



U.S. Citizenship
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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date:

SEP 06 2007

IN RE:

Petitioner:

Beneficiary:

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 petitioner is an insurance brokerage firm. It seeks to employ the beneficiary permanently in the United States as an insurance underwriter. 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 September 13, 2005, 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 April 24, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$28.00 per hour (\$58,240.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ It has been approximately six years since the Alien Employment Application has been accepted and the

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

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; a letter from the petitioner dated December 16, 2002; a letter from the beneficiary dated January 2, 2003; a translation of a certificate of the beneficiary's employment term; the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, and 2003; a letter from counsel dated August 9, 2005; a statement of the monthly expenses of the family of [REDACTED] and [REDACTED] dated as June 30, 2005 (\$5,395.00 per month or \$64,740.00 annually);³ approximately 36 of the petitioner's Ameritrade portfolio account statements for the period June 29, 2002 to June 24, 2005; realty closing documents for the purchase and sale of a property owned by [REDACTED]; Joon and Chong Song's banking account statement dated March 21, 2005; four checks payable by Escort Insurance Agency to [REDACTED] in June and July 2005 of \$17,761.78 each, indicating an annual wage of \$12,480.00; and a letter dated August 1, 2005, from the petitioner detailing the employment offer to the beneficiary.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship but then converted to a corporation presumably in 2004.⁴ On the petition, the petitioner claimed to have been established in 1997 and to currently employ two 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 April 17, 2001, the beneficiary did not claim to have worked for the petitioner. Counsel has asserted that the beneficiary had begun employment with the petitioner as of June 1, 2005 at the rate of pay of \$28.00 per hour for a 40-hour week.

On appeal, the petitioner asserts that there is no cost of goods stated on the tax returns submitted because the petitioner is a seller of services, and that the eight checks and payroll journal submitted into evidence are evidence of the ability to pay the proffered wage.

Accompanying the appeal, counsel submits an explanatory letter dated October 10, 2005, and additional evidence that includes the following documents: eight checks from the petitioner to the beneficiary in equal amounts of \$1,761.78 for the period June 15, 2005 to September 30, 2005;⁵ the petitioner's payroll journal stating wage payments to the beneficiary from January 1, 2005 to September 30, 2005 amounting to

proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² 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).

³ According to the director, the petitioner submitted a second statement of the monthly expenses of the petitioner (i.e. \$4,168.00 per month or \$50,016.00 annually).

⁴ No corporate tax returns were submitted.

⁵ The AAO was unable to correlate and substantiate through the petitioner's banking statements submitted that the checks in those amounts were issued.

\$19,412.00; three personal checking statements of the beneficiary from June 25, 2005 to September 23, 2005; approximately 108 of the petitioner's business checking statements for the period March 31, 2001 to September 30, 2005; the articles of incorporation of Golden Trust Inc. filed December 16, 2003; and an unpublished case⁶ dated March 20, 1992 with the petitioner's and beneficiary's names redacted.

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 not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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

⁶ Counsel refers to decisions issued by the AAO but does not provide its published citation. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 five. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$ 66,628	\$ 73,156
Petitioner's gross receipts or sales (Schedule C)	\$198,495	\$223,875
Petitioner's wages paid (Schedule C)	\$ 4,500	\$ 13,200
Petitioner's net profit from business (Schedule C)	\$ 76,697	\$ 81,859
	<u>2003</u>	
Proprietor's adjusted gross income (Form 1040)	\$ 58,944	
Petitioner's gross receipts or sales (Schedule C)	\$230,447	
Petitioner's wages paid (Schedule C)	\$ 11,670	
Petitioner's net profit from business (Schedule C)	\$ 81,091	

In 2001 the sole proprietorship's adjusted gross income of \$66,628.00 failed to cover the proffered wage of \$58,240.00 per year and his/her personal expenses. It is improbable that the sole proprietor could support himself/herself and their family members on \$8,388.00, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and still pay personal expenses. The petitioner had disclosed that her/his annual personal expenses are \$64,740.00. In 2003, the sole proprietorship's adjusted gross income of \$58,944.00 still includes a deficiency for that year between payment of the proffered wage and payment of personal expense. In 2002, the sole proprietorship's adjusted gross income of \$73,156.00 still failed to cover the proffered wage of \$58,240.00 per year and his/her personal expenses.

According to counsel the CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, provides guidance that if the petitioner has employed the beneficiary at the proffered wage, then the eight wage checks paid to the beneficiary or the wages evidenced in the payroll journal are proof of the petitioner's ability to pay the proffered wage. The proffered wage as stated on the Form ETA 750 is \$28.00 per hour (\$58,240.00 per year). The petitioner's payroll journal stated wage payments to the beneficiary from January 1, 2005 to September 30, 2005 amounting to \$19,412.00. In no year has the petitioner paid the beneficiary the proffered wage. There has been sufficient time in this case for counsel to have presented W-2 or 1099-MISC statements for 2005 and onward evidencing the petitioner's wage payments for a complete year to the beneficiary. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

According to counsel, the petitioner once a sole proprietorship and now a corporation, has sufficient cash and liquid or liquefiable assets to pay the proffered wage. During the time for which the petitioner was a sole proprietorship,⁷ personal funds of the sole proprietor can be used towards payment of the proffered wage.⁸

Counsel's statement that this Ameritrade account represents liquid or liquefiable assets to pay the proffered wage must be qualified. The Ameritrade account is a stock portfolio not a savings account or money market fund. Should the petitioner sell his stocks he would pay or be required to pay at tax time either short or long term capital gains. Generally, the impetus for a stock investor is not to sell a stock in less than a year's time to have advantage of the more favorable long term tax treatment. The margin interest charged by the brokerage as well as brokerage commission are also an offset to profits from stock sales in the tax year. Generally an investor sells stock to make a profit so there will be times for various reasons that an investor will be reluctant to sell stocks from his/her portfolio that will generate losses rather than profits.

The account summary dated July 26, 2002, stated that the market value of the stocks in the portfolio were \$25,534.00 but because of the amount identified in the margin account balance, <\$18,923.00.00> the net account value is \$6,611.00. At the end of 2002, the net account value had risen to \$21,334.00. Although this Office cannot determine the net profit that the petitioner would actually receive from a liquidation of the entire amount of this stock account, assuming for the sake of this discussion that the entire amount of the net account value would be available to pay the proffered wage, there still exists a significant deficiency in 2002 between the adjusted gross income, net account value of the Ameritrade account, and the proffered wage and personal expenses of the petitioner for 2002.

At the end of year 2003 the net account value of the Ameritrade account was \$167,491.00. Under the same rationale as above stated, the petitioner appears to have sufficient assets in 2003 to pay the proffered wage with one qualification. The amounts stated in the petitioner Ameritrade account increased or decreased as the petitioner either bought or sold stock on margin (or through addition of his/her own funds⁹). It is not possible to determine from the evidence submitted whether in fact there would be sufficient funds in 2003 to pay the proffered wage. Short (from 10%-35%) and long term rates tax rates (from 5% to 15%)¹⁰ should also be considered because they would as a practical matter constrain the petitioner from selling his stock investments prematurely and could reduce his/her profits from stocks sales substantially. Again, counsel's statement that this Ameritrade account represents liquid or liquefiable assets to pay the proffered wage must be qualified. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

While the operators of a sole proprietorship may utilize liquid assets to make up deficiencies as already discussed to pay the proffered wage, once the sole proprietorship was converted to a corporation the personal assets of the owners of the corporation are not available to pay the proffered wage. Contrary to counsel's

⁷ This Office is assuming that the a stock portfolio identified in the record of proceeding as the petitioner's Ameritrade portfolio account evidenced by statements for the period June 29, 2002 to June 24, 2005 in the name of Joon Song are sole proprietor assets and the sole proprietor would use these assets to make-up the deficiencies as detailed above between the sole proprietor's adjusted gross incomes, personal expenses and the proffered wage for those years for which information had been made available.

⁸ The petitioner's business checking accounts, however, would be accounted for on the sole proprietor's Schedule C (or corporate tax returns if they had been submitted).

⁹ The details of each transaction are not provided.

¹⁰ See <<http://invest.faq.com/articles/tax-cap-gains-rates.html>> accessed August 22, 2007.

assertion, CIS may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

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.