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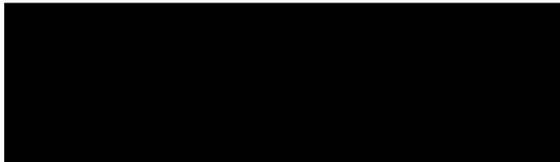


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **SEP 22 2006**
LIN 02 247 52068

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as an Unskilled Worker, Other pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electronic service center.¹ It seeks to employ the beneficiary permanently in the United States as an electronic 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 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 beneficiary has received wages that are sufficient to establish the petitioner's ability to pay the proffered wage. Counsel submits further documentation.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 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(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 August 19, 1997. The proffered wage as stated on the Form ETA 750 is a weekly salary of \$500 or an annual salary of \$26,000 a week. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ The petitioner appears to be the beneficiary, as will be discussed further in these proceedings.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner did not indicate when it was established, how many employees it has, or its gross or net annual income. In support of the petition, counsel submitted the first page and Schedule C for the petitioner's Form 1040, individual income tax return, for tax years 1997, 1998, and 1999. All first pages of the Forms 1040 identify [REDACTED] and [REDACTED] as a married couple filing jointly and the Schedules C identify [REDACTED] as the sole proprietor. These incomplete returns indicated that the petitioner had adjusted gross income of \$26,274 in 1997, of \$24,550 in 1998 and of \$24,555 in tax year 1999.

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 November 21, 2002, the director requested additional evidence pertinent to that ability. The director requested the original copy of Form ETA 750 Parts A and B. The director also requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date of August 19, 1997 and to the present. The director stated that such evidence might include audited profit/loss statements, bank account records, and/or personnel records.

In response, counsel stated that the petitioner had already provided the Service Center with the original copy of the ETA 750, and submitted a copy of the document. Counsel also submitted an altered second page of the I-140 petition that indicates the petitioner was established in 1994 and has two employees.

Counsel also submitted the petitioner's Form 1040, U.S. Individual Income Tax Return for tax years 2000, 2001, and 2002. These documents again identify [REDACTED] and [REDACTED] as a married couple filing jointly. The petitioner only submitted a Schedule C for the tax year 2002. This document identifies the sole proprietor as [REDACTED] and [REDACTED]. The 1040 Forms indicate the petitioner had an adjusted gross income of \$13,559 in 2000, of \$13,119 in 2001, and of \$33,809 in 2002. Counsel also submitted the petitioner's monthly bank account statements from St. Paul Federal Bank interest checking account, for the months of May, September, and November 1997, the months of February, May, and October of 1998, and the months of May, October, and December 1999.² The petitioner also submitted copies of bank statements from Banco Popular from September 2000 to October 2000 and from September 2001 to December 2002.³ The petitioner also supplied copies of checks from St. Paul Federal Bank for what appeared to be payments for utilities, among other items.⁴

On March 15, 2006, the director denied the petition. The director stated that the petitioner had ordinary income of \$14,117⁵ in tax year 2001, less than the proffered wage of \$26,000. The director then stated that although the petitioner's income tax return for 2002 indicated that the petitioner's net income was sufficient to pay the proffered wage, the petitioner had not submitted tax returns for the years 1998, 1999, and 2000.

² [REDACTED] interest checking bank account is in the name of [REDACTED] doing business as [REDACTED]

This checking account is in the name of [REDACTED]
It is difficult to read the check copies due to their reduced size.

⁵ The director incorrectly refers to line 12 of the Form 1040, the petitioner's business income, rather than line 33, the petitioner's adjusted gross income.

The director then stated that judging by the petitioner's 2001 income tax return, and the omission of the missing tax returns, the petitioner has not established that it has the ability to pay the proffered wage.

The director then reviewed the petitioner's checking account statements, and stated that the petitioner would need a minimum of \$2,167 in available monthly cash reserves to pay the proffered wage. The director reviewed the opening balances of the petitioner's bank statements September 1997, October 1998, and May 1999, and stated that these opening balances were \$1,746.15, \$785.07, and \$1,680.26, respectively. Although the director noted that the more recent bank balances appeared larger, he also stated that the checking account balances in 1997, 1998, and 1999 did not demonstrate that the petitioner's finances were sufficient to pay the proffered wage, either on a monthly or yearly basis.

On appeal, counsel states that the director failed to consider that the petitioner's net income is the amount after the beneficiary's wages were paid. Counsel states that the record indicates that since the time the petitioner commenced operations, the beneficiary received wages at times of more than \$26,000 per year. Counsel also states that the petitioner provided copies of bank statements indicating the amount paid to the beneficiary, and that CIS erred in reviewing the beginning and ending bank balances statements without considering the actual payments made to the beneficiary for his wages. Counsel then submits bank statements from Banco Popular, Westmont, Illinois, for May 2002 to December 2006 and from National City, Royal Oak, Michigan, for the month of December 2005. The joint holders of the Banco Popular account are identified as [REDACTED] and [REDACTED]. The joint holders of the National City account are identified as [REDACTED] or [REDACTED]. The statements list both deposits and debits into the accounts, but do not provide any information on individual entries.

The director in his request for further evidence requested that the petitioner had to establish its ability to pay the proffered wage as of August 19, 1997 to the present, and stated that the petitioner could submit audited profit/loss statements, bank account records, an/or personnel records. In his decision, the director refers to the monthly balances in these accounts. The record is not clear why the director requested such materials instead of the evidentiary documentation stipulated by 8 C.F.R. 204.5 (g)(2), namely, copies of annual reports, federal tax returns, or audited financial statements. Documents such as profit and loss statements, personnel records, or bank account records would only be viewed as supplementary documentation.

In responding to the director's request for further evidence, the petitioner submitted bank statements from two banks. On appeal, counsel submits further bank statements from two checking accounts. Counsel's reliance on the balances in the petitioner's bank accounts or the deposits placed into the identified account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750 but rather indicated he had worked for another U.S. company, ██████████ in Arlington, Illinois from July 1990 to August 1993.⁶ On appeal, counsel asserts that bank account statements establish that the beneficiary received wages since the sole proprietor began business activities and that the beneficiary received wages, at times of more than the proffered wage of \$26,000. To further substantiate this assertion, counsel submits copies of bank statements for ██████████ and ██████████ from Banco Popular and National City banks. However the bank statements appear to be for the beneficiary and his wife. While the bank statements do show deposits and withdrawals from the two accounts, none of the deposits are identified as paychecks or wages for the beneficiary. Therefore, these bank documents are given no weight in the present proceedings. Therefore the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 1997 priority date year and to the present. Furthermore, the petitioner has the obligation, in these proceedings, to establish that it has the ability to pay the entire proffered wage as of the priority year and to the present.

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).

Based on the income tax returns submitted with the petition and in response to the director's request for further evidence, 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). 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, his wife, and four children. As previously stated, counsel submitted the first page and Schedule C for the petitioner's Form 1040, individual income tax return,

⁶ It is noted that the record contains no letter of employment verification for this previous employment.

for tax years 1997, 1998, and 1999.⁷ These incomplete returns indicated that the petitioner had adjusted gross income in 1997 of \$26,274, of \$24,550 in 1998 and of \$24,555 in tax year 1999. In response to the director's request for further evidence, counsel submitted the petitioner's Form 1040, U.S. Individual Income Tax Return for tax years 2000, 2001, and 2002. These documents indicate the petitioner had an adjusted gross income of \$13,559 in 2000, of \$13,119 in 2001, and of gross income of \$33,809 in 2002.

The director did not request and nor did the petitioner provide an itemized list of reoccurring household expenses with which to gauge if the sole proprietor could both pay the proffered wage and support himself and his dependents. However, in those tax years in which the sole proprietor had adjusted gross income that was less than the proffered wage of \$26,000, namely tax years 1998, 1999, 2000, and 2001, the preponderance of the evidence does not establish that the petitioner could pay for household monthly expenses and pay the proffered wage based on its adjusted gross income. With regard to tax years 1997 and 2002 that are years in which the sole proprietor's adjusted gross income is higher than the proffered wage, the funds available to support a family of six after the proffered wage was paid would have been \$274 in tax year 1997 and \$7,809 in tax year 2002. Once again, the preponderance of the evidence does not establish that the sole proprietor could support himself and five dependents based on these remaining funds in tax years 1997 or 2000.

Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his five dependents, based on his adjusted gross income as of the priority date and to the present. The sole proprietor also did not provide any further evidence of additional available funds that could be used to pay the proffered wage. Thus, the petitioner has not established that it had the ability to pay the proffered wage as of the 1997 priority date and continuing to the present. Therefore the director's decision shall stand, and the petition will be denied.

Beyond the decision of the director, the AAO considers the issue of a bona fide job offer to exist in the instant petition. The sole proprietor submitted the I-140 petition for the beneficiary who was identified as [REDACTED] living at [REDACTED]. As stated previously, the sole proprietor petitioner submitted its Forms 1040, and the Schedules C submitted with these return either the sole proprietor as [REDACTED] living at [REDACTED] or as [REDACTED], and [REDACTED]. The Forms 1040 also identified the sole proprietor's four dependent children. The bank statements for a checking account submitted in response to the director's request for further evidence give two addresses for the sole proprietor, an earlier address at [REDACTED] Westmont, Illinois, and on more recent bank statements, an address at [REDACTED] Westmont, Illinois. The St. Paul Federal Bank statements identify the petitioner as [REDACTED] doing business as [REDACTED] at [REDACTED], Westmont, Illinois.

⁷ The director's comment that the petitioner did not submit its 1997, 1998, 1999, or 2000 tax returns may be based on the fact that the 1997, 1998 and 1999 tax returns only consisted of the Form 1040 and Schedule C. The materials for the petitioner's 2001 tax return also only included the Form 1040, with a Schedule C and other attachments. However, the AAO will examine the adjusted gross income figures contained on the tax returns in these proceedings.

⁸ The Schedule C for the petitioner's 2002 tax return identified both as the sole proprietor. It is noted that [REDACTED] signed the I-140 petition as the petitioner. In addition, she is listed on the I-140 petition as the beneficiary's wife.

On appeal, counsel submits what he claims are the beneficiary's checking account bank statements to establish that the beneficiary has always been paid by the sole proprietor. These documents are in the name of [REDACTED] who lives at [REDACTED]. Furthermore, on his I-485 Application To Register Permanent Resident or Adjust Status, the beneficiary lists the same wife and children as the individuals listed on the sole proprietor's Forms 1040. Finally on the copy of the beneficiary's passport submitted with the I-485, the beneficiary is identified as [REDACTED]. Based on the identical wife and children for both the beneficiary and the sole proprietor's owner, the sole proprietor and the beneficiary appear to be the same person, and the sole proprietor appears to be applying for himself.

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Thus, the petitioner has to establish that a *bona fide* position exists for a person distinct from the sole proprietor's owner in the instant petition. For this additional reason, the appeal will be dismissed.

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 or to the beneficiary's qualifications to perform the duties of the position.

ORDER: The appeal is dismissed.