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U.S. Citizenship
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FILE: [REDACTED]
EAC 05 009 52337

Office: VERMONT SERVICE CENTER

Date: SEP 05 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 sign company. It seeks to employ the beneficiary permanently in the United States as a sign painter. 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.

On appeal, counsel submits additional evidence and maintains that the petitioner has the 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 the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 7, 2000. The proffered wage as stated on the Form ETA 750 is \$12.65 per hour, which amounts to \$26,312 per annum. On Part B of the ETA 750, signed by the beneficiary on June 20, 2000, the beneficiary does not claim that he has worked for the petitioner.

On Part 5 of the preference petition, filed on October 12, 2004, the petitioner claims that it was established on March 8, 2002, grosses an annual \$94,845, and nets an annual \$9,825. The petitioner claims to employ one worker.

The record shows that for 2000 and 2001, the petitioner was structured as a sole proprietorship, before it became a corporation. In support of its ability to pay the proffered wage for those periods, the petitioner initially submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001. The individual tax returns reflect that the sole proprietor filed jointly as a married person and claimed one dependent in 2000 and no dependents in 2001. The returns contain the following information:

Years	2000	2001
Petitioner's gross receipts (Schedule C)	\$ 74,235	\$78,139
Petitioner's wages paid (Schedule C)	\$ 10,400	\$10,400
Petitioner's total expenses (Schedule C)	\$ 37,497	\$39,537
Petitioner's net profit (Sched. C)	\$ 36,738	\$38,602
Total business net income (Form 1040)	\$ 36,738	\$38,602
Sole Proprietor's adjusted gross income (Form 1040)	\$ 31,867	\$35,934

It is noted that the business profit reflected on Schedule C, Profit or Loss from Business accompanying the individual tax return is carried forward to line 12 of the first page of the sole proprietor's tax return.

The petitioner was incorporated in 2002. The petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 and 2003. The 2002 return covers the period from March 2002 until December 2003. The 2003 return covers the calendar year. The returns show the following information:

Years	2002	2003
Gross receipts	\$28,009	\$94,845
Salaries and wages	\$ 3,200	\$10,400
Ordinary income (loss) from trade or business ¹	\$ 5,891	\$ 9,825
Current Assets (Sched. L)	none listed	-0-
Current Liabilities (Sched. L)	none listed	-0-
Net Current Assets	n/a	n/a

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of internally generated financial statements for the year ending December 31, 2003, as well as copies of a July 2000 through December 2000 (omitting July to August) bank account held in the petitioner's name along with copies of the 2001 and January to October 2002 of the same account. Copies of the petitioner's checking account statements have also been provided for the September 2002 to August 2004 period.

¹ For the purpose of this review, ordinary income will be treated as net income.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On June 1, 2005, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer and the beneficiary's claimed two years of relevant work experience.

In response, the petitioner, through counsel's office emphasized that the bank statements reflected sufficient resources to pay the proffered wage and provided an additional experience verification letter, containing the same language but a different date from the one that had been provided with the petition.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 5, 2005, denied the petition. The director noted that the sole proprietor's adjusted gross income on the 2000 and 2001 tax returns was not sufficient to support a household and pay the proffered wage. Similarly, the director concluded that that petitioner's net income on the 2002 and 2003 tax returns were insufficient. Finally, the director concluded that the petitioner's internal financial statements provided little evidentiary value and that the bank statements failed to show sufficient ending balances to pay the proffered wage.

On appeal, counsel urges that the petitioner's monthly average bank balances be determinative of its continuing ability to pay the proposed wage offer of \$26,312.

We disagree. In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, as noted above, the record does not indicate that the petitioner has employed the beneficiary.

Regarding the unaudited 2003 financial statements, the AAO agrees that internally generated statements such as those which appear in this record are considered as based on the representations of management and cannot be deemed 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.

With regard to bank statements and other cash or cash-equivalent resources, it is noted that the earlier AAO cases cited by counsel are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions. Counsel's reliance on the petitioner's bank statements is misplaced. 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 would provide an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L of a corporate taxpayer and as part of the income and expenses of a petitioning business encompassed within Schedule C of an individual tax return. As such, they are already included in the calculation of a petitioner's net current assets or financial portrait for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements,

which correlate to the period(s) covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. No audited financial statement was provided to the record.

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). In *K.C.P. Food Co., Inc. v. Sava*, 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.

As discussed above, the petitioner was a sole proprietorship in 2000 and 2001; a business in which an individual 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. As noted above, 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 2000, even without consideration of payment of any additional living expenses, which were not requested here, the proffered wage of \$26,312 represents 82% of the sole proprietor's adjusted gross income of \$31,867 and 73% of the adjusted gross income in 2001. Based on these figures, and the evidence contained in the record, we conclude that is unlikely that the sole proprietor could have sufficient funds to pay the full proffered wage as well as support herself and household during the period under consideration. In this matter, during the 2000-2001 period, little tangible evidence, other than the declaration of taxable interest, consisting of cash or cash equivalent unrestricted liquid assets belonging to the sole proprietor and available to support the payment of the proffered wage has been submitted. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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).

As noted by the director, in 2002, the petitioner's net income of \$5,891 as shown on its federal tax return was \$20,421 less than the certified wage of \$26,312. In 2003, its net income was \$16,487 less than the proffered wage. Net current assets could not be calculated on either tax return because none were listed on the 2002 return and "-0-" was shown on the 2003 return. Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

Beyond the decision of the director, it is noted that the experience verification letters submitted on behalf of the beneficiary contain no legible name or signature of the author, and as such, cannot be accepted as a reliable indicator of his two years of experience as a sign painter pursuant to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The documents provided contain the names of the notaries and the translators, but do not indicate the name and title of the person who wrote the letters. 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).

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 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.