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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAR 24 2006**
EAC-04-052-50854

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:

SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a law office. It seeks to employ the beneficiary permanently in the United States as a secretary. 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, the petitioner submits a brief and additional evidence.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$14.02 per hour, which amounts to \$29,161.60 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its individual income tax return with accompanying Schedule C, Profit or Loss from Business Statement, for 2002.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 20, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its 2001 federal tax return to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested, *inter alia*, an itemized list of the sole proprietor's monthly expenses for 2001 and any evidence of wages actually paid by the petitioner to the beneficiary in 2001.

In response, the petitioner submitted a letter stating that it did not employ the beneficiary in 2001 but did in 2002 and 2003; its individual income tax return with accompanying Schedule C, Profit or Loss from Business Statement, for 2001; a 1099 and W-2 form issued by the petitioner to the beneficiary in 2002 and 2003 reflecting wages in the amounts of \$12,000 and \$18,568.17, respectively.

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 September 20, 2004, denied the petition.

On appeal, the petitioner asserts that the director failed to consider his personal assets, such as non-taxable social security income and funds in bank accounts, and wages paid to his secretarial staff. Additionally, the petitioner states that one of his current secretaries, [REDACTED] (Ms. [REDACTED]) would be terminating her position as secretary and assuming a position in accounting and thus the wages paid to her for her duties as secretary would be available for the proffered position. The petitioner resubmits previously submitted evidence; proof of receipt of \$30,309.60 in social security benefits in 2001; a copy of a W-2 form reflecting wages of \$20,000 paid to Ms. [REDACTED] in 2001; copies of W-2 forms reflecting wages paid to two other secretarial staff members in 2001; an unnotarized affidavit from Ms. [REDACTED] stating that she would be terminating her position as secretary and intending to find a position in accounting; a copy of Ms. [REDACTED] diploma in accounting; a statement of a money market account in the sole proprietor's name for November 2001 reflecting an average balance of \$30,638.93; and a checking account statement in the petitioner's name reflecting an average balance of \$5,668.44.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$12,806	\$5,756
Petitioner's gross receipts or sales (Schedule C)	\$50,939	\$39,188
Petitioner's wages paid (Schedule C)	\$26,717	\$34,780
Petitioner's net profit from business (Schedule C)	-\$39,031	-\$54,967

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 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, the petitioner established that it employed and paid the beneficiary \$12,000 and \$18,568.17 in 2002 and 2003, respectively. The petitioner conceded that it did not employ or pay any wages to the beneficiary in 2001 so it must illustrate that it can pay the full proffered wage in that year. Since the proffered wage is \$29,161.60, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$17,161.60 in 2002 and \$10,593.43 in 2003.

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. 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.

The petitioner rebuts the director's determination that the sole proprietor failed to submit a list of his personal living expenses, stating on appeal that it did in fact submit the sole proprietor's expenses with reference to a detailed list of expense deductions accompanying the petitioner's Schedule C, Profit or Loss from Business statement, to the sole proprietor's individual income tax return. On appeal, the sole proprietor submits a supplemental list of his monthly expenses that include mortgage, food, utilities, clothing, transportation, medical insurance and costs totaling \$1,971.79, which annualize to \$23,661.48. The AAO considers the sole proprietor's list of personal living expenses as the expenses it will analyze for purposes of determining whether or not the petitioner can demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In the instant case, the sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of \$12,806 does not cover the proffered wage. Thus, it cannot establish the petitioner's ability to pay the proffered wage in that year especially since that amount does not cover the sole proprietor's personal living expenses, which brings the sole proprietor's net income to a deficit of -\$10,855.48. The petitioner would also have to pay the proffered wage, which would further reduce that deficit to -\$40,017.08 since it is obligated to pay the full proffered wage.

Likewise, in 2002, the sole proprietorship's adjusted gross income of \$5,756 does not cover the difference between the wages actually paid to the beneficiary and the proffered wage of \$10,593.43. Thus, it cannot establish the petitioner's ability to pay the proffered wage in that year especially since that amount also does not cover the sole proprietor's personal living expenses, which brings the sole proprietor's net income to a deficit of -\$17,905.48. The petitioner would also have to pay the difference between the wages actually paid and the proffered wage, which would further reduce that deficit to -\$28,498.91.

The petitioner's 2003 tax return is not contained in the record of proceeding and thus that year may not be analyzed. However, it would be obligated to demonstrate that it could pay the difference between the wages it actually paid to the beneficiary and the proffered wage for that year, which is \$10,593.43.

On appeal, the petitioner states that the sole proprietor may rely upon his personal assets to pay the proffered wage. The Form SSA-1099-SM for 2001 reflects that the sole proprietor received \$30,309.60 in social security benefits. The form states that part of that amount may be taxable income although the petitioner claims that it is not. No evidence was submitted to establish that the total amount is not taxable income.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Finally, the petitioner maintains a balance of \$30,638.93 in a money market account from November through December 2001 and a balance of \$5,576.62 from November through December 2001 in a business checking account. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balances are not substantial enough to cover the deficit described above for 2001 of -\$40,017.08 and merely show the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. The funds from the petitioner's business checking account would be reflected on its Schedule C and factored into the sole proprietor's adjusted gross income and thus will not be added into the funds available to pay the proffered wage.

The petitioner advised that it would replace one worker and names the worker, states her wages, and verifies her employment. However, the language used by the petitioner and Ms. [REDACTED] indicates that she "intends" to pursue a job in accounting, not that the petitioner has terminated her employment and replaced her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position.

The AAO also notes that Ms. [REDACTED] declaration is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion or appeal are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO has no adverse information pertaining to this case and thus does not doubt the veracity of the petitioner's and Ms. [REDACTED] the sole proprietor's spouse, claim that Ms. [REDACTED] will terminate her employment upon Ms. [REDACTED] acquisition of a job in accounting. Additionally, the visa petition corroborates that the proffered position is not a new one. However, the sole proprietor's adjusted gross income combines his income with Ms. [REDACTED] income. Replacing her with the beneficiary may result in transferring the funds used to pay her salary to the petitioner's ability to pay the proffered wage; however, it also reduces the sole proprietor's adjusted gross income by the same amount and it is too speculative for these proceedings to consider her potential wages if or when she might be hired for an accounting position. Thus, Ms. [REDACTED] wages will not be considered towards the proffered wage.

Adding the \$30,309.60 in non-taxable social security income in 2001 to the funds from the sole proprietor's money market account, \$30,638.94, would bring the deficit for that year up from -\$40,017.08 to a surplus of \$20,931.45 in 2001, which thus establishes the petitioner's ability to pay in that year. Adding the 2001 surplus to its 2002 deficit results in -\$7,567.46. The sole proprietor reported dividend income from a trust fund in the amounts of \$17,686 in 2001 and \$19,969.09 in 2002; however, these funds are factored into his adjusted gross income and cannot be considered additional funds to pay the proffered wage. Although the sole proprietor's tax returns reflect that there are two CD accounts, there is no evidence that the sole proprietor

may access those. There is no regulatory-prescribed evidence for 2003 from which to analyze the petitioner's continuing ability to pay the proffered wage. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage in 2002 or 2003.

The petitioner has therefore failed to demonstrate that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is dismissed.