



U.S. Citizenship
and Immigration
Services

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File: EAC-03-205-50223 Office: VERMONT SERVICE CENTER Date: SEP 07 2006

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of ladies sportswear and seeks to employ the beneficiary permanently in the United States as a sample stitcher (“samplemaker”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s February 16, 2005, denial of the petitioner’s motion to reopen, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtained permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 for the position of a sample stitcher is \$13.66 per hour, 35 hours per week, which is equivalent to \$24,861.20 per year. The labor certification was approved on December 30, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on July 2, 2003. On the I-140, counsel listed the following information related the petitioning entity: established: September 18, 1997; gross annual income: \$629,944; net annual income: \$7,712; and current number of employees: 5; wages per week: \$460.60.²

The case was initially denied on August 31, 2004, based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner filed a motion to reopen, which was then denied on February 16, 2005, for failing to overcome the reason for denial. The petitioner then appealed to the AAO. We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 case at hand, on Form ETA 750B, signed by the beneficiary, the beneficiary has listed that she has been employed with the petitioner since November 1998 as a samplemaker. The record, however, contains no evidence of wage payment. In a Request for Additional Evidence ("RFE"), the service center had requested that the petitioner supply the beneficiary's W-2 statements, or forms 1099 for the years 2001 through 2003. In the petitioner's response to the RFE, counsel contends, "we submit the real issue is not how much petitioner actually paid her, but whether petitioner can and is able to pay the proffered wage." While counsel's statement regarding the beneficiary's pay is true, prior wage payments exhibited by W-2 statements would demonstrate the petitioner's ability to pay the proffered wage. However, since the petitioner has submitted no evidence of prior wage payment to the beneficiary, we cannot consider prior wages paid.

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. 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.

² We note that the wage listed on the I-140 Petition is incorrect. Based on the wage rate on the certified labor certification, the weekly wage for 35 hours per week at \$13.66 per hour, would be \$478.10. The petitioner would need to pay this amount to the beneficiary on a weekly basis.

The petitioner's business was formed as a limited liability company (LLC). As an LLC, the petitioner would file, and has submitted, Forms 1065, U.S. Return of Partnership Information for the years 2002, and 2003.³ Where a partnership's income is exclusively from a trade or business, the net income figure equates to ordinary income, on page one, line 22 of the petitioner's Form 1065. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,861 per year from the priority date.

<u>Tax Year</u>	<u>Net income or (loss)</u>
2003	-\$31,182
2002	-\$12,674
2001	not submitted

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either of the years above.

As an alternate means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are current assets less current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets would be converted to cash as the proffered wage becomes due. The petitioner's federal tax returns demonstrate the following in net current assets:

<u>Tax Year</u>	<u>Net current assets</u>
2003	\$9,389
2002	\$86,660

Following this second analysis, the petitioner's federal tax returns show that the petitioner could pay the beneficiary the proffered wage in the year 2002, but not 2003. However, the petitioner has not established consistently in any of the three foregoing methods, the ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

On appeal, counsel has submitted information related to the petitioning owner's assets, including an affidavit stating that the owner holds property worth \$782,680 in New Jersey and a second home in Florida, which is valued at \$223,132. Counsel asserts that these assets should be considered in determining the petitioner's ability to pay the proffered wage. The petitioner is an LLC. Although structured and taxed as a partnership, the owners in an LLC enjoy limited liability similar to owners of a corporation. An LLC, like a corporation is a legal entity separate and distinct from its owners. The owners are generally not liable for the company debts and obligations.⁴ An investor's liability is limited to his or her initial investment. As the owners and others are only liable to his or her initial investment, the owner's total income and assets cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage from the funds of the LLC.

³ The record also contains the 2001 Schedule K-1, Partner's Share of Income, Credits, Deductions, but not the full 2001 U.S. Return of Partnership Income for the petitioner.

⁴ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

Counsel cites to the case of *Matter of Ranchito Coletero*, 2002-INA-105 (BALCA Jan. 8, 2004), and asserts that *Matter of Ranchito Coletero* case should be applicable in the case at hand. First, we note that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Second, the *Matter of Ranchito Coletero*, is not applicable to the current case. In *Matter of Ranchito Coletero*, BALCA considered whether the “individual assets of the principals may be considered when the employer is a **sole proprietorship**.” (*Emphasis added*). BALCA found that consideration of individual assets would be appropriate in the case of a sole proprietorship. Similarly, we note that CIS would consider these assets, if the petitioner were structured as a sole proprietorship.⁵ However, in the case of an LLC, or corporation, CIS may not “pierce the corporate veil” and look to the assets of the owner to satisfy the petitioner’s ability to pay the proffered wage. Therefore, while the petitioner’s owner may have substantial individual assets, those assets are not relevant in the case at hand. Assets of the LLC’s shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner’s ability to pay the proffered wage.

Additionally, counsel contends that “CIS has erred in failing to address the issue of whether ongoing bank balances substantially in excess of the proffered wage is proof of ability to pay the proffered wage.” Further, counsel submits that the “AAO should make a definitive ruling on said issue with an explanation of the rationale therefore.” In support, counsel has submitted the petitioner’s bank statements for each month for the calendar years 2001, 2002, 2003, and for the months January 2004 through May 2004. Counsel contends that the statements demonstrate that the petitioner had enough money in the bank to pay the beneficiary’s proffered wage on a monthly basis.

To address the issue of bank statements definitively, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner’s ability to pay a proffered wage. This regulation allows for consideration of additional material “in appropriate cases.” Counsel has asserted that “C.I.S. has sidestepped addressing the issued [sic] posited therein: Does an employer have the ability to pay a given wage when its funds in the bank, even after deducting said wage, are on the plus side?”

We caution that a petitioner must demonstrate why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise does not provide an accurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements reflect additional available funds to the amounts listed on the petitioner’s tax return, such as the cash specified on Schedule L, which would already be considered in determining the petitioner’s net current assets. As a fundamental point, the petitioner’s tax returns are a better reflection of the company’s financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

⁵ A sole proprietorship, unlike a corporation, 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). Accordingly, a 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).

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. The petition cannot demonstrate this ability through: (1) prior wage payment; (2) positive net income; or (3) sufficient net current assets in the amount of the proffered wage. Accordingly, the petition was properly denied.

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.