

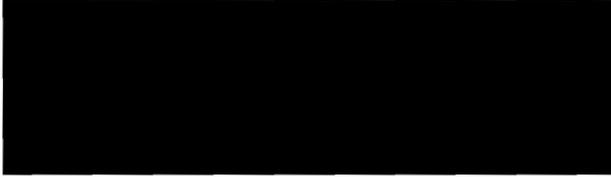
identifying data deleted to
prevent clear and unambiguous
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: [REDACTED]
EAC 05 056 50216

Office: VERMONT SERVICE CENTER

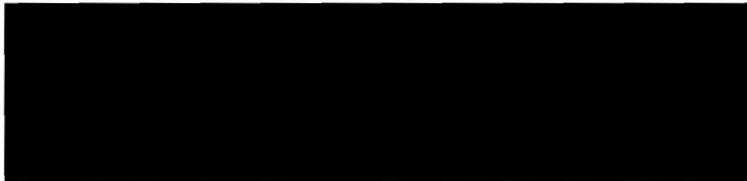
Date: JAN 03 2007

IN RE: 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, 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 sewing and alterations business. It seeks to employ the beneficiary permanently in the United States as a tailor. 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 June 1, 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.

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 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 CFR § 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$21,024.45 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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 appeal¹. Counsel submits evidence as to further financial assets of the sole proprietor petitioner, namely the petitioner's balances on as of December 2001 on the petitioner's wife's certificate of deposits and a checking account balance for December 2001. Counsel states that further evidence will be submitted to the AAO within 30 days. To date the AAO has not received any further evidence. Therefore the AAO will examine the petition based on the record as presently constituted. Other relevant evidence in the record includes the petitioner's Form 1040 for tax year 2001 and [REDACTED] statements for the petitioner's credit union share savings account and loan account from 2001 to 2004. The record also contains a statement from the [REDACTED] that provides the petitioner's balances from certificates of deposit as of June 24, 2004, as well as the petitioner's savings account. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in August 1997 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to work for the petitioner since October 1997.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) did not take into account the petitioner's full financial picture. Counsel states that the petitioner is a well-established businessperson who owns more than one business and who has personal resources beyond those listed on his tax return. Counsel submits an Internet report on the share certificates of [REDACTED] as of December 31, 2001. This reports indicates balances of \$10,573.59, \$7,397.91, and \$3,141.56. A second page submitted lists interest earned on an unidentified account from August 2001 to May 2005. According to the document, the account had a balance of \$5,087.29 as of December 31, 2001.

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, although the beneficiary indicated she had worked for the petitioner since October 1997, the petitioner submitted no further documentation as to the beneficiary's employment, such as W-2 forms, Forms

¹ 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).

1099-MISC, or paychecks. The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date and onwards. Thus, the petitioner has the obligation to establish its ability to pay the entire proffered wage as of April 2001 and to the present time.

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. Counsel is correct in his assertion that the petitioner's assets may be 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 sole proprietor supports himself, his wife, and one child. The petitioner's 2001 tax return reflect the following information:

	2001
Proprietor's adjusted gross income (Form 1040)	\$ 18,943
Petitioner's gross receipts or sales (Schedule C)	\$ 21,745
Petitioner's wages paid (Schedule C)	\$ 0
Petitioner's net profit from business (Schedule C)	\$ -1,732

In 2001, the sole proprietorship's adjusted gross income of \$18,943 fails to cover the proffered wage of \$21,024.45. It is improbable that the sole proprietor could support three dependents on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In response to the director's request for further evidence, counsel submitted the petitioner's account statements from the [REDACTED] from 2001 to 2004. These accounts include a savings account that showed a balance of \$3,295.29 as of April 26, 2001, the priority date. Therefore the monies from this savings account are not sufficient to establish the petitioner's ability to pay the proffered wage as of the 2001

priority date. The petitioner's loan account balances reflected on the Credit Union statement would be considered the petitioner's liabilities rather than assets and would not be considered in examining the petitioner's ability to pay the proffered wage. It is noted that this loan was paid off as of May 2003 and the record then reflect the petitioner's checking account.

The AAO does not view the petitioner's checking account balances as evidence of the petitioner's ability to pay the proffered wage. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate 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. Finally, since those funds are the petitioner's funds, they should already be represented on Schedule C to the sole proprietor's individual income tax return.

With regard to the evidence submitted on appeal, the record is not clear that the certificates of deposit are held in joint ownership, and thus can be viewed as part of the sole proprietor's assets. The sole proprietor is [REDACTED]. The document submitted by counsel identifies [REDACTED] as the holder of the certificates. The document does not note joint ownership of the certificates. It is noted that if these certificates were considered the sole proprietor's assets, the balances total \$21,113.16, an amount greater than the proffered wage.² Thus, the sole proprietor could have established its ability to pay the proffered wage as of the priority date, if the certificates of deposit are considered the sole proprietor's assets.³

However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Although not referenced by the director in his decision, the petitioner needs to establish its ability to pay the proffered wage as of the priority date and onward. See 8 C.F.R. § 204.5(g)(2). In the instant petition, the petitioner only submitted its Form 1040 for tax year 2001.⁴ To fully examine the petitioner's ability to pay the proffered wage, the petitioner would have to submit its Forms 1040 for tax years 2002 and 2003, both of which should have been available as of the date of filing the petition and by the date of the director's final decision in June 2005. Without further examination of the sole proprietor's tax returns and additional financial assets, the AAO cannot determine the petitioner's ability to pay the proffered wage as of the priority date and onward.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

² The sole proprietor, thus, would have the entire amount of its adjusted gross income in 2001, namely, \$18,943, available for the household expenses of three dependents.

³ It is further noted that if these certificates of deposit were applied to the wages to be paid in tax year 2001, the sole proprietor would have to provide evidence of further financial assets to pay the proffered wage in subsequent tax years.

⁴ It is noted that the director did not request the sole proprietor's additional tax returns in his request for further evidence, which is an omission on his part. However, the petitioner ultimately carries the burden of proof, and the regulation clearly states that a petitioner has to demonstrate a continuing ability to pay the proffered wage.

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.