

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

EAC-03-014-50399

Office: VERMONT SERVICE CENTER

Date: NOV 17 2005

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:

SELF-REPRESENTED

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

CC:

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 residential construction and remodeling firm. It seeks to employ the beneficiary permanently in the United States as a carpenter apprentice. 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 submits a statement and evidence. The petitioner apparently submitted the appeal on its own without assistance from counsel, who previously entered an appearance into the record of proceeding. The petitioner did not indicate that the attorney-client relationship had been terminated so the AAO is providing a copy of this decision to counsel of record.

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 29, 2000. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's individual income tax returns for 2000 and 2001 with the petitioner's accompanying Schedules C, Profit or Loss from Business statements.

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 August 4, 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 of any wages paid to the beneficiary by the petitioner in 2000 or 2001.

In response, the petitioner submitted Forms 1099, Miscellaneous Income statements, issued by the petitioner to the beneficiary in 2000, 2001, and 2002 reflecting wages paid in the amounts of \$11,920.00, \$10,455.00, and \$8,315.50, respectively, and its sole proprietor's 2002 individual income tax return with accompanying Schedule C, Profit or Loss from Business statement.

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

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$20,085	\$29,294	\$38,974
Petitioner's gross receipts or sales (Schedule C)	\$63,721	\$115,242	\$354,684
Petitioner's wages paid (Schedule C)	\$0	\$0	\$13,897
Petitioner's cost of labor (Schedule C)	\$0	\$0	\$0
Petitioner's other costs (Schedule C) ¹	\$8,409	\$39,511	\$122,795
Petitioner's net profit from business (Schedule C)	\$23,437	\$29,531	\$43,566

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 2001, and, on April 16, 2004, denied the petition. The director noted that the amount of wages paid to the petitioner's subcontractor, the beneficiary, in 2000 was inconsistent with what was reported as total subcontractor wages paid on the Schedule C submitted into the record of proceeding.

On appeal, the sole proprietor states that he has sufficient "moneys in the Bank, Equity on my home, wages paid to [the beneficiary] and other sub contractors, low overhead, and low personal expenses," and thus the petition should be approved. The petitioner submits the following on appeal: all 1099 forms issued to the beneficiary and other subcontractors from 2000 through 2003; the sole proprietor's individual income tax return with Schedule C for 2003; the sole proprietor's bank statements for accounts held at National Bank of Litchfield reflecting a balances from a high of \$50,167.58 in April 2000 to a low of \$79.81 in January 2001 for statements covering 2000 and 2001; the sole proprietor's amended 2000 individual income tax return to reflect an understatement of subcontractor expenses; and a letter from Dutcher Insurance Agency reflecting that the sole proprietor surrendered his policy on April 2000 for cash value of \$4,145.71. The sole proprietor claims that a deposit made into his account at National Bank of Litchfield in the amount of \$59,347.33 was based on equity in his home. He also stated that his monthly personal expenses are approximately \$2,500 and he has no family to support. Taking this into account, the sole proprietor's annualized expenses would then be approximately \$30,000.

The amended 2000 tax return and the 2003 tax return reflect the following:

	<u>2000</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$20,085	\$33,067
Petitioner's gross receipts or sales (Schedule C)	\$73,721	\$183,840
Petitioner's wages paid (Schedule C)	\$0	\$15,945
Petitioner's cost of labor (Schedule C)	\$0	\$0
Petitioner's other costs (Schedule C) ²	\$18,409	\$22,799

¹ Notated as subcontractor costs.

Petitioner's net profit from business (Schedule C)	\$23,437	\$35,873
----------------------------------------------------	----------	----------

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 \$11,920.00, \$10,455.00, \$8,315.50, and \$15,944.50 in 2000, 2001, 2002, and 2003, respectively. Since the proffered wage is \$31,200, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$19,280 in 2000, \$20,745 in 2001, \$22,884.50 in 2002, and \$15,255.50 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 one. In 2000, the sole proprietorship's adjusted gross income of \$20,085 covers the remaining proffered wage of \$19,280. However, the sole proprietor has \$30,000 in annualized personal expenses. He could not pay both the remaining proffered wage and his expenses out of his adjusted gross income. Thus, he cannot demonstrate the ability to pay the proffered wage out of his adjusted gross income in 2000.

In 2001, the sole proprietorship's adjusted gross income of \$29,294 covers the remaining proffered wage of \$20,745. However, the sole proprietor has \$30,000 in annualized personal expenses. He could not pay both

² Notated as subcontractor costs.

the remaining proffered wage and his expenses out of his adjusted gross income. Thus, he cannot demonstrate the ability to pay the proffered wage out of his adjusted gross income in 2001.

In 2002, the sole proprietorship's adjusted gross income of \$38,974 covers the remaining proffered wage of \$22,884.50. However, the sole proprietor has \$30,000 in annualized personal expenses. He could not pay both the remaining proffered wage and his expenses out of his adjusted gross income. Thus, he cannot demonstrate the ability to pay the proffered wage out of his adjusted gross income in 2002.

In 2003, the sole proprietorship's adjusted gross income of \$33,067 covers the remaining proffered wage of \$15,255.50. However, the sole proprietor has \$30,000 in annualized personal expenses. He could not pay both the remaining proffered wage and his expenses out of his adjusted gross income. Thus, he cannot demonstrate the ability to pay the proffered wage out of his adjusted gross income in 2000.

The petitioner maintained a balance of approximately \$50,000 in a checking account in 2000, which would show sufficient funds in that year to pay the remaining proffered wage. However, those funds were no longer in the account by 2001 and the record contains bank statements only covering the period 2000 and 2001, but nothing for 2002 and 2003. The balances in 2000 and 2001 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 and as noted, the \$50,000 was reduced to \$80 from April 2000 to January 2001, and while that balance rose again to \$25,442.39 by the end of 2001, the evidence is insufficient to show sufficient and continually accessible funds from 2000 through 2003, to pay the proffered wage.

The sole proprietor's life insurance cash value of \$4,145.71 is too small to overcome the deficiencies in each year under analysis. Additionally, although there is insufficient evidence that the sole proprietor's deposit of \$59,347.33 made into his account at National Bank of Litchfield was based on residential real estate equity, and those funds were liquidated within a year, as noted above.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in any relevant year.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2000 through 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.