

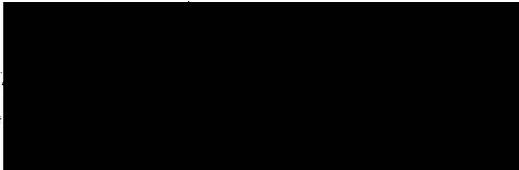


U.S. Citizenship
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Date: MAR 21 2006

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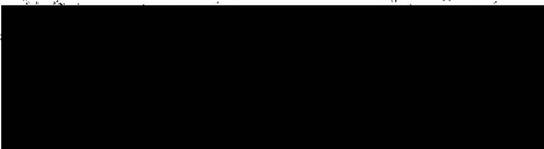
Petitioner:

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 service center director denied the employment-based visa petition, and a subsequent motion to reopen was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an automobile body repair company. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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. Accordingly, the director denied the petition.

On appeal, the petitioner submits additional documentation.

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 January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$18.63 an hour, or an annual salary of \$38,750.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since May 1995.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claims to have been established in April 1978, to have six employees, and did not indicate any gross or net annual income. The petitioner appears to have submitted a letter of employment verification from [REDACTED] Pacoima, California, that stated the beneficiary worked as a body repairer from February 1993 to May 1995. The petitioner also submitted a letter offering the beneficiary a job and describing the job duties and salary. In addition, the petitioner also submitted its Forms 1040, individual income tax return, for tax years 2000 and 2001. These documents indicated that the petitioner had an adjusted gross income of \$58,177 in 2001 and \$117,145 in 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 30, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner could establish its ability to pay the proffered wage by submitting annual reports federal tax returns, with all schedules and attachments, or audited financial statements. The director specifically requested that the petitioner provide such evidence for the years 1998 to the present, excluding the already submitted tax returns for 2000 and 2001.

In response, the sole proprietor submitted an incomplete 1998 federal tax return, which consisted of Schedule C, along with Schedule D, Form 4562, and attachments with regard to depreciation issues. The sole proprietor also submitted its complete federal tax return for tax year 1999, and a Form 4868 that indicated the petitioner requested an automatic extension of time to file its 2002 tax return. The petitioner also submitted its state of California tax returns with its federal returns.¹ The 1999 tax return indicates that the petitioner had two dependents besides himself in 1999 and an adjusted gross income of \$71,498.

On July 28, 2003, the director sent a second request for further evidence to the petitioner. The director requested that the petitioner resubmit its federal tax returns, excluding the years 1998 and 2002. The director also requested the petitioner submit Forms W-3, Transmittal of Wage and Tax Statements to establish the wages paid to its employees from 1998 to 2002. The director also requested the beneficiary's W-2 Forms from 1998 to 2002. Finally the director requested that the petitioner submit copies of its current valid city, county, state, and federal business licenses.

On September 15, 2003, the petitioner submitted its federal income tax returns from 1998 to 2002.² The petition also submitted its W-3 Forms for the years 1998, 1999, 2000, 2001, and 2002. Finally the petitioner submitted a business license issued by the Bureau of Automotive Repair, Licensing Unit, in Sacramento, California. September. With regard to the beneficiary's W-2 Forms, the petitioner stated that he paid the beneficiary in cash since the beneficiary began working for the petitioner. The petitioner stated that after the beneficiary received his work authorization card, he would then be placed on the petitioner's payroll.

On November 17, 2003, the director sent a third request for further evidence to the petitioner. The director stated that the petitioner had submitted its tax returns for 1998 to 2002, but had not established its ability to pay the beneficiary's wage from the priority to the present. The director also stated that the petitioner was a sole proprietorship, and that the submitted tax documents indicate that the petitioner did not have enough income to support his household and pay the proffered wage. The director then requested that the petitioner submit a statement of monthly expenses for the petitioner's family that included all of the family's household living expenses to include but not be limited to housing, food, car payments, insurance, utilities, credit cards, student loans, clothing, school, daycare, gardener, housecleaner, nanny and any other reoccurring monthly

¹ Although the sole proprietor did not submit the first page of its 1998 federal tax return that indicates the sole proprietor's gross adjusted income, the state of California tax return on line 13 indicates the petitioner's adjusted gross income for 1998 is \$50,761.

² The sole proprietor submitted only Schedule C of his 1998 Form 1040, and other schedules and attachments as described previously.

household expenses. The director also stated that if the sole proprietor would use personal assets to pay the proffered wage, the petitioner must submit evidence to verify that the petitioner possessed sufficient assets to pay the proffered wage continuously.

The director also requested the petitioner's Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters accepted by the state of California, as well as IRS W-2 Form printouts from the beneficiary for the years 1998, 1999, 2000, 2001, and 2002. With regard to the beneficiary's qualifications, the director requested that the petitioner submit a complete ETA Form 750, that shows the beneficiary's amended experience section, dated October 25, 1999, and to submit a letter that the petitioner possesses the experience listed on the Form ETA 750.³ Finally, the director requested that the petitioner submit evidence to establish the beneficiary's arrival in the United States.

In response, the petitioner submitted the requested statement of monthly expenses. This document indicated that the petitioner had monthly household expenses of \$1,170, or yearly household expenses of \$14,040. This document indicated that the petitioner paid no mortgage.⁴ The petitioner also submitted three DE-6 Forms for the last quarter of 2002, and the first and the third quarter of 2003. The DE-6 Form for the last quarter of 2002 has only the first page of the two-page document, and does not list the beneficiary as an employee. The two documents for 2003 indicate that the petitioner paid the beneficiary \$4,225 in the first quarter of 2003, and \$3,925 in the third quarter. The petitioner also appears to have submitted a copy of the Form ETA 750. Finally the petitioner resubmitted its tax returns for the years 1998, 1999, 2000, 2001, and 2002.⁵

On May 7, 2004, the director issued a Notice of Intent to Deny (NOID). The director noted that the petitioner had submitted its tax return for the years 1998,⁶ 1999, 2000, 2001 and 2002, with Schedules C for each year. The director also noted that the petitioner had not submitted a Form 1040 for its 1998 tax return; however, the director identified the petitioner's adjusted gross income for that year as \$36,207.⁷ The director then listed the petitioner's adjusted gross income for tax years 1999 to 2002 as follows: \$71,498 in 1999; \$117,145 in 2000, \$58,177 in 2001, and \$57,409 in 2002. The director determined that the petitioner had not established its ability to either pay the beneficiary's proffered wage or the difference between the beneficiary's actual wages and the proffered wage. The director stated that if only considering the petitioner's adjusted gross income in

³ As stated previously, the petitioner appears to have submitted a letter on letterhead from the beneficiary's previous employer. The Form ETA 750 indicates some corrections on Part B based on the petitioner's letter dated November 1999 that was also submitted apparently with the initial petition. The record is not clear why the director requested these materials.

⁴ Although the petitioner claims no mortgage payments, the petitioner does pay mortgages on other properties. The rents and the mortgage payments, however, are indicated in other schedules in the petitioner's tax returns; and are not considered part of the petitioner's household yearly expenses.

⁵ The sole proprietor's tax return for 1998 is not a complete Form 1040, although various schedules and attachments are submitted.

⁶ As previously stated, the sole proprietor submitted part of its tax return for 1998. It did not submit the first page of the Form 1040 for the tax year 1998, although it did submit Schedule C and other pertinent schedules and attachments.

⁷ The figure the director identified as the sole proprietor's 1998 adjusted gross income is actually the sole proprietor's net profit identified on line 31 of the 1998 Schedule C.

the period of time in question, it was not reasonable to assume that the petitioner's household of two could live off the income remaining after the beneficiary's wages had been subtracted from the petitioner's adjusted gross income. The director noted that any income that the petitioner earns, as a sole proprietor, must first be used to maintain the petitioner's cost of living. Any funds that remained after this was done could then be used to pay the beneficiary's wages. The director finally noted that if the sole proprietor would use personal assets to pay the wage, the petitioner had to submit evidence to verify that the sole proprietor possesses sufficient assets to pay the wage.

On June 3, 2004, counsel responded to the director's Notice of Intent to Deny (NOID). He stated that line 26, Schedule C of the petitioner's tax returns, reflects wages paid to all employees, which includes the beneficiary. Counsel also noted that line 31 of the Schedule C reflects the net profit of the petitioner's business. Counsel states that the beneficiary is included in the Forms DE-6 submitted to the record and that his wages are already deducted from the net profit. Counsel submits copies of the sole proprietor's bank statements and also Forms DE-6. The DE-6 Form submitted for the last quarter of 2002 contains two pages. The second page indicates that the beneficiary earned \$1,800 in the last quarter of 2002. The other DE-6 Forms indicate the beneficiary earned \$8,125 for the first and second quarters of 2003. With regard to the sole proprietor's bank statements, counsel submitted checking account statements from Bank of America for January to March 2004.

On July 20, 2004, the director denied the petition. The director stated that the petitioner had submitted a Schedule C for the tax year 1998 and IRS Form 1040, for the tax years 1999 to 2002. The director then stated that the 1998 Schedule C reflected an insufficient adjusted gross income of \$36,200.⁸ The director then noted that the tax returns for tax years 2001 and 2002 reflected insufficient adjusted gross income of \$58,177 and \$57,409. The director also stated that the petitioner's adjusted gross income for 2001 and 2002 were both greater than the proffered wage; however, he also stated that it was not reasonable to assume that the petitioner and his wife could live off the amount of income remaining after the beneficiary's proffered wage was subtracted from the petitioner's adjusted gross income. The director identified the sums remaining in the tax years 2001 and 2002 after the beneficiary's salary was paid as \$19,426 and \$18,658.60. The director then determined that the sole proprietor/petitioner had not established its ability to pay the beneficiary the proffered wage and also pay for his household expenses.

On appeal, the petitioner submits its Form 1040 for tax year 2003 that indicates the petitioner has an adjusted gross income of \$63,370. The petitioner also resubmits its tax returns for 1998 to 2002.⁹ He also submits the Forms W-3 Transmittal of Wages for tax years 1998 to 2001, as well as his previously submitted monthly expenses letter. Finally the petitioner submits copies of its Bank of America bank statements from December 2003 to July 2004.

On appeal, and in response to one of the director's request for further evidence, the petitioner submitted its bank statements. The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate

⁸ As stated previously, this figure is the petitioner's net profit for his business, not his adjusted gross income.

⁹ It is noted again that the sole proprietor only provided Schedule C in tax year 1998.

a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, the bank statements from the sole proprietor/petitioner's checking accounts do not cover the entire period of time in question from 1998 to the present time. Finally, the bank statements submitted on appeal that cover the period from December 2003 to July 2004 have an average monthly balance of \$3,510. The average balance is not substantial enough to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year.

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. Although the beneficiary claimed that the petitioner employed him since May 1995 on the Form ETA 750 submitted with the petition, the petitioner provided no further documentation of such employment from the priority date and to the end of 2003. The petitioner did provide copies of its DE-6 Forms for the last quarter of 2002 and the first three quarters of 2003. These documents established that the petitioner paid the beneficiary \$1,800 in tax year 2002, and \$12,050 in 2003. Thus, although the petitioner documented that he had paid the beneficiary wages in 2002 and 2003 these wages were not equal to or greater than the proffered wage of \$ 38,750.40. The petitioner also stated that he paid the beneficiary in cash and thus could not document any wages paid as of the 1998 priority date to tax year 2002. Thus, the petitioner did not employ or pay the beneficiary the proffered wage as of the 1998 priority date and to the present.

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, as stated previously, the director requested that the petitioner submit a list of reoccurring monthly expenses to better gauge the petitioner's household expenses and its ability to pay the proffered wage. The petitioner submitted a list that indicated the petitioner's monthly expenses were \$1,170, for a yearly household expense of \$14,040. In his decision, the director did not identify what figure he utilized when subtracting the petitioner's yearly household expenses from the petitioner's adjusted gross income. In these proceedings, the AAO considers the petitioner's yearly expenses as \$14,040, and will use this figure in its examination of the petition.

With regard to tax year 1998, the year in which the priority date was established, the sole proprietor did not submit a complete tax form to the record. The petitioner did however submit a Schedule C and other schedules and attachments for tax year 1998 to the record. The petitioner also has provided no explanation for why Form 1040 was not submitted. In his decision, the director incorrectly used the petitioner's net income listed on Schedule C in his examination of the petitioner's ability to pay the proffered wage. The AAO examines the petitioner's adjusted income on page 1 of the Form 1040, in its deliberations. It is noted that the petitioner's state of California Form 540 CI does identify the petitioner's adjusted gross income as taken from the IRS Form 1040, Line 18, and does list the petitioner's daughter as a dependent. The petitioner's 1998 California state income tax return indicates the petitioner is married, has an adjusted gross income of \$50,761, and has one daughter as a dependent. The petitioner's adjusted gross income minus the petitioner's yearly expenses of \$14,040 would leave \$36,721 to pay the proffered wage of \$38,750.40. The petitioner lacks \$2,029.40 to pay the proffered wage in tax year 1998.

In tax year 1999, the sole proprietor supports himself, his wife and a daughter. The sole proprietor's adjusted gross income is \$71,498. This sum, minus the petitioner's annual household expenses, totals \$57,458. This sum is sufficient to pay the proffered wage of \$38,750.40.

In tax year 2000, 2001, 2003 and 2003, the sole proprietor supports only himself and his wife. The petitioner's adjusted gross income in tax year 2000 is \$117,145. This sum, minus the petitioner's annual household expenses of \$14,040, equals \$103,105, which is sufficient to pay the beneficiary's proffered wage of \$38,750.40. In tax year 2001, the sole proprietor has an adjusted gross income of \$58,177. This sum, minus the petitioner's yearly expenses of \$14,040, equals \$44,137, which is sufficient to pay the proffered wage. In tax year 2002, the petitioner's adjusted gross income is \$57,409. This adjusted gross income, minus the petitioner's yearly household expenses, equals \$43,369, which is sufficient to pay the difference between the beneficiary's actual wages in 2002, and the proffered wage of \$38,750.40, namely, \$36,950.40.¹⁰ With regard to tax year 2003, the petitioner has adjusted gross income of \$63,370. This figure, minus the petitioner's yearly expenses of \$14,040, equals \$49,330, which is sufficient again, to pay the difference between the beneficiary's actual wages and the proffered wage of \$38,750.40, namely \$26,700.40.¹¹ Thus, the petitioner

¹⁰ Based on the petitioner's DE-6 Forms, the beneficiary earned \$1,800 in the fourth quarter of 2002.

¹¹ Based on the DE-6 Forms submitted to the record, the petitioner paid the beneficiary \$12,050 in tax year

appears to have established its ability to pay the proffered wage in tax years 1999, 2000, 2001, 2002 and 2003. Nevertheless, a petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As stated previously, the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date that in the instant petition is January 20, 1998.

It is noted that the petitioner has been in business since 1978, has always shown a profit in its business operations in the period of time in question, and has provided evidence as to wages being paid to its employees. In viewing the totality of the petitioner's circumstances, the AAO can examine overall circumstances of the petitioner's business operations and the sole proprietor's financial viability. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Since the petitioner has established that it has the ability to pay the proffered wage from 1999 to 2003, and the amount of financial resources missing that is needed to pay the proffered wage in 1998 is relatively small, the AAO finds that the petitioner has the financial viability to pay the proffered wage to the beneficiary as of the priority date and to the present.

Therefore, the director's decision is withdrawn. The appeal is sustained. The petition is approved.

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.

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