



**DISCUSSION:** The preference visa petition was denied by the Acting Director (director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded back to the director.

The petitioner is a retail jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler. 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 makes statements through counsel and submits no 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.78 per hour, which amounts to \$32,822.40 annually.

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 with the petitioner's accompanying Schedule C, Profit or Loss from Business statement, for 2003. The petitioner also submitted bank account statements reflecting the petitioner's balances in its business account held by Community First and in its checking account held by CityWide Banks. The statements at Community First cover January through March 2004 and reflect ending balances of \$31,879.82 in January 2004, \$6,416.30 in February 2004, and \$41,844.35 in March 2004. The statements at CityWide Banks cover January through March 2004 and reflect ending balances of \$9,792.95 in January 2004, \$3,660.83 in February 2004, and \$15,758.48 in March 2004.

The petitioner's tax return reflects the following information:

	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$15,001

Petitioner's gross receipts or sales (Schedule C)	\$95,257
Petitioner's wages paid (Schedule C)	\$0
Petitioner's cost of labor (Schedule C)	\$0
Petitioner's net profit from business (Schedule C)	\$15,236

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 October 22, 2004, denied the petition, citing the "business income of \$17,227, and a zero taxable income," as well as no indication of wages paid on Schedule C despite a representation made on the Form ETA 750B that the beneficiary was the petitioner's sole employee.

On appeal, counsel<sup>1</sup> stated that the petitioner acknowledges its "limited net and gross income," but asserts that the director erred by failing to consider the beneficiary's ability to generate income. Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of that proposition. Counsel also asserts that the sole proprietor's individual assets should be considered and cites to "The Whislers, 90-INA-569 (BALCA January 31, 1992) in support of that proposition. Counsel also stated that he would provide additional evidence to illustrate the amount of the sole proprietor's individual assets. However, counsel dated the appellate form November 23, 2004, and as of this date, no additional evidence or brief has been received. The AAO sent notice to counsel on September 1, 2005 informing him that the AAO had not received any additional evidence or brief despite counsel's indication on the appellate form that he would send additional evidence and/or a brief within 90 days<sup>2</sup>. Counsel did not respond to the notice that provided him with five days to respond.

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 did not establish that it previously employed the beneficiary.

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).

<sup>1</sup> The appellate form was accompanied by a Form G-28, Notice of Entry of Appearance as Attorney or Representative by [REDACTED] signed by one of those attorneys but not signed by any consenting individual. However, a Form G-28 previously submitted into the record of proceeding by [REDACTED], who lists the same address as [REDACTED]. [REDACTED] suffices to demonstrate that the petitioner is represented by counsel practicing from the same office.

<sup>2</sup> The AAO notes that counsel did not explain why he needed 90 days for this and the instructions on the appellate form states that additional time greater than the allotted 30 days may only be granted for "good cause shown."

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<sup>3</sup>. 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 (7<sup>th</sup> 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 five. In 2003, the sole proprietorship's adjusted gross income of \$15,001 fails to cover the annual proffered wage of \$32,822.40. It is improbable that the sole proprietor could support himself and his family on a deficit without any evidence of additional personal assets and expenses, and/or, *inter alia*, wages already paid to the beneficiary.

The petitioner maintains balances in two accounts. Thus, although not argued it is implied that the petitioner could use these funds to pay the proffered wage. The record contains bank statements covering three months in 2004. The average balances might be substantial enough to cover the proffered wage but merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. The petitioner's bank statements are also unhelpful with respect to the petitioner's demonstration of its ability to pay the proffered wage beginning on the priority date since they only evidence funds available in three months in 2004. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO notes that the record of proceeding does not contain any evidence of the beneficiary's ability to generate income for the petitioner. Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of *Masonry Masters* mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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<sup>3</sup> Thus, counsel is correct that a sole proprietor's individual assets may be considered.

The major problem in this case is the lack of any regulatory-prescribed evidence pertaining to 2001 or 2002, and the lack of evidence pertaining to wages actually paid to the beneficiary<sup>4</sup>, and the sole proprietor's personal assets and expenses for 2001, 2002, 2003, and 2004. The director was not compelled by 8 C.F.R. § 103.2(b)(8) to request additional evidence from the petitioner despite the petitioner's showing of ineligibility; however, the general practice and procedure is to elicit information and evidence pertaining to the years under scrutiny and a sole proprietor's personal assets and expenses. Thus, despite the failure to show the ability to pay the proffered wage in 2003, the case is being remanded to the director to seek regulatory-prescribed evidence of the petitioner's continuing ability to pay the proffered wage in 2001, 2002, 2003, and 2004, along with evidence of the sole proprietor's personal assets and expenses. The director also applied an improper analytical test in his decision since he focused upon "Business income" and "taxable income" instead of the adjusted gross income, the petitioner's net profit from its business, and the totality of circumstances in the case that includes wages paid to the beneficiary and the sole proprietor's unencumbered and liquefiable personal assets reduced by his expenses.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

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<sup>4</sup> If the petitioner has actually employed the beneficiary as represented on the Form ETA 750B and has actually paid the beneficiary wages, it must explain why no wages are reported on its Schedule C, Profit or Loss from Business statement as either "Wages" or "Cost of labor" entries, accompanying the sole proprietor's individual income tax return, a concern voiced by the director in his decision.