

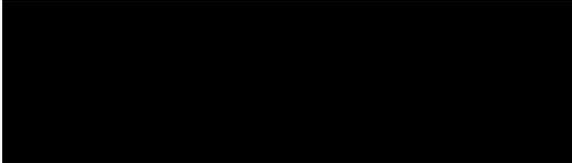
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U.S. Citizenship
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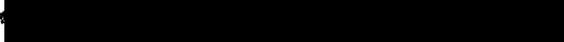


B6

OCT 21 2005
Date:

FILE: 
EAC 03 239 55256

Office: VERMONT SERVICE CENTER

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, 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 an automotive repair firm. It seeks to employ the beneficiary permanently in the United States as a 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, counsel submits additional evidence for review.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.76 per hour, which amounts to \$43,181 per annum. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary claims that he has worked for the petitioner since December 2000.

On Part 5 of the preference petition, the petitioner claims that it was established in September 2000, and currently employs three workers.

The petitioner appears to be structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a letter from [REDACTED] as owner of the petitioning business affirming that it is capable of paying the certified wage to the beneficiary. Also provided with the petition are copies of the petitioner's bank statements from December 2000 to July 2001 and Mr. [REDACTED] Form 1040, U.S. Individual Income Tax Return for 2001 and 2002. The tax returns reflect the Mr. [REDACTED] filing status is "married filing separately" and that he claims one dependent. It is noted that Schedule C, (Profit or Loss From Business) reflects Mr. [REDACTED] business income. The business name and address is somewhat different than that of the petitioner given on the preference petition. The business name is identified simply as [REDACTED] and the address appears to be [REDACTED] rather than the petitioner's address of [REDACTED]. The address also appears on the tax return as Mr. [REDACTED] residential address. The bank statements list a business name and address as [REDACTED]

DBA Like Nu Auto Sales" at [REDACTED] Connecticut. Both tax returns reflect the following information:

	2002	2001
Petitioner's gross income (Schedule C)	\$76,000	\$68,400
Petitioner's wages paid (Schedule C)	none listed	none listed
Petitioner's total expenses (Schedule C)	\$41,435	\$37,250
Petitioner's cost of labor (Part III, Schedule C)	none listed	none listed
Petitioner's net business income (Form 1040)	\$34,565	\$31,150
Proprietor's adjusted gross income (Form 1040)	\$27,177	\$29,013

On October 28, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested that the petitioner provide copies of the beneficiary's Wage and Tax Statement (W-2s), if the petitioner employed the beneficiary in 2001, as well as an itemized list of all the sole proprietor's monthly expenses for 2001 and 2002.

In response, the petitioner, through counsel submitted partial copies of the sole proprietor's federal tax returns previously supplied along with a list of itemized expenses which amount to \$8,990 per year for 2001 and 2002. This list also included a notation of rental income in the sum of \$18,000. A copy of a commercial lease between Mr. [REDACTED] and [REDACTED] was submitted to corroborate these funds. In addition, the petitioner submits a list of automobiles and values held as inventory and a hand-written list by a "Mr. [REDACTED]" at H&R Block itemizing a savings account of \$10,000, \$45,000 in "insurance and 401K savings," real estate and real estate equity of "250,000." No documentation of these holdings was supplied. Copies of the petitioner's bank statements extending from December 2000 to November 30, 2001 were, however, provided. No W-2s or other proof that the petitioner had employed the beneficiary was submitted with this response.

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 March 29, 2004, denied the petition. The director noted that the bank statements and list of the inventory held at the auto dealership are not determinative of the petitioner's ability to pay the proffered wage because the bank statements represent a portion of a petitioner's assets but do not reflect outstanding liabilities. Similarly, the director found that the evidence did not show that the automotive inventory is owned by the petitioning business outright. The director concluded that even if the additional \$18,000 was factored into the sole proprietor's income, after deducting the proffered wage of \$43,181, the remaining sum was not sufficient to cover the annual living expenses.

On appeal, counsel makes no specific allegation of error but submits additional evidence for consideration including a copy of Mr. [REDACTED] individual 2003 tax return, as well as a copy of the beneficiary's individual tax return for 2001, 2002, and 2003. Mr. [REDACTED] federal tax return submitted on appeal consisted only of Schedule C. It shows gross business income of \$78,000, total expenses of \$41,510, and net business income of \$36,490. No wages were paid and no labor costs were declared. According to the accompanying state tax return, Mr. [REDACTED] federal adjusted gross income was \$24,403 in 2003. Other documents offered on appeal show a \$30 dividend declared on a Form 1099 paid to Mr. [REDACTED] from Prudential Financial, interest income of \$63.74, an IRA fair market value given as \$302.57, and a mortgage interest statement showing that Mr. [REDACTED] wife individually paid \$21,089.74 in mortgage interest in 2002. As no other first-hand evidence of Mr. [REDACTED] individual assets have been submitted, it cannot be concluded that these documents are probative of any additional readily resources out of which the proffered salary may be paid. Simply going on record without supporting documentary evidence is not

sufficient for purposes of meeting the burden of proof in these proceedings. See *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)).

It is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases, as noted by the director in his discussion of the petitioner's automotive inventory and bank statements, such documents show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

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 may have 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, as noted above, Mr. [REDACTED] income tax return, including Schedule C do not corroborate that he has employed the beneficiary. He reported no wages paid and no labor costs on any of the three tax returns. No W-2s or Internal Revenue Service (IRS) Forms 1099-Miscellaneous Income have been submitted to the record by any party. The beneficiary's tax returns submitted on appeal do not serve to clarify the relationship of the petitioner and the beneficiary. Included in the beneficiary's individual tax returns for 2001, 2002, and 2003, are Schedule C, (Sole Proprietorship) Profit or Loss from Business. The beneficiary lists the petitioner's name and address as his business name and address and reports gross income ranging from \$13,361 in 2001 to \$75,951 in 2003 and net business income running from \$10,000 in 2001 to \$33,881 in 2003. It is not clear whether this income is derived from an employer-employee relationship or from some kind of other arrangement with Mr. [REDACTED]. Without more, this evidence is not persuasive in light of the complete lack of corroborative documentation from Mr. [REDACTED] tax returns or other evidence.

In determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner appears to be a sole proprietorship, a business in which an individual 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, as noted by the director, relevant to 2001 and 2002, after deducting the proffered wage from Mr. [REDACTED] adjusted gross income (including the claimed \$18,000 rental income), the remaining \$3,832 in 2001 and the remaining \$1,996 in 2002 would be insufficient to cover the annual living expenses submitted to the record. Similarly, the adjusted gross income of \$24,403 reported in 2003, which is less than that reported in 2001 or 2002, indicates that that it was also insufficient to pay the offered salary and the annual expenses.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.