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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 031 50585 Office: VERMONT SERVICE CENTER Date: **JUL 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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner, as a sole proprietor, 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. Accordingly, the director denied the petition.

On appeal, counsel states that the petitioner is not a sole proprietor and examines other sources of funding for the proffered wage. Counsel submits further documentation.

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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$19.45 per hour, which amounts to \$40,456 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1997.

Based on the federal income tax returns submitted, the petitioner appears to be structured as a sole proprietorship.¹ On the petition, the petitioner claimed to have been established in 1989, and to have six employees. The petitioner did not identify its gross or net annual income. In support of the petition, the sole proprietor submitted a Schedule C, for tax year 2001, along with the beneficiary's W-2 Forms for tax years 2001 and 2002. The Schedule C indicated the sole proprietor had a net profit of \$12,973 in 2001. The beneficiary's W-2 Forms indicated that he had earned \$21,120 in tax year 2001 and \$21,500 in tax year 2002.

¹ On appeal, counsel states that the petitioner is not a sole proprietor, but rather a corporation. This issue will be addressed further in these proceedings.

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, on June 28, 2004, the director requested additional evidence pertinent to that ability. The director noted that the combination of the beneficiary's 2001 wages and the sole proprietor's net profits was \$34,093, which was \$6,363 less than the proffered wage of \$40,456. The director specifically requested that the petitioner submit copies of its 2001, 2002, and 2003 federal tax returns. The director stated that if the petitioner's business was organized as a corporation that it should submit the corporate tax return. The director also noted that if the business was organized as a sole proprietor, that the petitioner should submit the owner's individual tax return, Form 1040, as well as any Schedules C relating to the business. The director specifically noted that the petitioner had submitted a Schedule C for its 2001 federal tax return, but that it had not submitted the actual Form 1040 tax return. The director finally requested that if the petitioner had employed the beneficiary in 2003, the petitioner should submit a copy of the beneficiary's 2003 W-2 Form.

In response, the sole proprietor submitted its Forms 1040, with accompanying Schedules C, for tax years 2001, 2002, and 2003. The tax forms submitted indicated the following adjusted gross incomes for the tax years 2001 to 2003: -\$10,916, \$3,136, and \$40,423. All three tax returns on the respective Schedule C identified the proprietor [REDACTED] and the business name for the sole proprietor's business as "Tico Dental Laboratories, Inc." The petitioner also submitted the first page of the petitioner's monthly checking account statements from Chase Bank for January 2001 to July 2002. Finally the petitioner submitted the beneficiary's 2003 W-2 Form that indicated he earned \$21,094 in tax year 2003.

In a cover letter, counsel stated that the petitioner owns the building in which the business is located as well as another piece of real estate, and stated that the sole proprietor's tax return depreciates these properties. With regard to the petitioner's 2001 tax return, counsel stated that there was a profit of \$12,973 and depreciation of \$1,225. Counsel also stated that a \$25,000 negative deduction expense was depreciation and other deductions based on the ownership of real estate. Counsel requested that the items depreciated be considered available funds to pay the proffered wage, since the deduction was only a paper loss. Counsel also noted that Cost of Labor in Part II of the petitioner's Form 1040 reflects \$109,015, which was paid to independent contractors who performed the same job as the beneficiary. Counsel states that the cost of labor will be reduced as soon as the beneficiary takes the proffered position on a permanent full time capacity. Counsel also notes that the beneficiary's W-2 form for 2001 reflects \$21,120. Counsel requested that the director review the sole proprietor's 2002 and 2003 tax returns with the same interpretation counsel gave to the 2001 return with regard to cost of labor, depreciation, and deductions.

On November 17, 2004, the director denied the petition. In his denial, the director noted the petitioner's adjusted gross income for the tax years 2001, 2002, and 2003. The director, based on the beneficiary's 2003 W-2 Form and the petitioner's adjusted gross income in 2003, determined that the petitioner did have the ability to pay the proffered wage in 2003. However the director determined that the petitioner had not established its ability to pay the proffered wage as of the 2001 priority date. The director noted that the bank statements submitted by the petitioner showed monthly ending balances ranging from \$516.13 to \$13,840.25. The director stated that the balances were not greater than or equal to the additional \$19,336 need to pay the difference between the beneficiary's actual wages and the proffered salary in 2001, or the \$18,876 needed to pay the difference between the beneficiary's actual wages and the proffered wage in 2002. The director further noted that a sole proprietor has to demonstrate that he can sustain himself or herself at the level of income that exceeds the federal poverty

guidelines for the 2001 priority date and for all subsequent years until the beneficiary obtains permanent resident status. The director stated that the sole proprietor did not establish that he had sufficient income to support himself, and provide the difference between the beneficiary's actual wages and the proffered wage in either 2001 or 2002.

On appeal, counsel states that the petitioner is not a sole proprietor. Counsel described [REDACTED] as the stockholder of a corporate petitioner. Counsel states that the director's decision may be a result of the manner in which the petitioner filed his tax returns. Counsel notes that Schedule C of Roberto Graham's personal tax return indicates he is doing business as Tico Dental Laboratories Inc. Counsel states that whether or not the tax return filing is correct, it is evidence that [REDACTED] does business through a corporation. Counsel states that [REDACTED] is the petitioner, and that [REDACTED] is the stockholder in the corporation. Other than pointing to the "Inc." in the petitioner's name, counsel provide no evidence to support his assertion.

Counsel states that the petitioner explained its finances in its response to the director's request for further evidence, and that through this submission and additional documentation, the petitioner established that it had the ability to pay the proffered wage in 2001. Counsel indicates the funds available to pay the wage in 2001 were derived from the corporate profit of almost \$13,000 in 2001; the depreciation of \$1,225 in 2001, the deduction of real estate on property owned by [REDACTED] the petitioner's cost of labor of over \$109,000 which would be available when the beneficiary worked fulltime for the petitioner, and the beneficiary's salary of \$21,200 in 2001. Counsel concludes by stating that there was over \$35,000 available to pay the beneficiary in 2001, just considering profit, depreciation and salary paid to the beneficiary, and that the remaining \$5,000, a small percentage of the total proffered wage, could and would easily come from the monies paid to independent contractors. Counsel submits two W-2 Forms for 2001 that indicate the sole proprietor paid [REDACTED] \$14,700 in 2001, and in the same year paid [REDACTED] \$12,308.51. Counsel submits an additional W-2 Form that indicates the sole proprietor paid [REDACTED] \$21,987.66 in tax year 2002.

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. As stated previously, the sole proprietor submitted W-2 Forms for the beneficiary for tax years 2001, 2002, and 2003. Based on these documents, the beneficiary earned \$21,120 in 2001, \$21,500 in 2002, and \$21,094 in 2003. These wages are not equal or greater to the proffered wage of \$40,456. Therefore, the sole proprietor did not establish that it employed or paid the beneficiary the proffered wage, or any wages, prior to or following the 2001 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).

Contrary to counsel's assertions, the petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Although counsel states that the petitioner is a corporation, the tax documents submitted to the record are not for a business structured as a corporation, but rather for a sole proprietorship. While counsel may assert that the petitioner is a corporation, 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 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, 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 out of their adjusted gross income or other available 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, the sole proprietor supports himself in the years 2001, 2002, and 2003. As previously stated, the petitioner's adjusted gross income in the years 2001 to 2003 is the following: -\$10,916, -\$3,136, and \$40,423. It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal monthly household expenses. Nevertheless, even without such information, the sole proprietor's adjusted gross income for any of the years from 2001 to 2002, minus the difference between the beneficiary's actual wages and the proffered wage, namely \$19,336 and \$18,956, leaves a substantial negative adjusted gross income to support the household expenses of the sole proprietor for these two years.

With regard to tax year 2003, the sole proprietor's adjusted gross income is \$40,423. The difference between the beneficiary's actual wages of \$21,084 and the proffered wage of \$40,456, is \$19,339. It appears reasonable that the sole proprietor would have the ability to pay the difference between the beneficiary's actual wages and the proffered wage, and support himself based on the adjusted gross income for the tax year 2003. Therefore the sole proprietor has established it is capable of paying the proffered wage in 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner in the instant petition has not established its ability to pay the proffered wage as of the 2001 priority date and through tax year 2002.

In addition, although counsel states on appeal that a \$1,225 depreciation expense noted on Line 13 of Schedule C of the sole proprietor's Form 1040 for tax year 2001 is a source of additional funds to pay the proffered wage, this expense has already been considered as part of the sole proprietor's total expenses. It is not viewed as additional funds available to pay the proffered wage. Counsel also notes that a \$25,000 depreciation expense in tax year 2001 can be used to pay the proffered wage. The AAO does not find counsel's analysis to be persuasive. 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.

Furthermore the sole proprietor's real estate assets, which includes the dental office, are not readily available to pay the proffered wage. In other words, the sole proprietor would have to sell its business property to be able to use such funds to pay the proffered wage.

Since counsel has not provided any proof of his assertions with regard to the petitioner's corporate status, the director was correct to treat the petitioner as a sole proprietor. 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 AAO notes that if the petitioner makes any further actions in regards to the instant petition, such proof must be included. The AAO also notes that if the petitioner were shown to be a corporation, the corporation's owner would not be able to use his assets to pay the wage. CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel also asserts that the difference between the beneficiary's present salary and the proffered wage can be made up through the use of funds presently being expended to pay other contract labor once the beneficiary is working fulltime. While the record identifies some workers employed by the sole proprietor, it does not verify their full-time or part-time employment. Furthermore, the record does not identify these workers as the sole proprietor's only employees, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. Moreover, there is no evidence that the position of the other individuals whose Forms W-2 were submitted to the record involve the same duties as those set forth in the Form ETA 750. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Finally the record of proceeding contains bank statements from the sole proprietor's checking accounts covering the period January 2001 to July 2002, with an average monthly balance of \$5,803. The average balance is not

sufficient to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year. The ending balances are also not sufficient enough to cover the remaining wage and always sufficient to cover the full wages paid on a monthly basis.

While the sole proprietor has established its ability to pay the proffered wage in tax year 2003, it has not established that it has the ability to pay the proffered wage as of 2001 and through 2002. Therefore the sole proprietor has not established its ability to pay the proffered wage as of the 2001 priority date and onward. 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 with regard to the petitioner's ability to pay the proffered wage. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.