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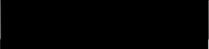
U.S. Citizenship and Immigration Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 02 2006

SRC 05 073 52343

IN RE:

Petitioner:

Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as an 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 employment based visa petition was denied by the Director (director), Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further investigation and entry of a new decision.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler. 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 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.

On appeal, counsel maintains that the petitioner has established its continuing ability to pay the proffered wage.

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:

*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. 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$38,875 per year. The ETA 750B, signed by the beneficiary on April 26, 2001, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the visa petition, filed on January 18, 2005, the petitioner claims that it was established in 1989, has one employee and declares \$192,000 as a gross income.

The petitioner is structured as a sole proprietorship. Because the petitioner submitted insufficient information regarding the petitioner's ability to pay the proffered wage, the director issued a notice of intent to deny on February

14, 2005 and on March 18, 2005. The director sought copies of the petitioner's federal income tax returns for 2002 and 2003 in addition to the 2001 return that had been provided, as well as an explanation of any wages or compensation paid to the petitioner's one employee. The petitioner's response included copies of the requested tax returns and further indicated that the sole proprietor is the only employee of the business and simply declares the net profit as his income on his individual tax return. The 2001, 2002, and 2003 Form 1040, U.S. Individual Income Tax Return(s) indicate that the sole proprietor filed jointly with his spouse and declared one dependent. The tax returns also contain the following information:

	2001	2002	2003
Gross Receipts or Sales (Sched. C			
Profit or Loss from Business)	\$ 192,730	\$179,560	\$246,242
Gross Income (Sched. C)	\$ 99,996	\$ 99,415	\$135,240
Total Expenses (Sched. C)	\$ 71,603	\$ 77,162	\$104,744
Net profit or (loss) (Sched. C & Form 1040)	\$ 28,393	\$ 22,253	\$ 30,496
Adjusted Gross Income (Form 1040)	\$ 24,027	\$ 17,683	\$ 21,656

It is further noted that the sole proprietor received some of his income as interest income. In addition to the tax returns, the petitioner provided a letter, dated March 2, 2005, from its accountant, [REDACTED] CPA." Mr. [REDACTED] states that the majority of profits realized by the business in excess of living expenses have been reinvested in inventory.

The director denied the petition on March 30, 2005. She concluded that the petitioner failed to establish its continuing ability to pay the proffered wage, determining that the petitioner was not employed by the beneficiary and that the proffered wage exceeded the sole proprietor's adjusted gross income.

On appeal, counsel noted that the director had erroneously referred to "Schedule L" in her decision and that the "assets and liabilities" of the petitioning business are encompassed within the figures on Schedule C, Profit or Loss from Business. Counsel also claims that the director should have requested to submit evidence of individual assets and living expenses.

Although the director noted the sole proprietor's modest reported adjusted gross income, because there is evidence of possible additional liquid assets, the AAO concurs with counsel in remanding the case to the director for consideration of additional individual assets that may have been available to pay the proffered wage. It is noted that CIS will first examine whether the petitioner may have 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. Wages less than the proposed wage offer will also be given relevant consideration. In this matter, no evidence of employment or payment of wages to the beneficiary was provided.

If the petitioner does not establish that it may have 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). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is a sole proprietorship, additional factors will be considered. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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 (line 12). 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). Such petitions often include a summary of household expenses of the sole proprietor.

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, as noted above, in each of the relevant years, the proffered wage of \$38,875 exceeded the sole proprietor's adjusted gross income. Although it is difficult to see how the proffered wage as well as the living expenses of the sole proprietor and his family may be supported, the case will be remanded to the director to specifically query the petitioner as to any credible documentation of individual cash or cash equivalent assets that would have been readily available to pay the proffered wage. The director should also solicit a summary of the sole proprietor's family living expenses to be included in the calculation.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). 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 consistent with the foregoing and entry of a new decision.