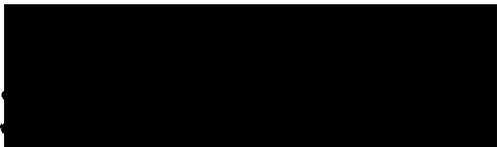




U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC-03-227-50101

Office: VERMONT SERVICE CENTER

Date: JUL 19 2005

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)

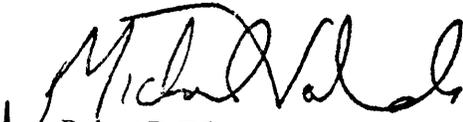
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

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, Director
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 dismissed.

The petitioner is a roofing and siding installer. It seeks to employ the beneficiary permanently in the United States as a siding mechanic. 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 and denied the petition accordingly.

On appeal, the petitioner's representative submits a brief and additional evidence¹.

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, 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$23.71 per hour, which amounts to \$49,316.80 annually.

¹ The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, executed by the petitioner's representative and [REDACTED] Esq (Ms. [REDACTED] Ms. [REDACTED] checked a box on the form indicating that she is an attorney in good standing of the New Jersey state bar. Ms. [REDACTED] letterhead reflects that she is a licensed attorney in Brazil but not admitted in New Jersey, but indicated "F.L.C. in NJ - [REDACTED]". The AAO has determined from the New Jersey Supreme Court's Office of Attorney Ethics (OAE) that Ms. [REDACTED] is not a registered and licensed attorney in the state of New Jersey and they did not know what "F.L.C. in NJ - ID: [REDACTED]" means. OAE referred the AAO to the federal courthouse for the district of New Jersey to determine if Ms. [REDACTED] had a limited admission to practice federal law in New Jersey. The AAO has determined from the Clerk's Office of the federal district court in New Jersey that an attorney must be admitted to the New Jersey state bar in order to practice federal law and the clerk also did not know what "F.L.C. in NJ - ID: [REDACTED]" means. Thus, the petitioner is considered self-represented as it is not represented by an accredited representative as delineated by the pertinent regulation at 8 C.F.R. § 292.1. However, the AAO will review the evidence Ms. [REDACTED] submitted on the petitioner's behalf.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, along with the petitioner's accompanying Schedule C, Profit or Loss from Business statement, for 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 25, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the sole proprietor's monthly expenses, the petitioner's tax returns for 2002 and 2003, and profit/loss statements, bank account records, or personnel records as additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, along with the petitioner's accompanying Schedule C, Profit or Loss from Business statement, for 2003. The petitioner also submitted its Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts, for 2002, without any Form 1040, U.S. Individual Income Tax Return or complete Schedule C, Profit or Loss statement. The petitioner also submitted the sole proprietor's itemized monthly statements for 2001, 2002, and 2003, showing monthly expenses in the amounts of \$2,351.84, \$2,229.99, and \$2,624.68 in each year, respectively. The sole proprietor's annualized personal expenses are thus \$28,222.08, \$26,759.88, and \$31,496.16 for 2001, 2002, and 2003, respectively. The petitioner also submitted its business checking account bank statements for April 2001, December 2001, and December 2002.

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

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$59,292	\$n/a	\$39,148
Petitioner's gross receipts or sales (Schedule C)	\$271,876	\$n/a	\$179,511
Petitioner's wages paid (Schedule C)	\$39,840	\$n/a	\$25,523
Petitioner's net profit from business (Schedule C)	\$69,153	\$n/a	\$39,535

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 21, 2004, denied the petition. The acting director determined that the sole proprietor's adjusted gross income (AGI) was insufficient to pay the proffered wage because after decreasing the AGI by the proffered wage, there were insufficient funds to finance the sole proprietor's claimed monthly expenses². Additionally, the acting director determined that the petitioner's bank balance amounts were also insufficient because the evidence did not establish that the "ending balances for the year were greater than or equal to the amount of the wage or increased incrementally with the amount of funds to meet the wage."

On appeal, the petitioner's unaccredited representative states that the director erred by failing to considered the sole proprietor's personal assets, and that for 2001:

² The director incorrectly referenced the AGI for 2002 as the AGI for 2001. The record of proceeding, however, only contains the Form 1040 with an AGI for 2001 and 2003.

[s]ince the [sole proprietor] operates his business out of his home, the business and personal expenses were combined in the tax return. [The sole proprietor's] expenses as listed in the return were mortgage, medical, dental, legal services, entertainment, utilities, salary paid to himself of \$23,643.00 as well as the salary paid to the beneficiary in the amount of \$9,120.00.

The petitioner's unaccredited representative also stated that in 2002, the petitioner's gross profit was \$136,630, which yielded the sole proprietor a net profit of \$74,078 after deducting all expenses, "including salary paid to himself in the sum of \$23,643 as well as the salary compensation paid to the beneficiary in the amount of \$6,048.25." The petitioner's unaccredited representative made the same argument for 2003, stating that the sole proprietor paid himself \$23,643 in addition to the beneficiary's salary of \$4,740.04.

The petitioner's unaccredited representative also referenced a case without providing a citation which she claimed stood for the premise that the "entire financial circumstances" should be considered for sole proprietor employers when determining a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date. Finally, the petitioner's unaccredited representative stated that the sole proprietor had cash assets evidenced by its bank account statements and a home equity value in the amount of \$139,599.70.

On appeal, the petitioner resubmits copies of previously submitted evidence, as well as new evidence, in the form of the petitioner's bank statements from January 2001 through December 2001, December 2002, December 2003; the sole proprietor's bank statements from December 2003 and September 2004; W-2 Wage and Tax Statements for 2001, 2002, and 2003, reflecting wages paid from the petitioner to the beneficiary in the amounts of \$9,120, \$6,048.25, and \$4,740.04 in each year, respectively; a copy of a settlement from an accident occurring at Macy's for which the sole proprietor's wife collected \$27,315.34 in 1999 from Macy's³; and documents evidencing real estate and vehicles owned by the sole proprietor and his wife.

While the AAO will consider the evidentiary submissions, the statements made by the petitioner's unaccredited representative are without merit. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Although the petitioner's representative is unaccredited, her statements cannot be provided any evidentiary weight since she has characterized herself as counsel in these proceedings and is effectively acting in that role, although without a license to practice law, she cannot and will not be recognized by the AAO according to 8 C.F.R. § 292.1.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 established that it employed and paid the beneficiary \$9,120, \$6,048.25, and \$4,740.04 in 2001, 2002, and 2003, respectively⁴. Since the

³ Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁴ Thus, CIS does consider wage payments made by a petitioning entity to a beneficiary; however, no evidence of wage payments made by the petitioner to the beneficiary was in the record of proceeding when the acting director issued her decision. Although petitioning entities are not obligated to pay the full proffered wage to beneficiaries, the AAO notes the amount of wages paid as an indicator of a petitioning entity's ability to pay

proffered wage is \$49,316.80, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$40,196.80 in 2001, \$43,268.55 in 2002, and \$44,576.76 in 2003.

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. In 2001, the sole proprietorship's adjusted gross income of \$59,292 covers the remaining proffered wage of \$40,196.80. The sole proprietor could not support himself and his family on \$19,095.20 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, since he reported monthly expenses of \$28,222.08 for that year.

The petitioner did not provide its sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002. It only provided a form, Form 2210, reflecting the sole proprietor's reporting of its underpayment of estimated taxes. That form's instructions, as accessed by the Internal Revenue Services' online website, does not obviate the need to file the individual income tax return on Form 1040. The petitioner's failure to provide its individual income tax return, which would have provided information concerning its AGI in 2002, as well as the petitioner's detailed expenses and profit or loss, is not excused. The petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning in 2002 because it did not provide evidence showing the sole proprietor's AGI or the petitioner's net income.

the full proffered wage. In this case, the petitioner has paid a small portion of the proffered wage in each year.

In 2003, the sole proprietorship's adjusted gross income of \$39,148 fails to cover the remaining proffered wage of \$44,576.76, and consequently renders it impossible for the sole proprietor to support himself and his family's additional expenses claimed for that year of \$31,496.16.

The AAO notes that the assertion made by the petitioner's unaccredited representative on appeal concerning the commingling of business and personal expenses is without merit. A review of the sole proprietor's individual income tax return does not corroborate those assertions. There is no evidence that the sole proprietor operates the petitioning entity's business out of his personal residence. 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)).

The sole proprietor's mortgage expense and utility expenses are not itemized as a deduction in his individual income tax return; the interest and points associated with the sole proprietor's mortgage payments are included, however, this does not represent the recurring monthly expenses of the \$1,580 the sole proprietor pays on his mortgage and there is no itemization details relating to utility expenses on the return at all. The sole proprietor did not list "legal services or entertainment" as recurring monthly expenses, so the petitioner's unaccredited representative's claim that the expenses were counted twice because they are also itemized as business expenses on the petitioner's tax return is without merit. Even if the sole proprietor could demonstrate that his personal expenses are included as deductibles from business tax liability on his individual income tax return, and the return does at least support that medical costs were expenses listed on Schedule A to the individual income tax returns, the petitioner still cannot overcome the deficiency in AGI reported in 2003, which is lower than the proffered wage regardless of additional expenses, or the lack of regulatory-prescribed evidence for 2002.

The petitioner maintains ending balances ranging from \$18,398.98 in February 2001 to \$21,406.68 in December 2001⁵; an ending balance of \$11,040.80 in December 2002 and \$18,654.98 in December 2003; a current balance of \$21,502.03 in December 2003 and \$16,888.41 in September 2004. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. However, complete and uninterrupted bank statements were not provided. Thus, the ending balances merely show the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months.

Finally, although the petitioner submits evidence that the sole proprietor owns real estate and vehicles, these are not the types of assets typically liquidated in order to pay an employer's wages. Additionally, there is no evidence that they are unencumbered personal assets. The AAO also notes, considering the totality of circumstances in this case, that the total wages paid by the petitioner to its employees in 2001 and 2003 were less than the proffered wage in each year and thus do not reflect the petitioner's ability to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001, 2002, or 2003.

⁵ The petitioner apparently changed banking institutions in the summer of 2001, so while the record of proceeding contains statements from two different banks, it may be deduced that the last statement from Summit Bank in June 2001 correlated to the petitioner's deposit in a new account with Fleet Bank in June 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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