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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



Ble

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 03 2005  
EAC 03 123 50339

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:  
[REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vehicle service garage. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 he 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 letter-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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour, which amounts to \$35,360 annually.

The petitioner is structured as a sole proprietorship. With the petition, counsel submitted:

- A Form G-28;
- An original certified Form ETA 750 labor certification application; and,
- An unsigned, incomplete<sup>1</sup> copy of the petitioner's Form 1040 tax return for 2001.

On July 24, 2003, the director requested additional evidence pertinent to the employer's ability to pay.<sup>2</sup> 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:

- The petitioner's complete income tax returns, including attachments, for 2001 and 2002;

<sup>1</sup> The submission lacked a Form 1040 tax return but included a Schedule C and other attachments, none of which require the signatures of the taxpayer or preparer attesting to accuracy.

<sup>2</sup> The director's May 7, 2003 request for evidence asked only about the beneficiary's qualifications.

- An itemized list of the petitioner's monthly expenses for 2001;
- Copies of Form W-2 Wage and Tax Statements issued to the beneficiary if the petitioner has employed the beneficiary;
- The petitioner's audited or reviewed annual financial reports for 2001 and 2002;
- The nature of the petitioner's business, his gross and net annual income, the date of establishing his business and the number he employs;
- Supplementary profit and loss statements, bank account records or personnel records; and,
- The petitioner's date of birth, missing from the Form I-140 petition.

In response, the petitioner submitted:

- An October 10, 2003 letter from a CPA asserting that the petitioner had the ability to pay;<sup>3</sup>
- The petitioner's balance sheet ending on August 31 of 2001, 2002 and 2003;
- Unsigned Form 1040 tax returns for the petitioner's business for calendar 2001 and 2002;
- The petitioner's business bank statements for December 2001 and 2002, and for July 2003; and,
- A page from the petitioner's Jordanian passport showing his date of birth.

The tax returns, submitted prior to appeal, reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$25,659	\$30,126
Petitioner's gross receipts or sales (Schedule C)	\$912,814	\$803,999
Petitioner's wages paid (Schedule C)	\$13,610	\$25,005
Petitioner's net profit from business (Schedule C)	\$24,696	\$26,606

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 November 25, 2003, denied the petition.

On appeal, counsel has submitted the following documents:

- A CPA's December 22, 2003 letter to counsel asserting that because of "errors, additional gross business revenues were added to the calendar year 2002 and 2001 tax returns," adding \$35,496 to total income for 2001, and \$33,560 for 2002;
- A December 22, 2003 letter brief asserts that the petitioner's annual household expenses in 2001 and 2002 totaled 125 percent of federal poverty guidelines for a family of four, which according to the director, was \$22,062.50 in 2001, and \$22,625.00 in 2002; and,

<sup>3</sup> The CPA stated notes the petitioner's submitted tax returns will be adjusted for both 2001 and 2002. Instead of 2001 reported net income of \$24,696, the amended net income is to be \$33,923, representing an additional \$6,160 in depreciation, \$667 in amortization, and \$2,400 paid to the petitioner's spouse. For 2002, the amended amount would be \$37,232, the result of the "same type of adjustments."

- Unsigned Form 1040X amended returns for 2001 and 2002<sup>4</sup>, showing the petitioner and his wife had \$58,647 in adjusted gross income in 2001; and had 61,315 in adjusted gross income for 2002.

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. In the instant case, the petitioner has not established that it has previously employed the beneficiary.

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).

This office notes counsel and the petitioner have failed to submit proof of having filed the amended returns or of having paid the additional tax resulting from the amendments, which combined would amount to more than \$21,000 in extra tax payments. Because such payments would consume a substantial portion of the claimed increases in revenues, and given the credence this office gives to evidence drawn from income tax returns, it was incumbent upon counsel and the petitioner to demonstrate completed the amendment process with the Internal Revenue Service (IRS). The timing of petitioner's decision to amend the returns and the amount of money they would involve raise issues about the petitioner's credibility that can only be resolved by proof that the petitioner filed the amended returns and paid the extra taxes. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states, "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

It is also noted that the balance sheets counsel submitted in response to the RFE were neither audited nor CPA-reviewed, as the director had specified. 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

This office does not rely upon federal poverty guidelines as a standard for cost of living in the context of proving the ability to pay. The guidelines do not take into account variations in the cost of living from region to region in the United States. Further, unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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

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<sup>4</sup> The amended returns bear no IRS-stamped receipt, nor has counsel submitted canceled checks to show payment of the increased taxes, which in 2001 were \$11,317, and in 2002 were \$10,189. The amendment to the 2001 return states, "The taxpayer failed to report \$35,496 in gross sales on his Schedule C." Likewise, the 2002 return states, "The taxpayer failed to report \$33,560 in gross sales related to his Schedule C."

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. In addition, they must show that they can sustain themselves and their dependents.<sup>5</sup> *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 the instant case, the sole proprietor supports a family of four. In 2001, the sole proprietorship's adjusted gross income of \$25,659 does not cover the proffered wage of \$35,360. It is therefore improbable that the sole proprietor could support himself and his family on his adjusted gross income for an entire year as well as pay the proffered wage.

This office notes that, contrary to the July 24, 2003 RFE asking for a list of the petitioner's monthly expenses in 2001, counsel submitted none, precluding "a material line of inquiry," for which 8 C.F.R. § 103.2(b)(14) sanctions a denial of the petition.

Finally, counsel maintained in his October 14, 2003 letter, that the petitioner maintains a balance of more than \$21,000 in a business account. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. However, the record of proceeding contains bank statements from the petitioner's checking accounts for December 5, 2001, December 5, 2002, and July 3, 2003, with an average monthly balance of \$15,821.38.<sup>6</sup>

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustained ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return that will be considered below in determining the petitioner's net current assets.

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

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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<sup>5</sup> Neither counsel nor the petitioner responded to the July 24, 2003 RFE, which asked for a list of the petitioner's monthly expenses for 2001.

<sup>6</sup> This average figure was calculated by adding the ending balances and dividing by the number of monthly statements submitted.

This office notes that petitioner and beneficiary share the surname "[REDACTED]". While the relationship between the two men is not clear in the record and is thus not a basis for the decision on this appeal, a common ancestry or other close ties could pose a barrier to conferring an employment-based classification upon the beneficiary. 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, and 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).

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.