

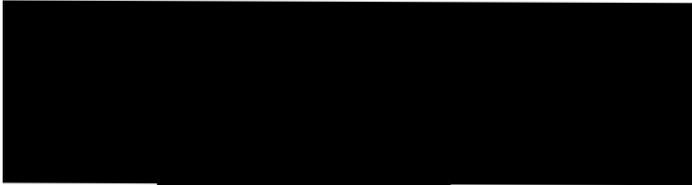
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

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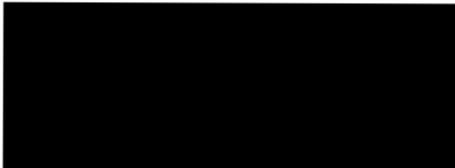
Petitioner:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is an automotive shop. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The ETA 750 identifies the petitioning employer as the same entity named on the I-140, Immigrant Petition for Alien Worker. The proffered wage as stated on the Form ETA 750 is \$19.30 per hour, which amounts to \$40,144 annually. The ETA 750B, signed by the alien beneficiary on April 1, 2001, does not indicate that the alien has worked for the petitioner.

The I-140 was filed on June 30, 2005. With the petition, the petitioner submitted a copy of a Harris County, Texas, document indicating that it recorded a certificate of operation under an assumed name for [REDACTED]. It continues by stating that this business is owned by [REDACTED]. The period of time the assumed name will be used is given as July 26, 2005 through July 26, 2015.

As evidence of its continuing financial ability to pay the certified wage of \$40,144 per year, the petitioner initially submitted an internal statement of income and expenses for the [REDACTED]. It also provided copies of the sole proprietors' individual federal income tax return consisting of Schedule C, Profit or Loss from Business

for 2001, 2002, and 2003. The other pages of the sole proprietor's income tax return were not provided. The copies of Schedule C, which each match the named petitioner on the I-140, contain the following information:

	2001	2002	2003
Gross receipts or sales	\$81,389	\$106,928	\$163,663
Gross Income	\$18,262	\$ 27,323	\$ 62,279
Total Expenses	\$ 5,916	\$ 15,749	\$ 41,248
Net profit	\$12,346	\$ 11,574	\$ 21,031

The petitioner also provided a copy of an Internal Revenue Service (IRS) Form 1099, Miscellaneous Income issued by "Baker Concrete Construction" to ██████████ in 2003¹ and a Form 1099 issued by ██████████ to ██████████ in 2003 for \$1,016. ██████████ Wage and Tax Statement (W-2) for 2003 is also included. It shows that she was paid \$8,629.79 by the ██████████ in 2003.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on August 30, 2005. The director requested that the petitioner supply evidence of its ability to pay the proffered salary by providing complete copies of the 2001, 2002, 2003, and 2004 federal tax returns, copies of W-3s for all employees including the beneficiary's W-2 for last year (2004), and a copy of the owner's business license and the date the business was established.

In response, the petitioner, through counsel, provided copies of the sole proprietors' individual income tax returns for 2001, 2002, 2003 and 2004. They show that he filed jointly with his spouse and declared three dependents. For 2001, 2002, and 2003, they reported adjusted gross income as follows:

2001	\$26,205
2002	\$23,791
2003	\$26,017

For 2004, the sole proprietors' individual income tax return reflects the following:

Gross receipts or sales (Sched. C)	\$220,414
Gross Income (Sched. C)	\$144,666
Total Expenses (Sched. C)	\$ 62,346
Net profit (Sched. C)	\$ 82,320
Adjusted gross income (Form 1040)	\$ 91,583

Counsel's transmittal letter also advised that the petitioner did not currently employ the beneficiary. She also indicates that a "certificate of operation with ██████████" is being submitted but it is not included with the materials provided. No information as to the petitioner's date of commencement or current business license was provided.

¹ The amount is not legible.

Upon reviewing the income tax returns provided, and mistakenly, the reported business income, the director concluded that the evidence did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on November 8, 2005, denied the petition.

On appeal, counsel resubmits more complete copies of the sole proprietors' individual tax returns (including schedules for self-employment tax calculation and earned income credit), a copy of a letter from an accountant, [REDACTED] CPA," and a copy of the "Assumed Name Certificate of Ownership," pertinent to the petitioner [REDACTED] indicating that one was filed in 1991 by the owners, [REDACTED] and [REDACTED] Aguilar and a second one for the period from August 30, 2004 through August 30, 2014.

Referring to the submitted documents, including [REDACTED] letter, counsel merely asserts that the petitioner has established its continuing ability to pay the proffered wage. The accountant's letter, dated December 5, 2005, correctly asserts that the adjusted gross income is the appropriate figure to examine when reviewing a sole proprietor's ability to pay the proffered wage. The accountant then states that he has completed a hypothetical balance sheet that would be reflective of the petitioner's net current assets if it were a corporation and concludes that the petitioner has had the ability to pay the proffered wage. The accountant lists the totals of these net current assets for each year, but fails to explain or enumerate how such calculations were made. The AAO finds that these conclusory findings are not probative of the petitioner's ability to pay the proffered wage. It is further noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited.

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 may have 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. The record in this case does not indicate that the petitioner has employed the beneficiary.

In determining the petitioner's ability to pay the proffered wage, CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual(s) 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses.

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, starting with 2001, even without consideration of payment of any additional household living expenses, which were not requested here, the proposed wage offer of \$40,144 exceeded, in each year, the sole proprietors' 2001 adjusted gross income of \$26,205, the 2002 adjusted gross income of \$23,791 and the adjusted gross income of \$26,017 in 2003. Only in 2004, did the sole proprietors' adjusted gross income of \$91,583 suggest that after covering their reasonable household living expenses, would there be sufficient funds to pay the certified wage.

However, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary beginning at the priority date. In this case, the priority date is April 17, 2001. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. 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).

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.