

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 26 2005
WAC-03-118-53155

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, Director
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 sustained. The petition will be approved.

The petitioner provides printing, coating, and anodizing services. It seeks to employ the beneficiary permanently in the United States as an engraving-press operator. 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, counsel submits a brief and additional evidence.

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 March 17, 2000. The proffered wage as stated on the Form ETA 750 is \$18.48 per hour, which amounts to \$38,438.40 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a copy of the sole proprietor's Form 1040, Individual Income Tax Return, along with its Schedule C, Profit or Loss from Business for 2000.

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 9, 2003, 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 evidence from 2000 through 2002.

In response, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, along with Schedules C, Profit or Loss from Business for 2000 and 2001, along with evidence that the sole proprietor sought an extension of time to file his return for 2002.

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

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$8,794	-\$41,334
Petitioner's gross receipts or sales (Schedule C)	\$1,649,044	\$1,629,853
Petitioner's wages paid (Schedule C)	\$980,374	\$959,443
Petitioner's net profit from business (Schedule C)	\$3,234	-\$47,237

The petitioner also submitted a copy of a W-2 form issued from the petitioner to the beneficiary¹ reflecting wages paid in the amount of \$17,661.91 in 2002 and three paystubs from 2003.

The 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 January 12, 2004, denied the petition, explaining that the sole proprietor's adjusted gross income showed insufficient funds to pay the proffered wage.

On appeal, counsel asserts that the petitioner can demonstrate its continuing ability to pay the proffered wage beginning on the priority date because it has been paying the proffered wage to the beneficiary since 2000. Counsel also asserts that the sole proprietor's cash in bank accounts can be extrapolated from interest reported on his individual income tax return. Counsel also references the sole proprietor's real estate holdings as evidence of his ability to pay the proffered wage. Finally, counsel asserts that the beneficiary would replace a retiring employee. In support of these assertions, the petitioner submits a letter from its sole proprietor, which states the following, in pertinent part:

The position which [the beneficiary] has applied for is not a new position. The salary for this position has been paid since 1993. The present Engraving Press Operator, [redacted] is planning on retirement and will vacate this position when [the beneficiary] is approved and available for permanent employment. [The beneficiary] is presently employed and earning part of the salary. This change will actually reduce over all expenses. The reduced expense is estimated as follows:

Current operator salary (Robinson)	- \$76800.00
[The beneficiary's] current salary	- \$28600.00
[The beneficiary's] new salary	\$35500.00
Estimated reduction in expenses	\$69900.00

The petitioner submits copies of state quarterly wage reports reflecting compensation paid to [redacted] from 2000 through 2003. The quarterly wage reports show that the petitioner paid [redacted] 76,674.96 in 2000, \$80,550.68 in 2001, \$81,230.60 in 2002, and \$82,707.52 in 2003. The

¹ The form is made out in the beneficiary's name prior to changing her name back to her maiden name after a divorce.

petitioner also submitted copies of W-2 forms issued by the petitioner to the beneficiary reflecting wages paid in the amount of \$25,150.75 in 2000, \$27,400.25 in 2001, \$17,661.91 in 2002, and \$28,155.24 in 2003.

At the outset, counsel did not provide his formula or evidence for how he extrapolated that the sole proprietor's bank account balances must be approximately \$100,000 based on the interest reported on the individual income tax returns. Thus, the AAO will not consider counsel's assertion pertaining to that alleged fact. Additionally, real estate holdings are not the type of unencumbered and easily liquefiable personal asset utilized by employers to pay wages.

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 \$25,150.75 in 2000, \$27,400.25 in 2001, \$17,661.91 in 2002, and \$28,155.24 in 2003². Since the proffered wage is \$38,438.40, the petitioner must illustrate that it could pay the difference between the wages actually paid and the proffered wage, which is \$13,287.65 in 2000, \$11,038.15 in 2001, \$20,776.49 in 2002, and \$10,283.16 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

² The AAO notes that the Form ETA 750B erroneously reflected that the beneficiary was employed in El Salvador from 1997 to present; however, prior counsel of record submitted a letter making a correction to that. The Form G-325, Biographic Information sheet, however, contains corroborating factual representations that she worked for the petitioner from 1997 to the present and for the El Salvadoran company from 1991 to 1994.

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 2000, the sole proprietorship's adjusted gross income of \$8,794 barely covers the remaining proffered wage of \$13,287.65 in that year. Thus, it is impossible that the sole proprietor could support himself and his family that year on negative income, which would result from reducing the adjusted gross income by the amount required to pay the proffered wage. Likewise, in 2001, the sole proprietorship's adjusted gross income of -\$41,334 could not cover the remaining proffered wage of \$11,038.15 in that year. Thus, it is impossible that the sole proprietor could support himself and his family that year on negative income. The record of proceeding does not contain any other regulatory-prescribed evidence for 2002 or 2003.

However, counsel advised that the beneficiary would replace a retiring worker. The record identifies the worker, states his wages, verifies his full-time employment, and provides evidence that the petitioner will replace him with the beneficiary. The AAO finds the letter submitted from the sole proprietor on appeal sufficient evidence that the beneficiary would replace [REDACTED] since the sole proprietor represented such in a signed statement in a formal administrative proceeding and the AAO has no evidence of derogatory information. Since the petitioner actually paid wages to [REDACTED] as evidenced by the quarterly wage reports in the record of proceeding, these funds can be attributed towards funds the petitioner may use towards paying the proffered wage for the proffered position in each relevant year. The petitioner shows ample funds from the wages it paid to [REDACTED] of \$76,674.96 in 2000, \$80,550.68 in 2001, \$81,230.60 in 2002, and \$82,707.52 in 2003 to demonstrate its ability to pay the proffered wage in each year³. Thus, the petitioner has established its ability to pay the proffered wage in each relevant year.

The sole proprietor's letter on appeal also references its size, longevity, and number of employees, which also contributes to a determination that it has the continuing ability to pay the proffered wage beginning on the priority date. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The AAO notes that the petitioner reports substantial gross revenues and wages paid in 2000 and 2001, and thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, 2002, and 2003. Therefore, the petitioner has established that it has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

³ Since the beneficiary is already employed by the petitioner, it might need to replace the beneficiary when the beneficiary assumes [REDACTED]'s position, and thus the petitioner must account for the full proffered wage and not the difference between wages actually paid to the beneficiary and the proffered wage. Although the sole proprietor's letter suggests that he might merge both positions into one engraving-press operator to reduce overall costs, it is not definitively clear from the language used in the letter.