



U.S. Citizenship  
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FILE:

EAC 04 053 50119

Office: VERMONT SERVICE CENTER

Date: MAR 03 2006

IN RE:

Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker an Unskilled Worker 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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a sales clerk. 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 asserts that the petitioner has the financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$9.42 per hour, which amounts to \$19,593.60 per annum. On Part B of the ETA 750, signed by the beneficiary on April 11, 2001, the beneficiary does not list the petitioner as one of his employers, although he claims employment with a business named “Stop and Shop” in the same city as the petitioner, from September 1999 until April 2001. No street address is given.

On Part 5 of the preference petition, filed on December 11, 2003, the petitioner claims that it currently employs three workers, has a gross annual income of \$199,174 and a net annual income of \$3,389.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002.

The sole proprietor's 2002 individual tax return reflects that she filed jointly with her spouse and claimed one dependent. The tax return contains the following information:

Petitioner's gross receipts (Schedule C)	\$ 265,000
Petitioner's wages paid (Schedule C)	\$ 75,000
Petitioner's total expenses (Schedule C)	\$ 118,684
Petitioner's net profit (Sched. C )	-\$ 52,243
Total business net income (Form 1040)	-\$ 52,243
Sole Proprietor's adjusted gross income (Form 1040)	\$ 9,793

The 2002 Wage and Tax Statement (W-2) issued to the beneficiary reflects that he was paid \$20,000 in wages by the petitioner.

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 December 11, 2003, denied the petition. The director found that the petitioner had failed to provide evidence from the year of filing, 2001.

On appeal, counsel provides a copy of a W-2 issued to the beneficiary for 2001. It also reflects that he received \$20,000 in wages from the petitioner. Counsel maintains that this establishes the petitioner's ability to pay the proffered wage as of the priority date of April 13, 2001.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

As mentioned 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 (7<sup>th</sup> 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 this case, as noted by the director, the sole proprietor's 2002 adjusted gross income of \$9,793 is far less than the proffered salary of \$19,593.60 and is insufficient to demonstrate the petitioner's ability to pay the certified wage. CIS, however, will also examine whether a petitioner may have actually employed and paid the full proffered wage to a beneficiary during a given period as an alternative method to show its ability to pay the certified wage. In this matter, the 2002 W-2 shows that the petitioner employed the beneficiary during that year and paid an annual wage exceeding the proffered salary by \$406.40. As shown by the W-2 submitted on appeal, the petitioner paid the same annual salary of \$20,000 to the beneficiary in 2001. Thus, this evidence constitutes *prima facie* proof of the petitioner's ability to pay the proffered wage of \$19,593.60.

Accordingly, based on the evidence contained in the record and after consideration of the information and argument presented on appeal, we conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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 sustained. The petition will be approved.