

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

BE

FILE:

EAC-03-081-52566

Office: VERMONT SERVICE CENTER

Date: APR 14 2005

IN RE:

Petitioner:

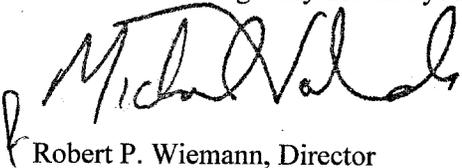
Beneficiary:

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, 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 involved in the business of masonry. It seeks to employ the beneficiary permanently in the United States as a mason. 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 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 February 9, 2001. The proffered wage as stated on the Form ETA 750 is \$19.00 per hour, which amounts to \$39,520 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business, for 2001.

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 March 12, 2003, 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 annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence of wages already paid to the beneficiary since the record of proceeding indicated that the petitioner had employed the beneficiary since 1999. The director noted that the sole proprietor's adjusted gross income was too low to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business, for 2002. The petitioner also submitted a letter from the sole proprietor stating that he paid the beneficiary cash for services rendered that the beneficiary paid individual taxes on. The sole proprietor claimed that the beneficiary paid taxes on what the beneficiary earned in each year since 1999, which he stated was \$9,500 in 1999, \$22,000 in 2000, and \$23,000 in 2001<sup>1</sup>. The sole proprietor also discussed his personal assets which he stated included the following: (1) "Chevy Express van worth approximately \$30,000," and the sole proprietor owes "less than \$5,000" on it; (2) real estate property valued at \$360,000 for which he has \$100,000 equity in; (3) real estate property "purchased for \$80,000" and in the process of being renovated with the anticipation that the "value [will] be about \$300,000"; (4) tools and equipment with an "estimated value" of \$30,000; and (5) a 1955 motorcycle with an "estimated value" of \$30,000.

The petitioner submitted the additional following evidence in response to the director's request for evidence: an appraisal of one property, located at a mortgage statement for property at evidencing that the sole proprietor owes \$252,401.25 on the note; an invoice from GMAC Financial Services evidencing an overdue account; a mortgage statement for evidencing past due installments on the note; bank statements, for the period January 2001 through May 2001, in the petitioner's name evidencing an ending balance for a business deposit account ranging from a low of \$709.22 to a high of \$3,092.25; checking account statements, for the period June 2001 through December 2001, in the petitioner's name evidencing an average balance ranging from a low of -\$10.68 to a high of \$341.83. The beneficiary's individual income tax returns were also submitted for the years 1999 through 2001, but the returns do not evidence the beneficiary's source of income. The beneficiary's indicated business on Schedule C is a "Handyman" and he lists his home address as the business address.

The tax returns reflect the following information:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$15,962	\$17,452
Petitioner's gross receipts or sales (Schedule C)	\$78,323	\$81,228
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$20,208	\$25,865
Petitioner's net profit from business (Schedule C)	\$17,134	\$15,388

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 July 16, 2003, denied the petition. The director noted that the petitioner failed to provide an audit of the sole proprietor's claimed assets and liabilities. Additionally, the director noted that in 2001, the beneficiary was paid \$16,520 less than the proffered wage and the sole proprietor's adjusted gross income for that year was insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the sole proprietor was unaware of a requirement to produce audited financial statements and states that the sole proprietor's assets are sufficient evidence of the petitioner's continuing

<sup>1</sup> Evidence preceding the priority date in 2001 does not necessarily provide dispositive proof of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

ability to pay the proffered wage beginning on the priority date. The petitioner submits handwritten, unnotarized and unaudited "Financial Statement Form[s]" for 1999, 2000, and 2001.

At the outset, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of the petitioner. The unsupported representations of the petitioner are not persuasive evidence of a petitioner's ability to pay the proffered wage. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the unaudited financial statement forms presented on appeal are not persuasive evidence of the petitioner's continuing 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 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 has not established that it has previously employed the beneficiary. The petitioner did not provide audited evidence pertaining to payroll records, paystubs or cash disbursement receipts, internal ledgers, or some other form of independent, corroborative evidence of wages paid to the beneficiary. Although the sole proprietor claims that he paid the amounts the beneficiary claimed on his individual income tax returns in an unnotarized and unsworn letter, the beneficiary's tax returns fail to corroborate that claim. The beneficiary's income tax returns do not indicate the source of income, and instead reflect that he earned the income reported as a "handyman" working out of his home, not as a "mason" for the petitioner. Additionally, the petitioner's reported paying no wages and only \$20,208 in costs of labor, which does not corroborate payment of \$23,000 in wages paid to the beneficiary in 2001. Either the sole proprietor's assertions were incorrect or the sole proprietor and the beneficiary failed to accurately complete their tax returns. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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 (7<sup>th</sup> 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 one. In 2001, the sole proprietorship's adjusted gross income of \$15,962 does not cover the proffered wage of \$39,520. Even if the petitioner established that it actually did pay the beneficiary wages in the amount of \$23,000 in 2001, this would leave a remaining wage of \$16,520. The sole proprietor's adjusted gross income would also fail to cover the remaining wage. Thus, it would be impossible for the sole proprietor to take care of his own expenses in addition to paying the proffered wage. Likewise, in 2002, the sole proprietorship's adjusted gross income of \$17,452 does not cover the proffered wage of \$39,520. Thus, it would be impossible for the sole proprietor to take care of his own expenses in addition to paying the proffered wage.

Finally, the petitioner maintains some bank accounts. However, the average or ending balances are not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. Indeed, some balances were negative. Likewise, the sole proprietor's claimed assets are insufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Real estate holdings and vehicles are not the type of easily liquefiable and unencumbered assets typically used by employers to pay their employees' wages. Additionally, the sole proprietor submitted two bills with deficiencies showing either inability to pay two different creditors or failure to pay bills on time. Either way, the evidence contained in the record of proceeding does not weigh in the favor of finding that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had 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 not met that burden.

**ORDER:** The appeal is dismissed.