

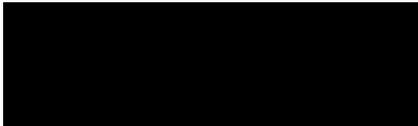


U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC-02-172-52789

Office: VERMONT SERVICE CENTER

Date: SEP 02 2005

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:

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

**DISCUSSION:** The preference visa petition was denied by the Acting Director (director), Vermont 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 is a private residence. It seeks to employ the beneficiary permanently in the United States as a live-out cook. 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 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 April 13, 2001. The proffered wage as stated on the Form ETA 750 is \$19.00 per hour, which amounts to \$39,520 annually.

The petitioner is a private household, which is considered analytically to be akin to a sole proprietorship. With the petition, the petitioner submitted his Form 1040, U.S. Individual Income Tax Return for 2000 showing a negative adjusted gross income<sup>1</sup>.

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 23, 2002, the director requested additional evidence pertinent to that ability. First of all, the director requested a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, if the petitioner was represented by counsel. 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 the petitioner's

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<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

2001 individual income tax return and noted that the petitioner's adjusted gross income in 2000 was insufficient to establish a continuing ability to pay the proffered wage. The director also requested any evidence of wage payments actually made to the beneficiary from the petitioner.

In response, the petitioner submitted a Form 1065, U.S. Return of Partnership Income of M&M Management Co., for which the petitioner is a 45% partner, that reported no net income and negative net current assets in 2001<sup>2</sup>.

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 23, 2002, the director requested additional evidence pertinent to that ability. The director again requested a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, if the petitioner was represented by counsel. 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 the petitioner's 2001 individual income tax return and any evidence of wage payments actually made to the beneficiary from the petitioner.

responded to the director's request with a letter stating that she did not received the request for evidence.

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 December 9, 2003, denied the petition. The director noted that did not submit a Form G-28 and thus was not acknowledged as the petitioner's counsel. The director also determined that the petitioner's partnership income was insufficient evidence of his continuing ability to pay the proffered wage in 2001 and noted the failure of the petitioner to submit his individual income tax return. Additionally, the director stated that the petitioner had to demonstrate he could support his family above the federal poverty guidelines in addition to paying the proffered wage<sup>3</sup>.

On appeal, the petitioner submits additional evidence of his personal assets, which he claims to total \$684,223.32 as of January 5, 2004. The petitioner submits copies of summary statements of various accounts held by the petitioner with Chase Investment Services Corp. The investments total \$516,249.73. Although the petitioner failed to provide evidence of the date the investment accounts originated, it would be a rare situation that such funds were generated in any timeframe other than a lengthy one. Thus, in its discretion, the AAO will consider that amount of funds as available to the petitioner beginning on the priority date in 2001<sup>4</sup>. The AAO also notes that preceding the priority date the petitioner reported substantial taxable interest on his 2000 individual income tax return.

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<sup>2</sup> Presumably this submission was according to the petitioner's intentions. The individual submitting the evidence on the petitioner's behalf did not submit a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner acknowledging his consent of her attorney services.

<sup>3</sup> The director referenced the federal poverty line, which is not utilized in the assessment of a sole proprietor's continuing ability to pay the proffered wage because the federal poverty guidelines do not account for specific differences among various geographical costs of living.

<sup>4</sup> Typically, 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).

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 has not established that it has 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).

The petitioner is akin to 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 (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 petitioner supports a family of four. In 2000, the petitioner's adjusted gross income was negative and does not demonstrate his ability to pay the proffered wage but that precedes the priority date in any event. The petitioner did not submit his 2001 tax return, which is required to demonstrate his ability to pay the proffered wage. However, the petitioner is correct on appeal – his personal assets may be considered. Although the AAO does not have evidence of his expenses and liabilities, the director failed to request them, and the AAO notes that the petitioner did not report a loss on his partnership return and the loss reported on his individual income tax return is aptly covered by his personal assets in addition to paying the proffered wage for multiple years. If the petitioner wishes to liquidate his investment savings to pay the wage of a household cook, he is entitled to do so. Based on the limited and unique factual circumstances of this case, the personal assets illustrate his continuing ability to pay the proffered wage beginning on the priority date.

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The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage. 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 on appeal.

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