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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: EAC-04-027-51418 Office: VERMONT SERVICE CENTER Date: AUG 2 2 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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

The petitioner is a auto and truck mechanical repair company firm. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. A copy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. Counsel states in a letter accompanying the instant petition that the original ETA 750 was submitted with a previous petition from the same petitioner. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 29, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 1, 1998. The proffered wage as stated on the Form ETA 750 is $17.86 per hour, which amounts to $37,148.80 annually.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and no additional evidence. The petitioner also submits duplicate copies of many documents previously submitted. Relevant evidence in the record includes copies of tax returns of the petitioner's owner for the years 1998 through 2002; copies of bank statements for an account of the petitioner; a letter dated August 31, 2004 from the petitioner's owner; a copy of a deed for the business premises of the petitioner; a letter dated August 18, 2004 from a real estate agent; and a copy of a certificate of formation of a limited liability company dated February 4, 2004.

On appeal, counsel states that in the year of the priority date the petitioner need establish only its ability to pay the proffered wage from December 1, 1998 until the end of that year. Counsel also states that the director's analysis of the tax returns in the record was incomplete and that the director failed to consider rents and bank statements sources of funds to pay the proffered wage. Counsel states that the petitioner's owner also owns the business premises of the petitioner and that rents paid by the petitioner to the owner are additional funds available to pay the proffered wage. Counsel also states that the business premises is valued between $420,000.00 and $460,000.00 and that the petitioner's net current assets exceed $400,000.00. Finally, counsel states that bank statements in the record provide additional evidence of the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on November 27, 1998, the beneficiary claimed to have worked for the petitioner beginning in March 1997 and continuing through the date of the ETA 750B.

The record contains a letter dated August 21, 2004 from the petitioner's owner in which the owner states the following:

> I am submitting this letter in support of the I-140 Petition submitted on behalf our employee, [the beneficiary] employed by our company since March 1997. The average salary paid to [the beneficiary] during the years that he has been working in our company is $650.00 dollars per week. However, as [the beneficiary] does not have a valid social security number, I have been unable to place him on my payroll. For accounting purposes, I have always incorporated the salary paid to [the beneficiary] under cost of goods sold.
>
> I have never had any difficulty in paying [the beneficiary's] salary. In addition, I purchased on February 9, 1999 the property where my company is located. The property was purchased using available cash assets and remains unencumbered. The current property value is between $420,000.00 to $460,000.00.

> My company does not have lines of credit for the business as the company has always been able to pay its employees and meet with all of the expenses fully, without the need of credit. However, if necessary, I am able and willing to obtain an equity line of credit on the business property.
>
> Kindly note that I recently have incorporated my business under the name [redacted] LLC. The business address and telephone remain the same. I am the registered agent and corporate officer.
>
> Thank you in advance for your cooperation.

(Letter from the petitioner's owner, August 21, 2004).

The information in the letter from the petitioner's owner is insufficient to establish the amount of the beneficiary's compensation in any of the years at issue. The owner states that the average salary paid to the beneficiary has been $650.00 per week, but the time period covered by the letter is from March 1997 until August 21, 2004, a period of more than seven years. The record provides no basis for calculating the amount paid to the beneficiary in 1998, which is the year of the priority date, nor in any of the other years at issue in the instant petition. Moreover, the record lacks copyes of any cashed checks, money orders or similar evidence showing any payments to the beneficiary. Therefore the evidence fails to establish that the petitioner paid the proffered wage to the beneficiary in any of the years at issue.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. 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." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 1998, 1999, 2000, 2001 and 2002. The I-140 petition was submitted on October 30, 2003. As of that date, the federal tax return of the petitioner's owner for 2002 was the most recent return available.

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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than $20,000.00 where the beneficiary's proposed salary was $6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and his wife. The returns for 1998 and 1999 show two dependents and the returns for 2000, 2001 and 2002 show three dependents. Therefore the household size of the petitioner's owner is four persons in 1998 and 1999, and five persons in 2001, 2001 and 2002. No statements of monthly or annual household expenses of the petitioner's owner were submitted for the record in the instant petition.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1998	$29,914.00	not submitted	$37,148.80*	$(7,234.80)
1999	$37,830.00	not submitted	$37,148.80*	$681.20
2000	$34,932.00	not submitted	$37,148.80*	$(2,216.80)
2001	$54,719.00	not submitted	$37,148.80*	$17,570.20
2002	$36,833.00	not submitted	$37,148.80*	$(315.80)

* The full proffered wage, since the evidence fails to establish the amounts of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. Only in the year 2001 is the amount remaining for the household expenses of the petitioner's owner greater than $1,000.00, and even in that year, the amount of $17,570.20 remaining is considered inadequate for the household expenses of a five-persons household.

Counsel states that in the year of the priority date the petitioner need establish only its ability to pay the proffered wage from December 1, 1998 until the end of that year. Even if that statement were accepted, however, the above information fails to establish the petitioner's ability to pay the proffered wage in each of the other years at issue.

Counsel states that the petitioner's owner also owns the business premises of the petitioner and that rents paid by the petitioner to the owner are additional funds available to pay the proffered wage. The record contains a copy of a deed dated February 9, 1999 showing the transfer of a piece of property in North Arlington, New Jersey to the petitioner's owner. The deed identifies the subject property only by block number and lot number, with no street address of the property stated. The deed states that a legal description of the property is attached to the property, but no legal description of the property is attached to the copy of the deed which was submitted in evidence. However, the tax returns of the petitioner's owner indicate that the petitioner's owner is also the owner of the business premises of the petitioner.

The owner's tax returns show deductions for rent on the petitioner's Schedule C's, and corresponding entries for income on the Schedule E's, in the form of rents received for the address which is the petitioner's business premises. Presumably, tax laws require such offsetting entries as a means of properly characterizing the

different categories of income received by the taxpayer. In any event, however, rents received by the owner do not represent additional financial resources of the owner, beyond the owner's adjusted gross income each year. The amounts shown on the Schedule E's as rents received are brought forward on each year's return to page one of the Form 1040, on line 17. Rents received are therefore fully counted along with the other line items for income in the calculation of the taxpayer's adjusted gross income. Moreover, the amounts listed for rent in the petitioner's Schedule C's are much less than the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	1998	1999	2000	2001	2002	2003
January	$2,834.41	$2,601.75	$4,227.73	$2,904.56	$1,496.95	$3,616.89
February	$2,220.67	$3,328.64	$6,202.19	$1,843.54	$6,595.68	$3,637.29
March	$2,932.01	$3,481.23	$2,117.78	$3,809.58	$2,674.46	$3,506.69
April	$584.65	$4,827.72	$4,796.79	$4,578.64	$12,770.89	$5,561.86
May	$1,374.03	$3,393.06	$874.88	$4,218.45	$4,811.76	$5,308.10
June	$1,629.42	$3,819.00	$1,839.93	$2,306.56	$4,991.02	$5,729.41
July	$2,294.91	$2,485.01	$2,452.03	$3,763.12	$3,652.20	$4,613.28
August	$1,756.09	$621.20	$410.87	$2,242.29	$2,591.06	$5,434.52
September	$2,353.29	$3,993.55	$3,908.05	$5,190.01	$2,603.59	
October	$3,028.29	$2,971.82	$2,616.98	$5,229.04	$3,400.61	
November	$1,276.31	$4,386.33	$1,752.61	$4,281.67	$5,023.85	
December	$2,845.13	$1,396.80	$3,431.53	$3,163.38	$1,135.72	

In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on the tax returns of the petitioner's owner.

Counsel states that the petitioner's business premises is valued at between $420,000.00 and $460,000.00 and that the petitioner's net current assets exceed $400,000.00. The record contains a letter dated August 18, 2004 from a real estate agent stating her opinion that the business premises of the petitioner have a current market value between $420,000.00 and $460,000.00. In his letter dated August 31, 2004, the petitioner's owner gives those same figures as the property's current market value. The owner states that he purchased the property on February 9, 1999, using available cash assets and that the property remains unencumbered. The property deed mentioned above shows the purchase price for the property as $75,000.00. The real estate agent's market estimate from August 2004 therefore apparently reflects a significant appreciation in the value of the property during the four and one half years from February 1999 to August 2004.

Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of

the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns. Evidence pertaining to the owner's real estate holdings therefore is relevant evidence which may be considered in evaluating the petitioner's ability to pay the proffered wage.

In the instant case, however, the petitioner has submitted only partial information about the owner's assets and liabilities. In his letter of August 18, 2004, the owner states that the business premises of the petitioner were purchased with available cash assets. No statement of the owner's other assets was submitted for the record nor was any statement of the owner's total liabilities submitted. If the petitioner's owner considers his tax returns to be insufficient to establish the petitioner's ability to pay the proffered wage, the owner was free to submit audited financial statements of his personal finances to establish that ability. Audited financial statements are another form of acceptable evidence under the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel states that the petitioner's net current assets are in excess of $400,000.00. 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). The evidence in the record fails to establish the net current assets of the petitioner's owner during any of the years at issue in the instant petition.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in each of the years 1998 through 2002 and correctly found that the amounts remaining after paying the proffered wage to the beneficiary each year would have been insufficient to pay the reasonable household expenses of the petitioner's owner. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director, evidence in the record indicates that the petitioner, which was a sole proprietorship when the I-140 petition was filed, is no longer in business under that form of organization. In his letter dated August 21, 2004, the petitioner's owner states that he has recently incorporated his business under the name [redacted] The owner states that the business address and telephone remain the same and that he is the registered agent and corporate officer.

The record contains a copy of Certificate of Formation for a limited liability company dated February 4, 2004, in the name [redacted], with the same address as the petitioner's address in North Arlington, New Jersey. The certificate bears a file stamp dated February 4, 2004 from the State Treasurer's office. The petitioner's owner is stated as the initial member of the limited liability company.

Although a limited liability company (LLC) is not a corporation, it is a separate legal entity from its member or members. The tax treatment of an LLC may be similar to that of a sole proprietorship, a partnership or a corporation, depending on the number of members of the LLC and on whether those members are individuals or are corporations. *See* Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, *available at* http://www.irs.gov/pub/irs-pdf/p3402.pdf.

The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

The statements of the petitioner's owner in his August 21, 2004 letter and information in the February 4, 2004 Certificate of Formation for [redacted] indicate that the sole proprietorship which filed the instant I-140 petition is no longer an employer desiring and intending to employee the beneficiary. Therefore, even if the evidence was sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period, the petition would still be denied for failure to establish that the petitioner is a United States employer within the meaning of the regulation at 8 C.F.R. § 204.5(c).

If [redacted], is in fact the employer intending and desiring to employ the beneficiary, any I-140 petition on behalf of the beneficiary would have to be filed by [redacted]. If that company wished to rely on the ETA 750 submitted by the sole proprietorship under the name [redacted] (ETA 750A, block 1), the limited liability company would have to submit documentation to establish that it is a successor in interest to the sole propretorship.

Another issue raised by the evidence is that the record lacks an original Form ETA 750. Counsel asserts that the original ETA 750 was filed with a previous I-140 petition by the same petitioner.

The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any I-140 petition filed under the preference category of INA § 203(b)(3) be accompanied by a labor certification.

The regulation at 8 C.F.R. § 103.2(b) provides:

> Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: "In general, ordinary legible photocopies of such documents *(except for labor certifications from the Department of Labor)* will be acceptable for initial filing and approval." (emphasis added).

The record on appeal is a record of proceeding of the instant I-140 petition, which was assigned receipt number EAC-04-027-51418. The record on appeal contains a copy of a Form I-797 receipt dated December 7, 2001 showing a previous I-140 petition filed by the same petitioner on behalf of the same beneficiary on December 5, 2001, with receipt number EAC-02-057-50418. CIS electronic records show that the prior I-140 petition was denied on August 16, 2002.

The record on appeal does not contain the A-file of the beneficiary. Presumably, the original ETA 750 is found in the beneficiary's A-file. However, the director has not made the original ETA 750 a part of the record of proceeding in the instant petition. Therefore, aside from the other issues discussed above, the instant I-140 petition could not be approved unless the original ETA 750 were made a part of the record of proceeding in the instant petition.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Beyond the decision of the director, the

evidence fails to establish that the petitioner is a United States employer desiring and intending to employ the beneficiary. Moreover, the record of proceeding lacks an original ETA 750 labor certification.

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.