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U.S. Citizenship
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Services

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[redacted]

FILE: EAC 03 079 50002 Office: VERMONT SERVICE CENTER Date: APR 04 2006

IN RE: Petitioner:
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:

[redacted]

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, Director
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 is a landscaping firm. It seeks to employ the beneficiary permanently in the United States as a landscaping gardener. 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 asserts that the director erred in her analysis of the evidence submitted and maintains that the petitioner has the financial ability to pay the proffered wage.

Counsel has requested oral argument before the AAO. Counsel states that the director's denial violates the petitioner's due process rights and the cited law is inapposite and requires correction by the AAO. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). Here, counsel's reasons for requesting oral argument did not specifically identify unique factors or issues of law to be addressed that could not be addressed in writing. The written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is $13.00 per hour, which amounts to $27,040 per annum. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary does not claim that he worked for the petitioner.

On Part 5 of the preference petition, filed on January 9, 2003, the petitioner claims that it currently employs two workers, has a gross annual income of $53,000 and a net annual income of $24,000.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001. As the priority date of April 27, 2001 is covered by the 2001 financial information, it is more relevant than earlier years. Both tax returns show that the sole proprietor filed as a single person and declared no dependents.

The sole proprietor's 2001 individual tax return reflects the following:

Petitioner's gross receipts (Schedule C)	$ 52,270
Petitioner's wages paid (Schedule C)	$ 22,252
Petitioner's total expenses (Schedule C)	$ 27,645.95
Petitioner's net profit (Sched. C)	$ 24,624.05
Total business net income (Form 1040)	$ 24,624.05
Sole Proprietor's adjusted gross income (Form 1040)	$ 25,197.98

On October 23, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested that the petitioner provide a copy of its monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, etc. for 2001.

In response, the petitioner, through counsel, provided a copy of the sole proprietor's 2001 household expenses, which amounted to $27,446.03 for that year. In addition, counsel supplied a copy of the sole proprietor's checking account statement, dated May 15, 2002, showing an ending balance of $1,781.61. Another document, dated January 8, 2004, referencing the same account number and identified as a "Demand Deposit Display History," shows a daily balance of $101,499.89 as of December 31, 2003.

Counsel's transmittal letter, dated January 11, 2004, submitted with the documents in response to the director's request for evidence, explains that the sole proprietor covered the shortfall between his living expenses and income by transferring funds from a CD account and his operating account. Counsel also mentions that the sole proprietor hired the beneficiary who has become indispensable and that there are plans for expansion.

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 April 6, 2004, denied the petition. The director determined that after covering his living expenses for 2001, the remaining funds were insufficient to pay the proffered wage of $27,040.

On appeal, counsel asserts that the director failed to consider that the beneficiary's wages of $22,252 had already been paid by the petitioner. He claims that his response to the director's request for evidence informed the director that the sole proprietor had "hired the beneficiary," and that the director had all the necessary relevant information to properly adjudicate the petition. Counsel also claims that the intentions underlying the Legal Immigration Family Equity (LIFE) Act Amendment, Section 245(i), presume that an alien present and remaining in the U.S. as of December 21, 2000, would be employed by a sponsor.

While we disagree that the adjudication of this petitioner's ability to pay the proffered wage in an employment-based preference petition is relevant to LIFE act provisions related to the application for permanent residence, we agree that if demonstrated by the appropriate documentation, actual wages paid to a beneficiary by a petitioner may be considered in a petitioner's ability to pay the proffered wage.

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 for a specified period. In the instant case, the director failed to mention the petitioner's employment of the beneficiary, as hinted by counsel's letter, in the director's denial of the petition. However, the director had no reason to assume that such employment existed, as the petitioner submitted no documentary evidence that the wage expense reported on the 2001 tax return specifically related to the beneficiary and not to some other employee. 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)). No identification of such employment and wages paid was made by the submission of any Wage and Tax Statement (W-2) or Miscellaneous Income (Form 1099) with either tax return. Moreover, the ETA 750B, signed by the beneficiary on April 23, 2001, and initially submitted with the petition, failed to mention any employment with the petitioner, although it is noted that the petitioner reported wage expense on Schedule C of his 2000 tax return as well. There was no reason for the director to automatically link such an expense with the beneficiary and to mention it in her request for evidence or make a specific finding related to such employment based on a brief mention in counsel's transmittal letter submitted in response to the request for evidence. Counsel's statements in a transmittal letter 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).

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 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, in 2001, even without consideration of payment of any additional living expenses, the proffered wage of $27,040 exceeded the sole proprietor's adjusted gross income of $25,197.98 by $1,842.02. Based on these figures, it is highly unlikely that the sole proprietor could have sufficient funds to pay the full proffered wage as well as support himself during the period under consideration. Put another way, even if documentation of actual wages of $22,252 paid to the beneficiary in 2001 was provided in the form of a W-2, the petitioner would need to be able to provide an additional $4,788 to pay the proffered wage of $27,040, in addition to covering his living expenses of $27,446.03. His reported 2001 adjusted gross income of $25,197.98 does not demonstrate that such an amount was available. The record does not contain any competent evidence that the petitioner had other assets available, in 2001, to pay the wage. The petitioner's ability to pay the proposed wage offer has not been established for this year.

A sole proprietor's individual assets (and liabilities) may also factor into the determination of a petitioner's ability to pay the proffered salary. In this matter, however, no tangible evidence consisting of demonstrated 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 for 2001. For 2002, as noted above, one May 15, 2002, bank statement shows a balance of $1,781.61. Not until December 31, 2003, when the sole proprietor's account showed a $100,000 deposit, does the petitioner's ability to pay a proffered wage of $27,040 begin to emerge, as well as provide the necessary living expenses for the sole proprietor. We do note that the petitioner reported significant amounts of interest income on his returns. However, this merely suggests that some amount of funds were earning interest in a bank. It does not show them to be available or accessible for payment of the beneficiary's wages during the pertinent period.

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 salary as of the April 27, 2001, priority date of the petition.

Beyond the decision of the director, it is noted that the employment verification letters contained in the record do not sufficiently corroborate the beneficiary's prior qualifying employment experience. According to Item 14 of the ETA 750, an applicant for the certified position of landscaping gardener must have two years of experience in the job offered as of the visa priority date of April 27, 2001, as set forth in the labor certification. The regulation at 8 C.F.R. §§ 204.5(l)(3)(ii)(A) requires that such experience be verified by the relevant trainer or employer. In the instant case, three letters, all dated November 21, 2002, from three different employers were submitted. Although all mentioned that the beneficiary had performed some landscaping work for them, none quantified the hours worked per week or the dates of employment, whereby two years of full-time employment as a landscaping gardener, obtained by April 27, 2001, may be corroborated. It cannot be concluded that the petitioner established that the beneficiary had accrued the requisite past employment experience as required by the terms of the approved labor certification.

In view of the foregoing, the petitioner's evidence fails to demonstrate its continuing ability to pay the proffered wage and fails to establish the beneficiary's prior employment experience in the certified position. Each reason is considered to be an independent and alternative basis for denial. In visa 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. In this matter, that burden has not been met.

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.