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U.S. Citizenship
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FILE:

EAC 98 044 53835

Office: VERMONT SERVICE CENTER

Date:

APR 04 2006

IN RE:

Petitioner:

Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as an Unskilled Worker 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 employment based immigrant visa petition was initially approved by the by the Director, Vermont Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a farm. It sought to employ the beneficiary permanently in the United States as a permanent farm worker. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was initially filed on January 28, 1998. It was initially approved on August 5, 1998. The alien beneficiary filed an application to adjust his status to that of lawful permanent resident. Upon further review, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on May 16, 2003. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the priority date. The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. The director also requested that the petitioner provide a copy of its 1996 federal tax return along with any other evidence that the petitioner felt would be sufficient to establish its ability to pay the certified wage set forth on the ETA 750. The petition's approval was subsequently revoked on July 14, 2004, pursuant to section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that it has had the ability to pay the proffered wage as of the priority date to the present.

Section 205 of the Act, states: "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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)].

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is August 20, 1996. The beneficiary's salary as stated on the labor certification is \$6.56 per hour or \$13,644.80 per annum. As reflected in Part 5 of the I-140, the petitioner claims that it was established in 1985, produces an annual gross income of \$200,00, a net annual income of \$20,000 and currently has four employees. The ETA 750B, signed by the beneficiary on July 19, 1996, originally indicated that the petitioner employed him since 1994. A DOL stamp, dated October 7, 1997, also reflects that this commencement date was corrected to September 16, 1996, and bears the beneficiary's initials. The record further contains an affidavit, dated June 5, 1998, in which the sole proprietor, [REDACTED] describes his farm and concludes by stating that the beneficiary has been employed as a farm worker for four years. It isn't clear from this statement whether Mr. [REDACTED] statement means that he has employed the beneficiary.

The record suggests that the petitioner is organized as a sole proprietorship. A sole proprietorship is a business that is operated in a single individual(s) personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Relevant to the petitioner's ability to pay the proposed annual wage offer of \$13,644.80, the petitioner provided several of the sole proprietor's Form 1040, U.S. Individual Income Tax Return(s) in response to the director's notification of his intent to revoke the approval of the I-140. These returns reflect that the sole proprietor files his income tax returns jointly with his spouse and declared three dependents in each of the six years provided. They contain the following information:

| Year | Business Net Income (Form 1040) | Farm income or (loss) (Form 1040) | Adjusted Gross Income (Form 1040) |
|------|------------------------------------|--------------------------------------|--------------------------------------|
| 1996 | | \$10,492 | \$ 9,756 |
| 1997 | | \$20,132 | \$ 23,471 |
| 1998 | | \$30,020 | \$ 31,134 |
| 1999 | | (Not Present) | |
| 2000 | -\$39,488 | -\$15,449 | -\$ 54,911 |
| 2001 | -\$ 174 | -\$ 7,932 | -\$ 56,999 |
| 2002 | -\$51,283 | -\$ 9,930 | -\$106,368 |

As noted above, the sole proprietor's tax return for 1999 was omitted, however the petitioner supplied copies of Wage and Tax Statements (W-2s) for 1999 through 2002 showing that the petitioner paid wages to the beneficiary of \$20,866 in 1999; \$26,031.12 in 2000; \$25,863 in 2001, and \$29,269 in 2002. No W-2s for 1996, 1997 or 1998 were provided.

On July 14, 2004, the director revoked the petition's approval, noting that the petitioner had not incurred any "business income" in 1996, and that the sole proprietor's total income of \$10,498 (line 22, Form 1040) was not sufficient to pay the proffered wage of \$13,644.80 and also support his household expenses for a family of five. The director concluded that the petitioner had failed to establish that it had the financial ability to pay the proposed wage offer at the time of filing the ETA 750.

On appeal, counsel provides copies of the sole proprietor's Schedule F, Profit or Loss from Farming and Form 4797, Sales of Business Property from the sole proprietor's 1996 tax return. He also submits for consideration a copy of Schedule C, Profit or Loss from Business, and Schedule F from the sole proprietor's 2002 individual tax return, as well as duplicate copies of the beneficiary's 1999-2002 W-2s.

Counsel contends that the sole proprietor's farming operation had the ability to pay the beneficiary's proposed wage offer and that he had paid the beneficiary's full salary during each year from 1996 through 2002. Counsel asserts that the depreciation expense of \$24,751 should be added back to the petitioner's income as set forth on the 1996 Schedule F provided on appeal. Counsel also maintains that the sole proprietor's farm equipment sale proceeds of \$22,043 as shown on the 1996 Form 4797, should be regarded as cash to the sole proprietor even though there was no taxable gain from the sale as shown by the \$27,650 taken as the cost or other basis, plus improvements and expense of sale of this equipment. Counsel cites no legal precedent for the contention that these figures should be considered instead of the sole proprietor's adjusted gross income, and these assertions are not persuasive.

When CIS examines a petitioner's net income during a given period, it reviews the figure reflected on a 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). 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. It is noted that a depreciation expense taken as a deduction does not require or represent cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate still represents an actual expense of doing business. 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. (Original emphasis.) *Chi-Feng* at 536.

Counsel asserts that the sole proprietor has no need to demonstrate the ability to pay the proffered wage out of the net income because the beneficiary was an employee of the sole proprietor throughout 1996 and that this is already considered as a business expense. Counsel claims that this is demonstrated through the \$31,345 taken as “labor hired” on line 24 of Schedule F of the 1996 tax return.

Although it is noted that if a petitioner establishes by documentary evidence that it employed a beneficiary at a salary equal to or greater than the proffered wage as described in the approved labor certification, such evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage for that specific period, here it is noted that no first hand evidence such as W-2s, Form 1099s, or other documentation has been provided in this matter to establish specific amounts of wages paid to the beneficiary in either 1996, 1997 or 1998. The labor expense taken on the sole proprietor’s tax return does not identify the recipient of these payments. The record of proceeding does not contain any W-2s or Form 1099s or other evidence of payments made to the beneficiary for the years 1996, 1997, and 1998. Counsel’s assertion in this regard does not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, as mentioned earlier, the statements relevant to the dates of the beneficiary’s employment with the petitioner do not appear to be consistently represented on the ETA 750B and in other documents. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor’s adjusted gross income, personal cash or cash equivalent 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. Generally, the business-related income and expenses are reported on Schedule C or, if farm profit or loss, Schedule F, 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 individually held funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner’s gross income.

In the instant case, although payment in excess of the proffered wage in 1999 through 2002 demonstrates the petitioner’s ability to pay the certified wage in those years, the priority date of this petition is August 20, 1996. If a petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the

priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear and is reflected in the regulation at 8 C.F.R. § 204.5(g)(2). Here, even considering that the sole proprietor's family is slightly smaller than the one discussed in *Ubeda*, it is noted that the sole proprietor's adjusted gross income in 1996 was less than the proffered wage by \$3,888.80. In 1997, the proffered salary of \$13,644.80 represented 58% of the sole proprietor's adjusted gross income of \$23,471. In 1999, the certified wage represented 44% of the sole proprietor's adjusted gross income of \$31,134. Although this case would have been better served if the director had requested the petitioner to provide a summary of sole proprietor's actual household expenses during these years, and any other source of funds available to the to pay the wage, it is noted the evidence submitted does not demonstrate that the sole proprietor could support the household as well as pay the proffered wage in these years.

The AAO cannot conclude that the director erred in revoking the approval of the petitioner's I-140 based on the petitioner's failure to show its continuing ability to pay the beneficiary's wage offer as of the priority date of August 20, 1996. A petitioner must establish its *continuing* ability to pay based on the requirements set forth in 8 C.F.R. § 204.5(g)(2), which states that annual reports, federal tax returns or audited financial statements must be provided to establish the ability to pay the certified wage. (Emphasis added.) The financial evidence provided for 1996-1998, failed to establish the petitioner's ability to pay the proffered wage. Based on the financial data that was provided to the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the August 20, 1996, priority date of the petition.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, at 590, ((citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

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.