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U.S. Citizenship
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Services

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FILE [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005
WAC 03 042 51771

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

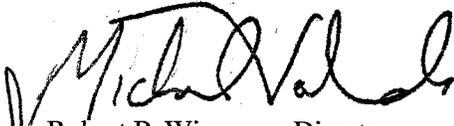
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 an appliance sales and service company. It seeks to employ the beneficiary permanently in the United States as an electrical appliance servicer.¹ 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. Accordingly, the director denied the petition.

On appeal, the petitioner states that it can pay the prevailing wage and submits additional documentation.²

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 January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$15.34 per hour, which amounts to \$31,907 annually.³

¹ The I-140 petition identifies the petitioner as Electrical Appliance Serv., which appears to be the beneficiary's job classification rather than the petitioner's name.

² Although the certified Form ETA 750 was sent to [REDACTED] of Immigration Services Inc., and the record contains a G-28 filed by him dated January 14, 1998, he is not identified as an attorney or certified immigration representative on the Form G-28. In addition, [REDACTED] is identified as an immigration assistant on the G-28 dated January 30, 2004 and on a previous G-28. She is also identified as the person filing the I-290B appeal for the petitioner, a certified translator of Spanish, and as the preparer of the I-140 petition. Nowhere in the record is she identified as an attorney or an accredited representative recognized by the Board of Immigration Appeals. Therefore for purposes of the appeal, the petitioner is self-represented.

³ In his decision, the director erroneously stated the proffered wage was \$29,280. The annual wage that the AAO stated above is calculated by multiplying the hourly wage of \$15.34 by 2080 hours.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted four incomplete Forms 1040 for 1998, 1999, 2000, and 2001. The petitioner left blank the spaces on the petition for number of employees, gross income and net annual income. The petitioner stated it was established in 1984.

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 April 18, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide signed and certified copies of its federal tax returns from 1998 to the present. The director also stated that if the petitioner had more than 100 employees, it could submit a statement from its financial officer to establish the petitioner's ability to pay the proffered wage.

In response, the petitioner submitted signed copies of its federal income tax returns from 1998 to 2002, along with schedules and attachments. The petitioner also submitted Form I-864, Affidavit of Support Under Section 213A of the Act.⁴ Finally, the petitioner submitted documentation from various banks or mortgage companies with regard to the petitioner's financial resources. Such documentation included a statement from [REDACTED] Assistant Manager, Washington Mutual, dated June 18, 2003, that stated the petitioner had a balance of \$20,079 in its Washington Mutual account; a document with regard to a Washington Mutual home loan, copies of statements from CitiMortgage with regard to various mortgages on properties; and the petitioner's monthly bank statements from a Washington Mutual banking account. The latter documents cover a period from June 1999 to April 2003. The petitioner also submitted monthly bank statements from Home Savings of America that dated from January 1, 1998 to May 1999.

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 January 13, 2004, denied the petition. The director examined the petitioner's adjusted gross income from 1998 to 2002 as documented in the petitioner's Forms 1040 and stated that the petitioner did not have sufficient adjusted gross income in any of the years in question to pay the proffered wages of \$29,280.⁵

On appeal, the petitioner resubmits the petitioner's monthly bank statements, and documentation on three properties. The petitioner also submits the petitioner's wife's monthly bank statements from 1998 to 2002. The petitioner states that it has a long-term business, and it owns three properties that provide the petitioner with substantial additional income. The petitioner also states that the petitioner's wife makes monetary deposits to fund the business, through her own bank account. The petitioner also states that it has the monetary ability to pay the proffered wage from 1998 to the present and has begun in good faith since the beginning of 2004, to pay the beneficiary the proffered wage. The petitioner submits pay stubs for the beneficiary from December 29, 2003 to January 30, 2004.

With regard to the petitioner's Washington Mutual banking account and the petitioner's wife's bank statements from Wells Fargo Bank, Inc., that were submitted on appeal, these accounts can be viewed as sources of additional funds in sole proprietor I-140 petitions. However, the Washington Mutual documentation submitted by the petitioner is not clear as to whether the petitioner's account is his personal account, or a business account. The record also does not establish that the funds in this account were available as of the

⁴ The petitioner provided no explanation for why it submitted Form I-864. This document is not relevant to the proceedings.

⁵ See Note 3.

1998 priority date. With regard to the wife's Wells Fargo savings and checking bank account, it is not clear as to whether the funds being withdrawn or deposited are part of the petitioner's business proceeds and documented elsewhere in the petitioner's tax forms, or from totally distinct financial sources. Corporate 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 sustainable ability to pay a proffered wage. The petitioner also provided no further documentation of any specific deposits made by his wife from her bank account to the petitioner's bank account that would have been available to pay the beneficiary's wages. Finally the petitioner provided no information on the number of employees on its payroll and their current wages. Without such information, it is not possible to determine what available funds would be needed, regardless of which bank account would be used, to pay a new salary based on prevailing wage rates.

The petitioner also submits documentation on the mortgages held on three properties, and states that these properties are evidence that the petitioner has the ability to pay the proffered wage. The petitioner's assertion is not persuasive. First, such properties are not viewed as assets that are sufficiently liquid to pay the proffered wage. In other words, the petitioner would have to sell a property in order to have cash available to pay the proffered wage. Second, the rental income provided by such properties would logically be shown on the petitioner's joint tax returns. As such, this would represent part of the adjusted gross income which will be discussed below.

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. With regard to the pay stubs submitted by the petitioner, these documents only establish that for the beginning of 2004, the petitioner paid the beneficiary a weekly wage of \$509.85. This weekly wage would only add up to a yearly wage of \$26,512, which is lower than the proffered wage.⁶ The petitioner submitted no other documentation of any wages paid to the beneficiary from the 1998 priority date to the present. While the ETA 750 signed by the beneficiary states that the beneficiary worked from the petitioner from 1989 to 1991, the petitioner submitted no employment verification letter or proof of employment to further substantiate such employment. Therefore, the petitioner did not establish that it paid the beneficiary a sum equal to or greater than the proffered salary at the time the priority date was established.

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).

⁶ This yearly wage is calculated by multiplying the weekly rate of \$509.85 by 52 weeks.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. See 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). This is the reason that a review of the ability to pay the proffered wage includes consideration of the sole proprietors' household expenses, as well as the adjusted gross income set forth on page one of the tax return.

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 proprietors are a couple filing jointly who list five to three children as dependents from 1998 to 2002 on their Forms 1040. The petitioner must illustrate that it can pay the proffered wage for each year, or the remainder of the proffered wage for each year, after subtracting any documented wages it actually paid the beneficiary during those years. In the instant petition, the petitioner has provided no documentation with regard to the beneficiary's employment beyond the pay stubs for the beginning of 2004. Therefore, the petitioner would have to establish that it had the ability to pay the entire proffered wage of \$31,907 from 1998 to the present, as well as pay its household monthly expenses for itself and any dependents.

With regard to the petitioner's adjusted gross income, as correctly noted by the director, the petitioner had the following amounts of income: in 1998, \$7,556; in 1999, \$8,848; in 2000, \$15,915; in 2001, \$17,277; and in 2002, \$16,005. None of these figures are sufficient to pay the proffered wage of \$31,907. As previously stated, the petitioner's bank statements and evidence of property ownership are not viewed as additional sources of current assets that could be used to pay the proffered wage. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage during the salient portion of 1998 or subsequently during 1999 to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date. In addition, the director did not request a monthly household expenses statement from the petitioner and the petitioner did not provide any documentation as to household expenses. Nevertheless, based on its gross income, the petitioner does not have sufficient income to pay both the proffered wage and monthly household expenses for a family of two adults and three to five dependent children.

Beyond the decision of the director, the petitioner did not establish that the beneficiary had the requisite two years of work experience as an electrical appliance servicer. The regulation at 8 C.F.R. § 204.5(l)(3) 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 petitioner 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 . . . The minimum requirements for this classification are at least the two years of training or experience.

Upon review of the record, the petitioner has not established that the beneficiary has the requisite two years of work experience, as outlined in the regulations. This is due primarily to the conflicting nature of the documentation submitted to establish the beneficiary's work history, both in Mexico and in the United States. The ETA Form 750 indicates that the beneficiary worked for Talle [REDACTED] Mexico, from 1982 to 1984, while the Mexican employer's letter indicates that the beneficiary worked for this company from 1982 to 1985. While this slight discrepancy does not conflict with the beneficiary's having worked for the requisite two years outlined in the Form ETA 750, the contents of the letter from the previous employer, and its translation raise questions with regard to the beneficiary's work in the variety of electrical appliances, outlined in the Form ETA 750.

The original letter of employment verification states in Spanish that the beneficiary worked in the repair department, as a technician in the repair of washing machines (lavadoras). The translation done by [REDACTED] states that the beneficiary performed "excellent work as a technical repairman for all the appliances we service- stoves, washers, dryers, refrigerators, etc." The translation also states that the beneficiary worked full-time, while the original letter mentions no such work schedule. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the letter written by the beneficiary's previous employer in Jalisco, Mexico, and the translation of this letter are given no weight in these proceedings.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. While any work performed as an appliance repair servicer prior to the priority date in 1998 could be considered as evidence of the beneficiary's prior work experience, as stated previously, the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A) states that any requirement of training or experience for skilled workers must be supported by letters from trainer 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. As previously stated, the discrepancies between the translation of the previous employer's letter and the actual letter disallow the use of this letter to document the beneficiary's work experience in the areas of appliance repair outlined in the Form ETA 750, and the beneficiary's work experience in Mexico can not be used to establish the requisite two years of work experience. Thus, the beneficiary's work experience in the United States prior to the priority date is crucial to establishing the beneficiary's requisite two years of relevant work experience. However, the petitioner did not provide sufficient documentation of its prior employment of the beneficiary from 1989 to 1991 and the beneficiary's work experience in appliance repair.

Therefore, the petitioner did not establish that the beneficiary possessed the requisite two years of relevant work experience as of the priority date.

Without more persuasive evidence, the petitioner has not established that it had the ability to pay the proffered wage or that the beneficiary had two years of work experience at the time the original petition was filed. 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. The appeal is dismissed. The petition is denied.

ORDER: The appeal is dismissed.