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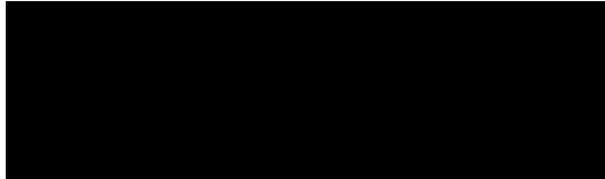
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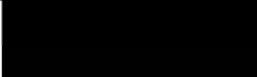
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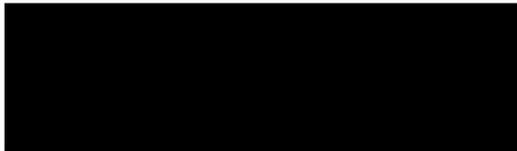
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 gas station and automobile workshop. It seeks to employ the beneficiary permanently in the United States as a "gas attendant cum cashier". As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director 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 in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 3, 2005 denial, the single issue in this case is whether or not the petitioner has the 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, 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(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$400 a week, or \$20,800 per year. The Form ETA 750 does not indicate that the position requires any experience.¹

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits a statement. Other relevant evidence in the record includes a Schedule C for the petitioner's Form 1040 for tax year 2001, as well as the beneficiary's W-2 form for tax year 2001. This document indicates the petitioner paid the beneficiary \$14,400 in tax year 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage as of the 2001 priority date or any other subsequent year.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.³ On the petition, the petitioner claimed to have been established on February 9, 1978, to have a gross annual

¹ Although the director did not address this issue in his decision, the AAO notes that the record is confused as to the visa petition classification requested by the petitioner in the initial I-140 petition. The petitioner submitted the I-140 petition under the classification of professional/skilled worker, while the Form ETA 750 indicates that no experience is needed to perform the duties of the proffered position. Further, although the Form ETA 750, Part B, that identifies the beneficiary's work experience, notes three years of work experience as a gas station attendant in Elmont, New York, the record contains no further verification of this work experience. For this reason, the AAO previously listed the regulatory guidance for both the skilled worker classification (Section 203(b)(3)(A)(i)), and other workers classification, (Section 203(B)(3)(A)(iii)).

² 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).

³ The AAO notes that the Schedule C for the petitioner's Form 1040 submitted to the record identifies the sole proprietor as Anton's Car Care Personnel, and the sole proprietor's principal business as personnel management. This statement further confuses the record. The beneficiary's 2001 W-2 form is also issued by Anton's Car Care Personnel. It is also noted that the director requested the petitioner's complete IRS 1040 tax return for 2001 in his request for further evidence. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a complete copy of its 2001 1040 tax return that would have demonstrated the sole proprietor's adjusted gross income and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

income of four million dollars, and to employ fifteen workers. On the Form ETA 750B, signed by the beneficiary on February 9, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the beneficiary only worked for the petitioner for part of the year in tax year 2001, and thus the beneficiary's salary is less than the proffered wage of \$20,400. Counsel also asserts that based on the world events affecting New York and Long Island in 2001, most businesses suffered losses in tax year 2001. Counsel also states that the petitioner has other business locations, which are more profitable, and that the petitioner's principal can use the income from other businesses to compensate for any of the instant petitioner's income deficiencies. Counsel states that the full time employment of the beneficiary will prompt more profits for the petitioner, as the beneficiary will improve the overall appearance of the store and sale items.⁴ Although counsel indicated on the I-290B appeal that he was submitting further evidence to the record, the AAO has received no further evidence. The AAO did send a FAX to the attorney of record inquiring as to whether counsel had submitted any further evidence on February 13, 2007. The AAO received no reply to this FAX. Thus, the AAO will examine the instant petition based on the record as presently constituted.

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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered 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 during a given period, 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 established that it employed the beneficiary in the priority year 2001; however, it did not establish that it paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Thus, the petitioner would have to establish its ability to pay the difference between the beneficiary's actual wages of \$14,400 in 2001, and the proffered wage of \$20,800 during tax year 2001. With regard to subsequent years following the priority date year of 2001, the petitioner has to establish its ability to pay the entire proffered wage.

⁴ Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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, the record does not contain the petitioner's Form 1040 for the priority year 2001 or for any other relevant year. Thus, the petitioner cannot satisfy the regulatory criteria outlined in 8 C.F.R. § 204.5(g)(2) with regard to the submission of either copies of federal tax returns, audited financial statements or annual reports to establish a petitioner's ability to pay the proffered wage. As a consequence, the AAO cannot examine the sole proprietor's ability to pay the proffered wage as of the 2001 priority date and to the present. Thus, the director's decision must be affirmed and the petition denied.

Nevertheless, the AAO, for illustrative purposes, will examine the Schedule C submitted to the record. As stated previously, the sole proprietor did not submit its complete federal tax return for tax year 2001, namely Form 1040 with all accompanying schedules and attachments. Thus, the sole proprietor cannot establish the actual number of persons the sole proprietor supported as of the 2001 priority date or the number of persons he currently supports. The sole proprietor's Schedule C for tax year 2001, the only evidence submitted with regard to the petitioner's financial resources, reflects the following information for tax year 2001:

	2001
Petitioner's gross receipts or sales (Schedule C)	\$81,064
Petitioner's wages paid (Schedule C)	\$73,299
Petitioner's net profit from business (Schedule C)	\$ 300

In 2001, as noted previously, based on the lack of sufficient evidence submitted to the record, the sole proprietor's adjusted gross income is unknown. Thus the sole proprietor cannot establish that it has sufficient

adjusted gross income to pay the difference between the beneficiary's actual wages and the proffered wage, as well as support himself and any other dependents. As stated previously, the record contains no further evidence as to the sole proprietor's number of dependents, household monthly expenses and reported adjusted gross incomes for any subsequent relevant year. Thus, the sole proprietor cannot establish its ability to pay the entire proffered wage in any year subsequent to the 2001 priority year.

On appeal, counsel asserts that the sole proprietor suffered losses based on the events of September 11, 2001. Counsel also asserts that the sole proprietor owns other businesses and as such, the sole proprietor can use the financial resources of these other businesses to pay the difference between the beneficiary's wages and the proffered wage in priority year 2001, or the entire proffered wage in subsequent years. However, counsel submits no further evidentiary documentation to further substantiate these assertions. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With reference to the events of September 11, 2001, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001

Counsel's assertion with regard to the sole proprietor's financial interests in other businesses is also not persuasive. If counsel refers to other businesses that the sole proprietor owns, these businesses would be represented by additional Schedules C in the petitioner's 2001 1040 tax form. The sole proprietor's adjusted gross income on page 1 of the Form 1040 would reflect the total net profits from all the Schedules C, not just the business identified on the instant petition as Anton's Car Care Center, Ltd. The record does not reflect any other businesses contained under the sole proprietor umbrella in the instant petition.

Furthermore, if counsel refers to the sole proprietor's financial interests in a distinct corporation separate from the sole proprietor's business identified in the 2001 Schedule C submitted to the record, such a corporation is a separate and distinct legal entity from its owners and shareholders, and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the 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 not met that burden.

ORDER: The appeal is dismissed.