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FILE: EAC 03 104 50694 Office: VERMONT SERVICE CENTER Date: **JAN 24 2006**

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

The petitioner is a building contractor. It seeks to employ the beneficiary permanently in the United States as a civil engineering technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits a brief.

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).

Here, the Form ETA 750 was accepted on April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$14.08 per hour (\$29,286.40 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.<sup>1</sup> On the petition, the petitioner claimed to have been established in 1997, and to have a gross annual income of \$25,501. On the Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Former counsel's G-28;
- The original ETA 750; and,
- Copies of a few of the petitioner's business bank statements for 2002 giving his address as [REDACTED]; and,
- The petitioner's 2001 Schedule C listing [REDACTED] as the business address.

On December 5, 2003, 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

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<sup>1</sup> The ETA 750 listed the petitioner as [REDACTED]. If it operated as a corporation in 2001, the petitioner must submit corporate returns for 2001. If not, the petitioner should explain why the ETA 750 listed "Inc." as part of its name.

wage beginning on the priority date. The director specifically requested the petitioner's federal income tax returns for 2001.

In response, the petitioner submitted:

- A copy of the petitioner's complete Form 1040 return<sup>2</sup>, filed separately from his wife, for 2001 with Schedule C; and,
- Counsel's G-28.

On June 3, 2004, the director requested additional evidence pertaining to the petitioner's ability to pay the proffered wage, and specifically requesting an itemized list of all of the petitioner's monthly household expenses for 2001.

In response, counsel submitted:

- The petitioner's June 8, 2004 statement, notarized, stating that [REDACTED], his wife, had covered all his living expenses;
- Anna Beydik's notarized statement stating that the petitioner had lived with her in her home since 2000, first at [REDACTED] East Brunswick, and since May 2002, at [REDACTED] East Brunswick, New Jersey, adding that during 2001 she had covered his expenses for food, shelter and his other needs;
- A marriage certificate from East Brunswick, New Jersey, showing that the petitioner and his wife were married in East Brunswick on November 16, 2001;
- Ms. [REDACTED] Form 1040 return, filed separately from her husband, for 2001, reporting adjusted gross income of \$46,182, and listing her son as her only dependent;
- Copies of the petitioner and his wife's joint bank statement dating from November 13, 2001; and,
- A deed made May 26, 1998, granting ownership to Ms. [REDACTED] East Brunswick.

The director denied the petition on September 14, 2004, finding that the evidence submitted with the petition and in response to its Requests 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 petitioner and Ms. [REDACTED] together earned \$98,316 in 2001, establishing the petitioner's ability to pay the proffered wage of \$29,286.40.

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

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<sup>2</sup>It is noted that the 2001 Schedule C that he submitted with the petition listed [REDACTED] East Brunswick, NJ [REDACTED] as the business address.

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 the beneficiary.

If the petitioner does not establish that it employed, 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.

The tax returns demonstrated the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$29,286.40 per year from the priority date.

In 2001, the petitioner's Form 1040 stated adjusted gross income<sup>3</sup> of \$48,451.

Despite the director's request in the second request for evidence, counsel did not submit any evidence to demonstrate the amount of the petitioner's annualized living expenses. Counsel instead submitted notarized statements and other documents purporting to show that Ms. [REDACTED] paid all of the petitioner's living expenses.

It is noted that there are discrepancies in the residential and business addresses listed on the documents purporting to be the petitioner's and his spouse's Form 1040s for 2001, each return filed as "Married filing separate return."<sup>4</sup> These discrepancies raise questions about the authenticity of the documents themselves but also about whether the petitioner and his wife resided in the same household or town, considering the addresses on their respective returns listed their residences in 2001 in separate towns. If they did live separately, the question arises whether the petitioner would have had additional living expenses beyond those mentioned in Ms. [REDACTED]'s affidavit. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent, including the petitioner's ability to pay the proffered wage in 2002 and the petitioner's

<sup>3</sup> IRS Form 1040, Line 33.

<sup>4</sup> The petitioner lists two different addresses for his business on what purports to be the same Schedule C attached to his Form 1040 for 2001. The petitioner submitted the first such Schedule C with the petition and submitted the second with his response to the second RFE.

living expense in that year as well. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.