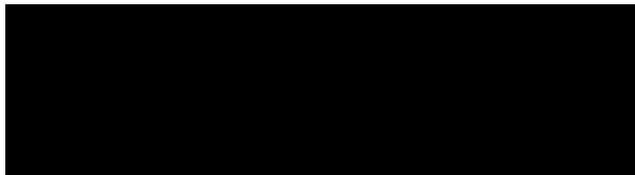




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy**

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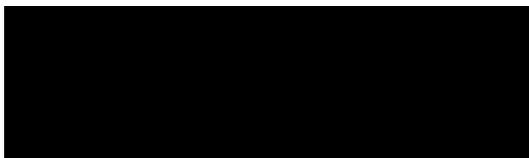
FILE: WAC-02-032-52237 Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2005**

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

The petitioner is an auto upholsterer. It seeks to employ the beneficiary permanently in the United States as a custom upholsterer. 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, counsel submits a brief.

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. See 8 CFR § 204.5(d). 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$17.89 per hour (\$37,211.20 per year). The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1982, and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on January 6, 1998, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted Schedule C to its sole proprietor's individual income tax return for 2000.

On February 15, 2002, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. 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 regulatory-prescribed evidence from 1998 to the time the request for evidence was issued, as well as quarterly wage reports and payroll summaries, including W-2 and W-3 forms.

In response, the petitioner submitted its tax returns for 1998, 1999, 2000, quarterly wage reports for 2001, and payroll documentation for 2001. The quarterly wage reports reflect that the petitioner paid the beneficiary \$18,240 in wages in 2001. Additionally, the petitioner's overall wages were \$208,850 for 2001.

On April 18, 2003, because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director again requested additional evidence pertinent to that ability. The director specifically requested signed and dated tax records from 1998 through 2000, which were subsequently submitted by the petitioner along with its 2001 tax return.

On January 28, 2004, because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director again requested additional evidence pertinent to that ability. The director specifically requested signed and dated tax records for 2002 and 2003 and evidence of the sole proprietor's monthly expenses.

In response, the petitioner submitted its 2002 tax return and evidence it sought an extension of time to file its 2003 tax return. Additionally, counsel "clarified" that the beneficiary "has been working for [the] petitioner since January 1996." Counsel submits W-2 forms showing wages paid by the petitioner to the beneficiary from 1998 through 2002 in the following amounts, respectively: \$11,570, \$17,878, \$21,950, \$18,240, and \$18,410. The sole proprietor wrote a list of his monthly expenses totaling \$1,775, which may be annualized to \$21,300.

The director denied the petition on May 13, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the director erred by failing to consider the sole proprietor had other businesses from which he derived profits, and that he paid all of his expenses and still profited. Additionally, counsel asserts that depreciation expenses should be considered since it is only a paper loss. Counsel also asserts that the petitioner has paid wages to outside contractors "while waiting for the approval of the [beneficiary,]" and that the petitioner's revenues would increase by hiring the beneficiary.

At the outset, the AAO does not accept counsel's appellate assertion that the beneficiary would replace outside contractors or would alter the petitioner's revenues because he is already working for the petitioner and has been since 1996. 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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. 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).

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 (approximately thirty percent of the petitioner's gross income).

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 paid partial wages in the amounts of \$11,570, \$17,878, \$21,950, \$18,240, and \$18,410 in 1998, 1999, 2000, 2001, and 2002, which are \$25,641.20, \$19,333.20, \$15,261.20, \$18,971.20, and \$18,801.20 less than the proffered wage in each year, respectively. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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 contrary to counsel's appellate assertions. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$37,211.20 per year from the priority date:

In 1998, the Form 1040 stated adjustable gross income¹ of \$41,757.
In 1999, the Form 1040 stated adjustable gross income of \$62,307.
In 2000, the Form 1040 stated adjustable gross income of -\$4,092.
In 2001, the Form 1040 stated adjustable gross income of \$36,739.
In 2002, the Form 1040 stated adjustable gross income of \$28,594.

The sole proprietor's annualized expenses are \$21,300 and he supported a family of 5 in 1998, 6 in 1999, and three from 2000 through 2002.

In the year 1998, the sole proprietor's adjusted gross income of \$41,757, which when reduced by the sole proprietor's annualized expenses, leaves \$20,457, which is less than the amount required to pay the difference between the wage paid and the proffered wage.

In the year 1999, the sole proprietor's adjusted gross income of \$62,307, which when reduced by the sole proprietor's annualized expenses, leaves \$41,007, which is sufficient to pay the difference between the wage paid and the proffered wage.

In the year 2000, the sole proprietor's adjusted gross income of -\$4,092 is insufficient to cover the difference between the wage paid and the proffered wage and the petitioner's personal expenses.

In the year 2001, the sole proprietor's adjusted gross income of \$36,739, which when reduced by the sole proprietor's annualized expenses, leaves \$15,439, which is less than the amount required to pay the difference between the wage paid and the proffered wage.

In the year 2002, the sole proprietor's adjusted gross income of \$28,594, which when reduced by the sole proprietor's annualized expenses, leaves \$7,294, which is less than the amount required to pay the difference between the wage paid and the proffered wage.

Therefore, for the years 1998, 2000, 2001, and 2002, the petitioner did not have sufficient net income to pay the proffered wage and the sole proprietor's living expenses.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, does not equal the amount of the proffered wage or more, CIS will review the sole proprietor's assets. The record of proceeding does not contain any evidence about the sole proprietor's personal assets other than his business income reported on his individual income tax returns, from which his adjusted gross income was derived.

The AAO also notes that the petitioner has filed eight other immigrant visa petitions from 1993 through 2004. The petitioner must show that it had sufficient income to pay all the wages at the priority date. Although only one other petition was approved in 1998 and the other petitions were either denied, dismissed on appeal by the AAO, had an approval revoked, or were terminated because the beneficiary obtained lawful permanent status through other means, the petitioner still must show that it could pay the proffered wage of all of those

¹ IRS Form 1040, Line 33.

petitions from the time those petitions were filed until they reached final disposition because the petitioner showed its intent to sponsor and pay all of those wages. The petitioner is unable to establish that it could pay the one proffered wage in this case out of its net income and failed to provide sufficient evidence concerning its sole proprietor's unencumbered and liquefiable personal assets to overcome that finding. If it could not pay one proffered wage, then the petitioner could also not establish that it could pay multiple proffered wages, which also weighs against a decision in its favor.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has failed to establish that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the 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.