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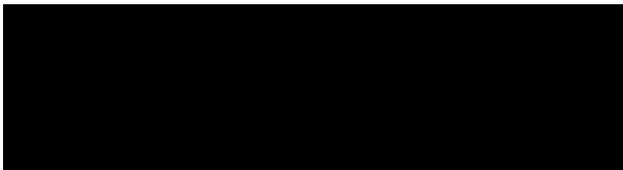
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 04 049 51665 Office: NEBRASKA SERVICE CENTER Date: AUG 01 2008

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a photographic studio. It seeks to employ the beneficiary permanently in the United States as a photographer. 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 also noted that the petitioner had failed to respond to the director's request for evidence of the petitioner's date of birth, with which the director would run security checks. The director denied the petition on both grounds. The director subsequently affirmed the denial when counsel moved the director to reopen and reconsider his denial.

On appeal, counsel submits a brief and additional evidence.

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 \$14.43 per hour (\$30,014.40 per year).

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 1987, to have a gross annual income of \$68,000, and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on January 10, 1998, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;
- Petitioner's letter of October 15, 2003, asserting that 90 percent of its clientele speak Polish, the language of the beneficiary;
- An original certified ETA 750;<sup>1</sup> and,

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<sup>1</sup> The ETA 750 does not require Polish language skills.

- Schedule Cs from the petitioner's Form 1040 for the years 1998–2002;

On April 12, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested complete copies of the petitioner's Form 1040s for the years in which counsel previously submitted only his schedule C's, as well as evidence of the petitioner's monthly living expenses.

In response, the petitioner submitted:

- The petitioner's Form 1040s for the years 1998–2003;
- A statement of the petitioner's monthly living expenses; and,
- The petitioner's bank statements for December 1998 through May 2004, which counsel asserts shows an average monthly balance of \$7,377.04.

The director denied the petition on August 23, 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 September 16, 2004, counsel filed a motion to reopen and reconsider the decision, and submitted the following:

- Bank statements for January 2001–May 2004;

On January 20, 2005, the director affirmed his prior decision, finding that the petitioner's profits, starting with the priority date, could not cover both the proffered wage and the petitioner's living expense. The director also found the bank statements were not reliable indicators of the petitioner's net current assets, since they failed to address the petitioner's liabilities. The director further found that the bank account ending balances since the priority date were often less than the total of the monthly proffered wage and the petitioner's living expenses.

On appeal, counsel asserts that the evidence demonstrates the petitioner's ability to pay the proffered wage because his net income combined with his cash assets "have consistently been greater than the proffered wage."

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 (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 (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 did not establish that it employed and paid the beneficiary the full proffered wage continuously from the priority date.

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). 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 the 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 demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,014.40 per year from the priority date.

In 2002, the Form 1040 stated adjustable gross income<sup>2</sup> of \$22,606.  
 In 2001, the Form 1040 stated adjustable gross income of \$23,808.  
 In 2000, the Form 1040 stated adjustable gross income of \$24,153.  
 In 1999, the Form 1040 stated adjustable gross income of \$16,467.  
 In 1998, the Form 1040 stated adjustable gross income of \$15,180.

The petitioner's annualized expenses are:	<u>1998-2000</u>	<u>2001-2002</u>
	\$15,180	\$17,580

For the years 1998, 1999 and 2000, the petitioner's adjusted gross income exceeded his annualized living expenses by approximately \$5,000-\$7,000, whereas for the years 2001 and 2002, the petitioner's adjusted

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<sup>2</sup> IRS Form 1040, Line 33.

gross income was approximately \$1,000 less than its annualized living expenses. It is therefore not likely that the petitioner could meet his and his dependents'<sup>3</sup> personal expenses from his adjusted gross income and, additionally, pay the proffered wage.

Therefore, for the years 1998 through 2002, the petitioner did not have sufficient income to pay both the proffered wage and petitioner's living expenses.

Counsel's reliance on the balances in the 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.<sup>4</sup> 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, such as the petitioner's taxable income (income minus deductions).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of its wages paid, adjusted gross income. Additionally, the record does not show any other liquid assets available to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner can establish that ability by aggregating its annual net income with its cash assets. We reject that assertion because a company's cash assets depend on its past annual earnings; adding one to the other ignores that cash assets is, in some part, last year's income. Because cash assets, in part, duplicate income, adding them again exaggerates a company's earnings.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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.

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<sup>3</sup> The petitioner's Form 1040s list a wife and child.

<sup>4</sup> We note that the record does not contain bank statements for the period before December 1998.