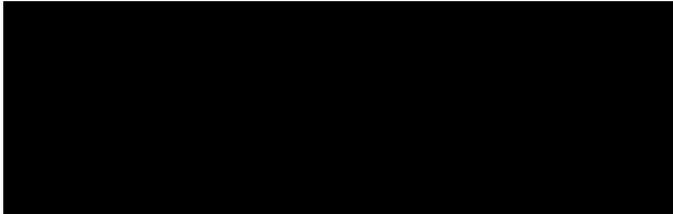




U.S. Citizenship  
and Immigration  
Services

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prevent clearly unwarranted  
invasion of personal privacy

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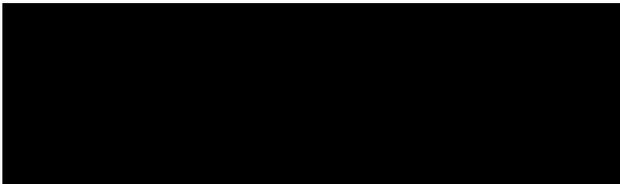
Office: TEXAS SERVICE CENTER

Date: JUN 13 2005

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

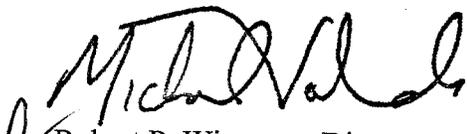
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a solar screening/insulation company. It seeks to employ the beneficiary permanently in the United States as a construction supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$21.42 per hour (\$44,553.60.00 per year). The Form ETA 750 states that the position requires 5 years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for 2000 to 2001<sup>1</sup>, copies of documentation concerning the beneficiary's qualifications.

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<sup>1</sup> The Form 1040 tax returns stated personal taxable income of \$24,347.00 in 2000, \$29,944.00 in 2001, and \$29,398.00 in 2003. As stated on Schedule "C" business income was \$3,820.00 in 2000, and, \$6,916.00 in 2001.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center on November 7, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

"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 has submitted federal tax returns from 2001. This evidence from 2001, however, does not establish the ability to pay. The petitioner must submit additional evidence of the availability of funds to pay the beneficiary. If the petitioning company ... has been paying the beneficiary during previous years, submit evidence in the form of Forms W-2."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted Schedule "C" to Form 1040 tax returns for tax year 2001. The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,553.60.00 per year from the priority date.

- In 2001, Schedule "C" to the Form 1040 stated taxable income<sup>2</sup> of \$6,916.00.

The director denied the petition on February 24, 2004 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"In denying the Petition for inability to pay, the Service incorrectly analyzed the cost of labor figures for the year 2000 and 2001, and made a factual error in finding the existence of a W-2 for the Beneficiary from 2001 for \$4,913.00. Had the Service correctly analyzed the cost of labor, the Service would have found ability to pay. Had the Service realized that the beneficiary never worked for the petitioner, the Service would have found ability to pay."

Also on appeal, counsel submitted a W-2 Wage and Tax Statement for 2001 showing wages of \$4,913.14 paid by a Florida employer to the owner of petitioner; and a W-2 Wage and Tax Statement for 2001 showing wages of \$18,114.40 paid by a Florida employer (that is to say not the petitioner) to the owner of petitioner. These wages were earned by the owner of the petitioner outside the subject business based upon the federal employer identification numbers and the names of the third party payers.

On appeal, petitioner submitted his Form 1040 for 2003 with attached Schedule "C" showing personal taxable income of \$29,398.00 derived from outside employment and a business loss of <\$24,177.00>

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<sup>2</sup> Schedule "C" to IRS Form 1040, Line 31.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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 period between February 2004 and April 2004, petitioner paid the beneficiary at the rate of \$21.42 per hour or calculated on a yearly basis, \$44,553.60 per year. Therefore for three months, petitioner paid the beneficiary the proffered wage.<sup>3</sup>

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 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. *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 three. In 2000, the sole proprietorship's adjusted gross income of \$24,347.00 is not sufficient to pay the proffered wage of \$44,553.60.00 per year. It is improbable that the sole proprietor could support himself and his family on for an entire year, without any income from any of his earnings.

Counsel asserts that the beneficiary will replace independent contractors<sup>4</sup> including the owner of the company as he worked in his business. The record does not, however, verify the independent contractors full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel makes assertions concerning that portion of the "cost of labor" expressed on Schedule "C" that relates to supervision, but nowhere in the evidence is there substantiation for her claim. 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). Insofar as the beneficiary will replace not a worker but the principal of the business, since the principal's labor is not a component in the expense of the business for tax purposes, this assertion has no relevance to the ability to pay the proffered wage on and after the priority date.

Counsel submits bank deposits slips for year 2004. There are no similar business payments or expense statements submitted so their evidentiary value is limited. Counsel's reliance on the balances in the

<sup>3</sup> Petitioner also provided bank deposits slips for this period. There is no other financial data submitted for 2004.

<sup>4</sup> The petitioner submitted four Form 1099 statements for year 2003 that stated payments to third parties of \$109,059.28, \$4,600.00, \$9,059.00, and \$7,500.00. There was no explanation provided explaining the services they provided.

petitioner's bank account 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 sustainable ability to pay a proffered wage.

To iterate the information presented in the tax returns and other financial information submitted, the Form 1040 tax returns stated personal taxable income of \$24,347.00 in 2000, \$29,944.00 in 2001, and \$29,398.00 in 2003. As reported on Schedule "C," business income was \$3,820.00 in 2000, \$6,916.00 in 2001 and a business loss of <\$24,177.00> in 2003.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage of \$44,553.60.00 per year beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.