

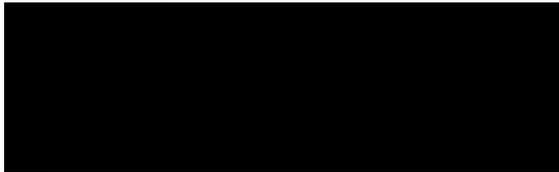
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U.S. Citizenship
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Services

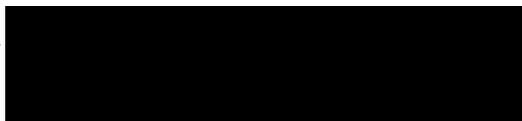


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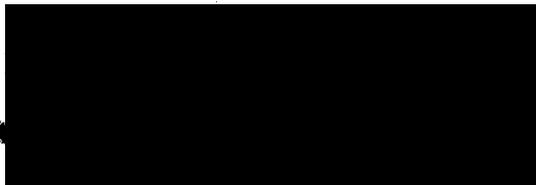
Date: MAY 18 2005

IN RE: Petitioner:
Beneficiary:



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

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. *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 \$17.22 per hour, which amounts to \$35,817.60 annually. The ETA 750B, signed by the alien beneficiary on January 14, 1998, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, it is claimed that the petitioner has a gross annual income of \$700,167 and a net annual income of \$249,548. The petitioner is structured as a sole proprietorship. As evidence of its continuing financial ability to pay the certified wage of \$35,817.60 per year, the petitioner initially submitted a partial copy of the petitioner's Form 1040, U.S. Individual Income Tax Return for 1998. It shows that the petitioner filed as a single person with no dependents. It also reflects that the petitioner reported -\$29,850 as his adjusted gross income, which includes a net business income of \$45,103, as well as a prior year net operating loss of \$39,058.¹

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on June 30, 2003.

¹ Because a prior year net operating loss reflects a loss claimed in a year other than the year in which it was incurred, the adjusted gross income should be considered without this deduction.

The director advised the petitioner that its financial ability to pay the proposed wage offer must be established by annual reports, federal tax returns, or audited financial statements. The director requested additional evidence from the petitioner demonstrating that it has had the ability to pay the proffered salary of \$35,817.60 as of the priority date of January 20, 1998 and continuing until the present. The director also requested that the petitioner submit a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if it employed the beneficiary during that year.

In response, the petitioner submitted a copy of a letter, dated September 22, 2003, from its accountant, [REDACTED] Mr. [REDACTED] expresses confidence that the petitioner could pay the beneficiary's proposed certified wage as a maintenance mechanic, as the company had been paying an outside entity over \$65,000 for the services of a maintenance mechanic.

The petitioner also provided a copy of the sole proprietor's 2002 individual tax return. It shows that he reported \$34,038 as adjusted gross income for that year. It includes net business income of \$10,344, as well as a prior year net operating loss of \$5,459, as reflected on Statement 1, supplementing line 21 of the first page of the return.

The director denied the petition on January 9, 2004, determining that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director noted that the 2002 tax return reflected that the sole proprietor's adjusted gross income was less than the proffered wage of \$35,817.60 and therefore could not demonstrate the petitioner's ability to pay the certified wage. The director also observed that no corroboration of any payment to an outside service for a maintenance mechanic had been submitted.

On appeal, counsel submits duplicative copies of the petitioner's 1998 tax return and various copies or extracts from the sole proprietor's New Jersey tax returns. Counsel also offers a copy of the sole proprietor's individual 1999 federal tax return. It shows that the sole proprietor reported -\$24,835 in adjusted gross income. This included net business income of \$39,064, as well as a prior year net operating loss of \$29,150. No annual reports, federal tax returns, or audited financial statements from either 2000 or 2001 are provided, although a "two year comparison report" for 2001 and 2002 suggests that the sole proprietor reported \$16,038 in adjusted gross income in 2001, including net business income of \$23,915.

On appeal, counsel also offers another letter from Mr. [REDACTED]. He again asserts that out of the repair and maintenance expense of \$105,425 taken in 1998 and \$54,218 taken in 2002, which was paid to various corporations, over \$65,000 could be used for a maintenance mechanic position. Without credible evidence of a specific nature relating to such maintenance expenses to demonstrate that the beneficiary's duties would negate future corresponding expenses, such an assertion has limited probative value. Mr. [REDACTED] also states that the petitioner's non-cash depreciation expense should be added back to the taxpayer's income. Counsel adopts this argument and also contends that the director unduly relied on net income in reviewing the petitioner's ability to pay the proffered wage of \$35,817.60. Counsel states that the petitioner paid salaries of between \$143,660 and \$145,818 in 1998 and 2002, respectively, as shown on the federal tax returns. Counsel provides various employee and business reference letters stating that the petitioning company provides insurance and is a stable employer.

No legal authority is cited for these assertions and counsel's contentions are not persuasive in this case. 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 may have employed and paid the beneficiary during a given 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. The record fails to indicate that the petitioner 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 a given period, CIS will also 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). Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. Similarly, showing that the petitioner paid other wages in excess of the proffered wage is insufficient, because wages already expended in paying other salaries are not available to pay the proffered wage beginning on the visa priority date. Although it is suggested that the alien's services would have somehow replaced over \$65,000 paid to outside corporate entities for repair and maintenance, this hypothesis is not corroborated by the record and is not sufficiently persuasive to outweigh the other evidence presented (and omitted) within the information provided to the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

It is further noted that in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537.

The petitioner is a sole proprietorship, a business in which one or more persons operate a business in their personal capacities. 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(s). 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. See *Ubeda v. Palmer*, *supra*.

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, although the sole proprietor's household was comprised of fewer members than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income in each of the relevant years shows that after considering the sole proprietor's net operating loss in 1998, it was improbable that the \$9,208 available was sufficient to pay the proffered wage as well as pay household living expenses. In 1999, there was only \$4,315 available to pay the proffered salary as well as living expenses. In 2001, based only on the two year comparison report, it appears that the sole proprietor's adjusted gross income of \$16,038, even without considering living expenses, was \$19,779.60 less than the certified salary of \$35,817.60. Finally, in 2002, after paying the proffered salary, it can also be concluded that it would be improbable that the sole proprietor could cover reasonable household expenses on the \$3,679.40 sum remaining. Although the director failed to request an itemization of reasonable living expenses, these figures do not suggest that enough income would be remaining to pay the proffered salary as well as cover reasonable living expenses. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

It must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* ability to pay a proffered wage as of the priority date. In this matter, that date was January 20, 1998. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO cannot conclude that the director erred in finding that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa 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.