

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

EAC 04 134 53402

Office: VERMONT SERVICE CENTER

Date: SEP 5 2006

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, 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 masonry contractor. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 18, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$20.83 per hour (\$43,326.40 per year based on a 40 hour work week). The Form ETA 750 states that the position requires four years of experience in the job offered or four years of experience as a bricklayer.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all

pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief and the proprietor's bank statements covering the period of April 2001 through December 2001. Other relevant evidence in the record includes the proprietor's IRS Form 1040, U.S. Individual Income Tax Return, for 2001, the beneficiary's IRS Forms 1099-MISC, Miscellaneous Income, issued by the petitioner in 2000, 2001 and 2002, and a statement from the proprietor regarding his yearly living expenses. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner from August 2000 to the date he signed Form ETA 750B.

On appeal, counsel asserts that based on the petitioner's net profit, the salary paid to the beneficiary, the proprietor's expenses and the balances in the proprietor's bank accounts, the petitioner had the ability to pay the proffered wage in 2001. Counsel also asserts that the Interoffice Memorandum dated May 4, 2004 by William R. Yates, supports an analysis based on the petitioner's net assets.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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 beneficiary's IRS Forms 1099-MISC show compensation received from the petitioner of \$22,837.00 in 2001 and \$7,630.00 in 2002. Therefore, for the years 2001 and 2002, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$43,326.40 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$20,489.40 and \$35,696.40 in 2001 and 2002, respectively. However, the director did not request the petitioner's tax returns for 2002 or subsequent to that time, and as such, the AAO will only analyze the petitioner's ability to pay in 2001.

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*

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.² 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.

In the instant case, the sole proprietor supports himself, his spouse and his grandchild. The proprietor's IRS Form 1040 reflects that his adjusted gross income was \$37,076.00 in 2001. After paying the difference between the wages actually paid to the beneficiary and the proffered wage, the petitioner would have had \$16,586.60 to support himself, his spouse and his grandchild in 2001. The record contains a statement from the petitioner indicating that his yearly expenses were approximately \$30,000.00 for 2001. Therefore, the sole proprietor could not support himself, his spouse and his grandchild on a deficit, which is what remains after reducing the proprietor's adjusted gross income by the petitioner's yearly expenses and the difference between the wages actually paid to the beneficiary and the proffered wage.

However, the record of proceeding contains bank statements from the petitioner's checking account covering the period April 2001 through December 2001. On the petitioner's bank statements, the ending balances are as follows:

	Acct. # [REDACTED] share suffix A	Acct. # [REDACTED] share suffix X
2001:		
April	\$1,180.75	\$5,980.00
May	\$2,579.14	\$7,059.57
June	\$1,647.95	\$6,280.66
July	\$1,000.00	\$7,519.13
August	\$842.45	\$12,239.71

² Counsel asserts that the Interoffice Memorandum dated May 4, 2004 by William R. Yates, supports an analysis based on the petitioner's net current assets. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, CIS, to Service Center Directors and other CIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). For corporations, CIS considers current assets and current liabilities in its determination of the petitioner's ability to pay the proffered wage. For sole proprietorships, the sole proprietor's adjusted gross income, liquid assets and personal liabilities are also considered as part of the petitioner's ability to pay.

September	\$2,395.84	\$1,854.69
October	\$1,338.29	\$11,003.01
November	\$1,240.74	\$5,252.01
December	\$1,600.38	\$29,633.32

The account with share suffix A appears to be a savings account, while the account with share suffix X appears to be a checking account. The funds in the savings account may be considered to be available for the sole proprietor to pay the proffered wage. However, the average monthly balance in the proprietor's savings account is not sufficient to cover the difference between the wages actually paid to the beneficiary and the proffered wage.

The funds in the proprietor's checking account represent what appears to be the sole proprietor's business checking account. Therefore, some of these funds are shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the present case, the petitioner is a masonry contractor. The record does not establish how long the petitioner has been doing business, the established historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. The petitioner paid out \$0 in wages and salaries and \$22,837.00 in subcontractor expenses during 2001, the year in which the priority date was established.³ Further, the average monthly balance in the proprietor's checking account was \$9,646.90 in 2001.⁴ Thus, assessing the totality of circumstances in this individual

³ Thus, the evidence shows that the petitioner had no employees in 2001 and that the beneficiary was the petitioner's only subcontractor in 2001.

⁴ The petitioner submitted bank statements from the proprietor's checking account covering the period April 2001 through December 2001. The average monthly balance in the proprietor's checking account is not

case, it is concluded that the petitioner has not proven its financial strength and viability and has not established that it had the ability to pay the proffered wage.

The petitioner has failed to establish by the preponderance of the evidence its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains permanent residence.

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.

sufficient to cover the difference between the wages actually paid to the beneficiary and the proffered wage in 2001.