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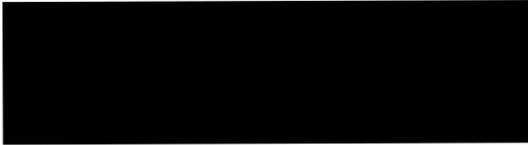


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 19 2007
WAC 06 030 52672

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is automotive service. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated July 21, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 10, 2003. The proffered wage as stated on the Form ETA 750 is \$42,536.00 per year. The Form ETA 750 states that the position requires three years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1040 tax return for 2004; an "Evaluation Report" from the International Services Inc., by [REDACTED] dated January 6, 2003;² a job experience statement (as translated) from [REDACTED] Automotive, [REDACTED] dated August 9, 1996; a California State license valid until March 31, 2006, identifying the petitioner as a licensed smog check station; a statement dated May 20, 2006, by [REDACTED] that he is also known as [REDACTED] a W-2 Wage and Tax statement from [REDACTED] to the beneficiary for 2005 in the amount of \$14,042.91; W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2003 and 2004 in the amounts of \$14,090.00 and \$13,200.00 respectively; the beneficiary's personal federal tax returns for 2003 and 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in May of 2001 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 28, 2002, the beneficiary did claim to have worked for the petitioner starting on November 2001.

On appeal, counsel asserts that a new employer ([REDACTED] San Jose, California) desires to "continue this case" for the beneficiary.

Further counsel contends that the W-2 Wage and Tax statement submitted in the record does not show commissions earned by the beneficiary.

There is also a contention that [REDACTED] San Jose, California, qualifies as a successor-in-interest to petitioner.

Accompanying the appeal, counsel submitted a letter from the [REDACTED] San Jose, California dated August 10, 2006. Ms. [REDACTED] stated in the letter that the petitioner's business was purchased on June 16, 2005, by Country Club Auto Service as well as its business licenses from the State of California.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

² The beneficiary's qualifications are not at issue.

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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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. Counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2003 and 2004 in the amounts of \$14,090.00 and \$13,200.00. Counsel asserts that the beneficiary earned additional compensation in the amount of \$4,400.00 in 2005. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$42,536.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$28,446.00 and \$29,336.00 respectively in 2003 and 2004. In 2005 the difference is \$38,136.00.

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).

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 a family of two individuals. The tax returns reflect the following information for the following years:

2004

| | |
|--|----------------|
| Proprietor's adjusted gross income (Form 1040) | \$ 49,428.00 |
| Petitioner's gross receipts or sales (Schedule C) | \$1,796,169.00 |
| Petitioner's wages paid (Schedule C) | \$ -0- |
| Petitioner's net profit from business (Schedule C) | \$ 53,186.00 |

In 2004, the sole proprietor's adjusted gross income \$49,428.00 covers the proffered wage of \$42,536.00 per year. Since no personal expenses were requested by the director or submitted by the petitioner, the AAO is unable to determine if the proprietor's personal expenses would adversely affect his ability to pay the proffered wage in 2004.

However the record of proceeding contains no regulatory prescribed evidence of the petitioner's ability to pay the proffered wage, or 2002 or 2003.³ According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. There has been ample time during these proceedings for the petitioner to submit the tax documentation in the record of proceeding. The petitioner has the burden to prove it could pay the proffered wage in these years as well. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not established at the priority date (with the expectation of eligibility at a subsequent time). *Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The record contains no evidence that the [REDACTED] San Jose, California, qualifies as a successor-in-interest to petitioner. This status requires documentary evidence that Country Club Auto Service has assumed all of the rights, duties, and obligations of the petitioner.⁵ For example, the fact that the [REDACTED] is doing business at the same location as the predecessor does not establish that the [REDACTED] Service is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage at the priority date. Moreover, [REDACTED] must establish its ability to pay the certified wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.

³ Also the director requested in the request for evidence the petitioner's 2003 and 2005 federal tax returns, but none have been submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

⁴ 8 C.F.R. § 204.5(g)(2).

⁵ This office notes that on appeal the petitioner submits a letter dated August 10, 2006 in the record from [REDACTED] the owner of the Country Club Auto Service, that states that the purchase of the petitioner's business by the [REDACTED] occurred on June 16, 2005. However the petition was filed November 7, 2005 by the present petitioner. If that is the correct circumstance (which has not been demonstrated by independent objective evidence) then the petition should have been filed by [REDACTED]. *See Avena v. I.N.S.*, 989 F. Supp. 1, 7 (D.D.C. 1997).