



U.S. Citizenship
and Immigration
Services

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MAY 16 2007

FILE:

[REDACTED]
EAC 05 101 51530

Office: VERMONT SERVICE CENTER

Date:

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:

[REDACTED]

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a painting company. It seeks to employ the beneficiary¹ permanently in the United States as a painting supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2002 or 2003, but, that the petitioner had established that it had the ability to pay the proffered wage in 2004. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's July 18, 2005, denial, 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 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 June 4, 2002. The proffered wage as stated on the Form ETA 750 is \$850.00 per week (\$44,200.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

¹ The beneficiary is also known as

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.²

Counsel submits copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a Schedule C from the petitioner's U.S. Internal Revenue Service Form 1040 tax return for 2001; the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2002, 2003 and 2004; the petitioner's T. Rowe Price mutual fund statement evidencing savings of \$25,059.15 as of December 31, 2003, and earlier statements for 2002; an Ameritrade brokerage account stating the value of a stock portfolio in the amount of \$12,149.00 as of December 31, 2003 and earlier statements for 2002; an explanatory letter from counsel dated June 17, 2005; three of the beneficiary's U.S. Internal Revenue Service tax returns Form 1040 for 2002, 2003 and 2004 with W-2 Wage and Tax statements received from the petitioner; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Other relevant evidence in the record includes copies of the following documents: a cover letter from counsel dated August 18, 2005; a motion dated August 18, 2005; approximately 35 credit card statements; approximately 69 bank checking account statements; and, the petitioner's U.S. Internal Revenue Service Form 1040 tax return for 2001.

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 1993 and to currently employ 5 to 8 workers.

On appeal, counsel asserts that the evidence submitted such as credit card lines of credit, bank balances, savings statements, tax returns and W-2 statements evidence the petitioner's ability to pay the proffered wage.

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 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 (Reg. Comm. 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. In the instant case, the petitioner has established that he employed and paid the beneficiary \$19,917.00, \$24,435.00, and \$24,569.00 in years 2002, 2003 and 2004 respectively according to W-2 statements submitted into

² 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).

evidence. Since the proffered wage is \$44,200.00, the petitioner did not pay the proffered wage in any year in which W-2 statements were submitted.

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. The director did not request a statement of the personal expenses of the petitioner.

In the instant case, the sole proprietor is single. The proffered wage is \$44,200.00. The tax returns reflect the following information for the following years:

	<u>2001</u> ³	<u>2002</u>	<u>2003</u>	<u>2004</u>
Adjusted gross income (Form 1040)	\$ 68,824 ⁴	\$ 37,042.00	\$ 53,551.00	\$ 70,127.00
Gross receipts or sales (Schedule C)	\$285,425 ⁵	\$224,992.00	\$264,351.00	\$351,562.00
Wages paid/cost of labor (Sch. C)	\$101,195 ⁶	\$ 79,729.00	\$110,318.00	\$150,779.00
Net profit from business (Schedule C)	\$ 78,443 ⁷	\$ 45,413.00	\$ 68,262.00	\$ 83,104.00

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. We have included the data here for what evidence it may show.

⁴ IRS Form 1040, Line 33, 34, 35 or 36 depending upon the year of the tax return.

⁵ IRS Form 1040, Schedule C, Part I, Line 1

⁶ IRS Form 1040, Schedule C, Part II, Line 26 or Part III, Line 37.

⁷ IRS Form 1040, Schedule C (painting contractor), Part II, Line 31.

The petitioner is obligated to demonstrate that is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date. As stated above, the petitioner paid the beneficiary \$19,917.00, \$24,435.00, and \$24,569.00 in years 2002, 2003 and 2004. Therefore, for each of the years for which tax returns were submitted, the petitioner demonstrated that he was able to pay the difference between wages actually paid to the beneficiary and the proffered wage. Although there is no evidence in the record of the petitioner's monthly personal expenses, it is credible to believe that he could support himself and pay the proffered wage based upon the evidence of the petitioner's personal assets and adjusted gross income.

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 met that burden.

ORDER: The appeal is sustained.