

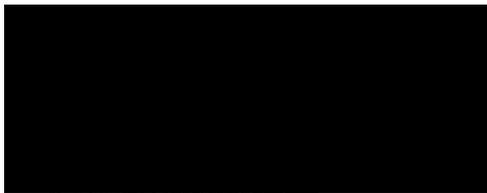
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: OCT 24 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:



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 dismissed.

The petitioner is a lawn services firm. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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, through current counsel, asserts that the evidence established the petitioner's ability to pay the proffered wage. The notice of appeal, filed August 8, 2002, indicates that counsel planned to submit a brief and/or additional evidence to the AAO in 30 days. As nothing further has been received to the record, the appeal will be reviewed as the record currently stands.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 December 9, 1997. The proffered wage as stated on the Form ETA 750 is \$10.42 per hour, which amounts to \$21,673.60 annually. The ETA 750B, signed by the beneficiary (as amended) on June 8, 1998, does not indicate that he has worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims that it was established 1984 and currently has one employee. The petitioner is structured as a sole proprietorship.

In support of its continuing financial ability to pay the proposed wage offer of \$21,673.60 per year, the petitioner initially submitted only a copy of Schedule C, Profit or Loss From Business, of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1997 through 2000. Schedule C reflects the financial data of the sole proprietor's business operations. Line 31 of Schedule C shows the net profit of an individual business. Any cumulative business income is carried forward to page 1 of the return and is reflected as a combined total on line 12 and included in the calculation of the sole proprietor's adjusted gross income. Because these extracted documents were not sufficient evidence of the petitioner's ability to pay the proffered wage, on April 10, 2002, the director requested additional evidence pertinent to this ability. The director requested that the petitioner submit complete signed federal tax returns for 1997 through 2001.

In response, the petitioner provided complete copies of the sole proprietor's requested tax returns. They reflect that the sole proprietor filed his taxes jointly with his spouse and declared two dependents. The tax returns contain the following information:

	1997	1998	1999	2000	2001
Adj. gross income (Form 1040)	\$18,739	\$ 16,395	\$ 15,089	\$ 16,005	\$ 18,102
Business gross receipts or sales (Sched. C)	\$105,826	\$ 94,891	\$108,795	\$122,540	\$154,493
Business gross income	\$105,826	\$100,374	\$113,972	\$122,540	\$ 78,930
Business total expenses (Sched. C)	\$93,132	\$ 90,279	\$105,237	\$113,621	\$ 66,164
Business net business income (Form 1040)	\$12,694	\$ 10,095	\$ 8,735	\$ 7,925	\$ 11,931

The director denied the petition on July 16, 2002. The director concluded that the sole proprietor's adjusted gross income shown on the tax returns for each of the relevant years was not sufficient to pay the proffered wage of \$21,673.60.

On appeal, counsel asserts that Schedule C of the sole proprietor's tax returns shows that the petitioning business earned in excess of \$100,000 each year, which demonstrated its ability to pay the proffered salary.

Despite counsel's assertions, the AAO notes that the petitioner's gross receipts dipped below \$100,000 in 1998 and the gross income fell to \$78,930 in 2001. Nevertheless, CIS does not review a petitioner's ability to pay by looking solely at the petitioner's gross receipts.

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 may have 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 record does not suggest that the petitioner has employed the beneficiary.

If the petitioner does not establish that it may have 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Counsel's assertion that only the petitioner's gross revenue should be considered is not persuasive as it is not supported by precedent and presents only a partial financial profile. It fails to include an examination of the expenses incurred in order to generate such revenue.

The petitioner in this case 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. As noted above, 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 certified wage offer is \$21,673.60 per year. Even without considering any living expenses incurred in order for the sole proprietor to support himself and his dependents, the proffered wage exceeded the sole proprietor's adjusted gross income by \$8,979.60 in 1997, \$11,578.60 in 1998, \$12,938.60 in 1999, \$13,748.60 in 2000, and by \$9,742.60 in 2001. Based on these consistent shortfalls, it cannot be concluded that the sole proprietor's adjusted gross income demonstrates the ability to pay the proffered wage in any of the pertinent years. It is also noted that the record of proceeding is devoid of any other assets of the petitioner.

Based on the evidence contained in the record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary 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.