

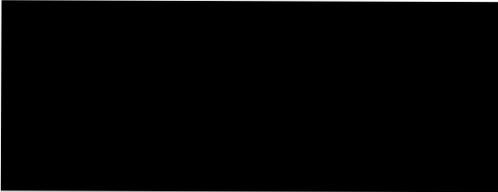
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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC-04-245-50068 Office: VERMONT SERVICE CENTER Date: SEP 06 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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, Chief
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 a commercial construction company. It seeks to employ the beneficiary permanently in the United States as a sheet metal roofer. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 21, 2005 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal 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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$29.32 per hour, which amounts to \$60,985.60 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes copies of investment account statements of the petitioner's owner and his wife dated in December 2003 and a copy of a Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2004. Other relevant evidence in the record includes copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2001, 2002 and 2003, a copy of a letter from a prior employer of the beneficiary in Philadelphia and a copy of a letter from a prior employer of the beneficiary in Russia.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the petitioner is submitting on appeal additional financial information in the form of personally owned brokerage accounts, held during all relevant periods, and a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2004 showing the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001, 2002, 2003 and 2004. The copies of the returns for 2001, 2002 and 2003 were submitted with the I-140 petition and the copy of the return for 2004 was submitted on appeal. The I-140 petition was submitted on August 23, 2004. Therefore the owner's tax return for 2003 was the most recent return available when the I-140 petition was submitted.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and his wife. The returns for 2001, 2002 and 2003 show three dependents and the return for 2004 shows two dependents. Therefore the household size of the petitioner's owner was five persons in 2001, 2002 and 2003 and four persons in 2004.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$70,555.00	not submitted	\$60,985.60*	\$9,569.40
2002	\$61,796.00	not submitted	\$60,985.60*	\$810.40
2003	\$47,593.00	not submitted	\$60,985.60*	\$(13,392.60)
2004	\$70,511.00	not submitted	\$60,985.60*	\$9,525.40

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The amounts remaining after paying the proffered wage are less than \$10,000.00 each year. Those amounts are considered insufficient to pay the reasonable household expenses of a five-person household in 2001, 2002 and 2003 and a four-person household in 2004. The above information therefore fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains copies of bank statements and brokerage account statements of the petitioner's owner and his wife, each dated in December 2003. Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business.

Bank statements and brokerage account statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

In the instant petition, the record contains a combined statement for a bank account and a money market account of the petitioner's owner and his wife with Wachovia Bank dated December 18, 2003. The total balance in those two accounts as of December 15, 2003 is shown as \$16,638.11. The record also contains a copy of an account statement for an investment account of the petitioner's owner and his wife with Wachovia Bank dated December 31, 2003. The statement shows a closing value of \$21,242.87 as of December 31, 2003.

On the I-290B, counsel states that the personally owned brokerage accounts were held "during all relevant periods." (I-290B, block 3). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence in the record indicates that the bank and investment accounts covered by the above account statements were held by the petitioner's owner and his wife during each of the years at issue in the instant petition. Therefore the account statements fail to establish the petitioner's ability to pay the proffered wage during 2001 and 2002. Moreover, even for 2003, the combined total balances on the accounts was only \$37,880.98 in December 2003. That amount is less than the proffered wage of \$60,985.60. It would not be appropriate to combine the account balances total with the adjusted gross income of the petitioner's owner and his wife for 2003, since to do so might cause double counting of some funds. Income earned by the petitioner's owner and his wife in 2003 could have been the source for some of the money in the account statements as of December 2003. Reviewing all of the bank statements during the relevant periods would assist CIS in determining if the funds really are double-counted. For these reasons, the account statements in the record fail to establish the petitioner's ability to pay the proffered wage during any of the years at issue in the instant petition.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2001, 2002 and 2003, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.