reason exists to doubt that the tax returns counsel submitted to CIS are the same returns the petitioner submitted to IRS. No reason exists to doubt the entries on those tax returns. The evidence indicates that those amounts represent additional funds available to the petitioner and petitioner's owner to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 \$1,085 during 2002 and \$12,600 during 2003.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income¹ 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. In addition, they 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). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The proffered wage is \$26,000 per year. The priority date is March 29, 2002.

Having demonstrated that it paid the beneficiary \$1,085 during 2002 the petitioner is obliged to show the ability to pay the \$24,915 balance of the proffered wage. The 2002 Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$7,090 during that year, including the petitioner's loss for that year. The Schedule C shows that the petitioner's owner also received \$65,047.08 in tax-free income during that year.

The petitioner's owner's adjusted gross income and tax-free income, combined, equal \$72,137.08. If the petitioner's owner had been obliged to pay the \$24,915 balance of the proffered wage out of that amount, he

¹ Only income that may, after deductions, be taxed is carried forward. Tax-free income is not carried forward.

would have been left with \$47,222.08 upon which to support himself and his spouse during that year. Information on the petitioner's owner's personal budget was neither requested nor provided. This office is unable, however, to perceive any reason the petitioner's owner could not have sustained his household of two on that amount.

Having demonstrated that it paid the beneficiary \$12,600 during 2003 the petitioner is obliged to show the ability to pay the \$13,400 balance of the proffered wage. The 2003 Form 1040 U.S. Individual Income Tax Return shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$5,027 during that year, including the petitioner's loss for that year. The Schedule C shows that the petitioner's owner also received \$79,089.68 in tax-free income during that year.

The petitioner's owner's adjusted gross income and tax-free income, combined, equal \$84,116.68. If the petitioner's owner had been obliged to pay the \$13,400 balance of the proffered wage out of that amount, he would have been left with \$70,716.68 upon which to support himself and his spouse during that year. Again, this office has no information on the petitioner's owner's personal expenses. This office is unable, however, to perceive any reason the petitioner's owner could not have sustained his household of two on that amount.

The petitioner has demonstrated the ability to pay the proffered wage during 2002 and 2003, both of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date. Because the petitioner has demonstrated this ability with its income, this office need not address the evidence pertinent to the assets of the petitioner's owner and the owner's spouse.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.