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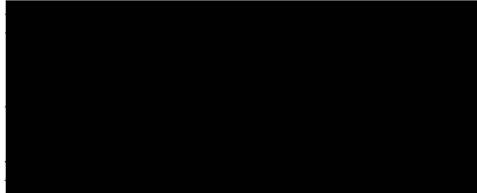
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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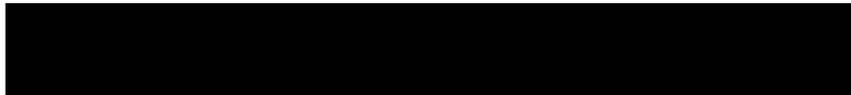


FILE: [REDACTED]
EAC-03-045-52588

Office: VERMONT SERVICE CENTER

Date: JAN 04 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 operates a business related to construction. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's May 2, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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.¹

The record shows that the appeal is properly filed, 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.

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 for processing by the relevant office within the DOL employment

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).

system on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour, 40 hours per week, for an annual salary of \$43,680. The labor certification was approved on August 6, 2002. The petitioner filed an I-140 Petition for the beneficiary on November 23, 2002. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: 1998; gross annual income: \$150,000.00; net annual income: \$20,000; and current number of employees: 6.

On June 11, 2003, the director issued a Request for Additional Evidence (“RFE”), requesting that the petitioner provide evidence of the petitioner’s ability to pay including its 2001 tax return, and if a sole proprietor, to include Schedule C. The RFE additionally requested that the petitioner provide evidence that the beneficiary had the required prior work experience to meet the qualifications listed on the certified ETA 750.

The director denied the petition on May 2, 2005, based on the petitioner’s failure to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. The petitioner appealed and the matter is now before the AAO.

First, in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim that it has employed the beneficiary. Therefore, the petitioner is unable to establish its ability to pay the beneficiary through prior wage payment.

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. 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 proprietor, 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 sole proprietor supports a family of two, including himself, and his daughter in Philadelphia, Pennsylvania. The tax returns reflect the following information for the following years:

	Petitioner's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2001²	\$11,458	\$81,704	\$53,616	-\$403

If we reduced the owner's adjusted gross income (AGI) by the wages that the petitioner would need to pay the beneficiary (\$43,680) to meet the proffered wage, the owner would be left with a negative adjusted gross income of -\$32,222 in 2001.

Based on the above analysis, the petitioner cannot demonstrate that he can pay the beneficiary the proffered wage in 2001 and support himself, and his daughter.

On appeal, counsel provides that the petitioning company's owner has over \$45,000 in personal funds, which he is willing to use to pay the beneficiary's salary, and therefore, the petitioner can demonstrate its ability to pay the beneficiary the proffered wage. The owner provided a signed statement to that effect. Additionally, to support the owner's statement, the petitioner provided a letter from PNC Bank, which confirmed that the owner had an account with PNC since December 2000. The letter further provided that the account's "average monthly balance" was \$36,793; that the petitioner had an average balance of \$46,892.09 on April 2001; and that the average balance as of July 2003 was \$45,223.21. If we accepted that the petitioner would use his personal funds to pay the wage, then the entire amount in the petitioner's bank account would be required to pay the proffered wage in 2001, and would leave the owner and his daughter to live on \$11,458. Counsel has not submitted any information regarding the owner's expenses to allow us to determine the amount required so that the petitioner can support himself, and his daughter.³ Further, the "average monthly balance" was \$36,793, less than the proffered wage. Additionally, we note that bank letter does not account for any liabilities that the petitioner may owe. Any liabilities might similarly require that the petitioner use his personal bank funds to pay the debts as they come due.

The petitioner provided a statement from a realty company confirming a list of properties that the sole proprietor currently owned. The list included the properties' estimated market values, and mortgage amounts. We note that this document is not dated and does not reflect as of what date the properties' market value was determined, but provides that the total market values for all properties combined is: \$1,197,000; and that the sole proprietor owed the following in mortgage amounts: \$548,500, leaving the petitioner with \$648,500 in equity.⁴ Conversely, we note that the mortgage amounts owed show that the petitioner has substantial liabilities, which the petitioner would be required to pay through income, and his tax return exhibits a low AGI. The petitioner's tax returns reflect that the petitioner rents out the properties owned, and while the properties generated \$35,580 in rental income, after considering repairs and other expenses, the petitioner's tax return reflects only \$431 in total rental income, which is already considered in the petitioner's AGI.

² We note that the petitioner did not submit his 2002 federal tax return individual Form 1040, which should have been available at the time of responding to the RFE.

³ Here, we note that the petitioner should submit a statement of the owner's expenses in any future proceedings so that CIS can determine the amount the petitioner requires to support himself and his family.

⁴ We note, however, that the properties would be encumbered and non-liquefiable assets.

Based on the petitioner's tax return, the properties do not generate extensive revenue through which the petitioner could pay the proffered wage.

The petitioner additionally provided bank statements for the business from March 30, 2001 to April 29, 2005. The statements reflected substantial variation, including a high amount of \$86,973 on August 31, 2004, and a low amount of \$0 on February 28, 2002. Further, between March 2001 and the end of 2002, the bank statements show that the petitioner's business had less than \$1,000 in its account in eight months of that time period. Additionally, as the accounts represent the sole proprietor's business checking account, these funds should have been shown on Schedule C of the sole proprietor's returns as gross receipts and expenses, and therefore already considered.

Examining the petitioner's tax return, bank statements, properties held, rental income generated, and mortgages, we would not conclude that the petitioner is able to pay the beneficiary the proffered wage from the priority date until the beneficiary reaches permanent residence.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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.