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U.S. Citizenship  
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FILE: WAC 03 031 54508 Office: CALIFORNIA SERVICE CENTER Date: APR 19 2005

IN RE: Petitioner:  
Beneficiary:

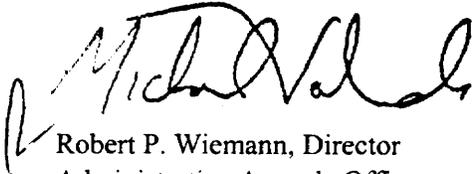
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a house for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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. Accordingly, the director denied the petition.

On appeal, the petitioner states that there were errors on the petitioner's tax returns, and submits amended income tax returns, along with other additional documentation.

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 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 regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification..

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 5, 2001. The proffered wage as stated on the Form ETA 750 is \$1,166.53 per hour, which amounts to \$13,998 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1999.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$74,500, and to currently employ two workers. The petitioner submitted no documentation to support the

petition. On April 25, 2003, the director requested further evidence to support the petitioner's ability to pay the proffered wage and to establish the beneficiary's qualifications to perform the duties of the position. The director specifically requested annual reports, signed and dated federal tax returns, or audited financial statements from 2001 to 2002. The director stated that the federal tax returns also had to include all pages and be certified. The director also requested photographs of the business premises, copies of the petitioner's Form DE-6 State of California Quarterly Wage Reports for all employees for the last four quarters, with job title and duties listed for each employee, and Form W-3 to establish wages paid to employees in 2001 and 2002. Finally, the director asked for copies of the petitioner's current valid business licenses, as well as the beneficiary's signed, dated and certified federal tax returns for the years 1999 to 2002.

With regard to the beneficiary's qualifications, the director asked for evidence that the beneficiary possessed a high school education, two years of work experience with the petitioner, as well as evidence that the beneficiary has obtained first aid, CPR and Health screening reports issued by the state of California Health and Welfare Agency. The director also stated that the beneficiary had to be willing to be fingerprinted and have fingerprints submitted to the Department of Justice.

In response, the petitioner submitted a statement from [REDACTED] & Associates, Los Angeles, California, that referred to the petitioner's past and projected gross income in 2001 and 2003. The petitioner also submitted the petitioner's Bank of America bank statement from February 2003, as well as a monthly statement with regard to a savings account with Washington Mutual. The petitioner also submitted its federal income tax return, Form 1040 for 2001, and 2002; photographs of the petitioner's house that provided elder care; state of California Form DE-6, for four quarters from June 2002 to June 2003; and a two page document that described the duties of the petitioner's three employees who worked in two facilities. The Forms DE-6 indicated that the beneficiary earned \$5,600 in 2002, and \$6,632 in 2003.<sup>1</sup> The petitioner also submitted IRS Forms W-3 Transmittal of Wage and Tax Statements for 2001 and 2002. The petitioner also submitted its business license to operate a residential facility for six non-ambulatory elderly residents as of 1998 and 2000. The petitioner also submitted the beneficiary's IRS Forms 1040 for 1999, 2000, and 2001. These documents indicated that the beneficiary earned \$5,400 in 1999, \$8,400 in 2000, and \$4,012 in 2001, and \$5,600 in 2002. The petitioner also submitted the beneficiary's diploma from Araullo High School in the Philippines, as well as certificate form the American Red Cross, Los Angeles Chapter, in Adult CPR, Standard First Aid, and eight hour training in Alzheimer's dementia training for caregivers given in December 2001; a health screening report; and a fingerprint screening report dated 2001, from the California Bureau of Criminal Identification and Information.

On September 14, 2003, the director sent a second request for additional evidence to the petitioner and stated that if the petitioner was submitting bank account statements to the record to establish the petitioner's ability to pay the proffered wage, the petitioner had to submit such documentation from the priority date onward. In response, the petitioner submitted statements from its Bank of America business checking account from November 2001 to January 2003, as well as 2003 statements for the petitioner's Platinum account with Washington Mutual that showed balances from \$35,001 to \$35,742. The petitioner also submitted statements from Washington Mutual that indicated a checking account was opened in March 2003, and that as of

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<sup>1</sup> The wages stated on the 2002 DE-6 forms match the beneficiary's individual income tax return for 2002.

November 13, 2003, the balance was \$90,709. The petitioner also submitted copies of property title and grant deeds for properties owned by the petitioner.

On January 9, 2004, 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, namely, February 5, 2001, and denied the petition. The director examined the petitioner's federal income tax returns and noted that the petitioner's adjusted incomes for 2001 and 2002 were insufficient to establish the petitioner's ability to pay the proffered wage. The director noted that the petitioner's adjusted gross income in 2001 was \$-23,345, and that in 2002, the petitioner's adjusted gross income was \$17,331.<sup>2</sup> The director also stated the wages reported on Forms W-3 did not coincide with the wages shown on the petitioner's tax returns, and cited to Matter of Ho, with regard to inconsistencies in the record. The director also noted that the petitioner was a sole proprietor, and that the CIS had to consider the monthly living expenses of the petitioner. The director noted that in the year 2002, if the proffered wage was deducted from the adjusted gross income shown on the 2002 return, the petitioner would have had \$3,332.64 to cover all living expenses for the year. With regard to the petitioner's 2001 tax return, the director noted the negative adjusted gross income and stated that the petitioner did not demonstrate the ability to pay the proffered wage of \$13,998 based on this adjusted gross income.

The director also stated that the business bank statements submitted by the petitioner showed ending balances ranging from a high of \$9,553 to a negative ending balance. The director stated that such statements indicated an essentially static reserve of cash that would have been exhausted prior to paying the beneficiary's wage for a full year. The director acknowledged the submission of the petitioner's statements on its personal banking accounts, but noted that this evidence had only been submitted for the year 2003. With regard to the evidence submitted by the petitioner of its real estate properties, the director stated that it was not clear that this propriety represented assets that could be readily converted to cash to pay the proffered wage. Finally the director noted that the petitioner had filed at least one other petition in 2002. The director stated that the petitioner had to establish its ability to pay the proffered wage for all beneficiaries on pending or approved petitions.

On appeal, the petitioner submits its amended 2001 and 2002 tax returns that show an increase of \$76,478 in the petitioner's adjusted gross income for 2001, and an increase of \$56,870 in the petitioner's adjusted gross income for 2002. The petitioner's letter and Part II of the amended tax return state that the changes were due to computation errors of the total gross income and expenses for [REDACTED] and [REDACTED] Home Care. The petitioner provides no further explanation of the amended returns. The petitioner also submits its 2003 income tax return that shows an adjusted gross income of \$63,436. The petitioner also submits a letter from Roland [REDACTED]. This letter is addressed to the petitioner and states that she and her husband bought two parcels of land and that their accounts are current and in good standing. The petitioner submits the letter as evidence that the real estate property owned by the petitioner can be readily converted to cash.

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<sup>2</sup> It is unclear how the director arrived at this figure. On page 1, the petitioner's 2001 federal income tax submitted in response to the director's request for further evidence indicates an adjusted gross income of -\$6,585.

With regard to the amended returns submitted by the petitioner, the petitioner submits these documents on appeal, even though the director previously raised the issue of the petitioner's ability to pay the proffered wage previously. Furthermore, the petitioner's statement with regard to computation errors is not persuasive. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Furthermore, the petitioner offers no clarification of why it chose to amend its tax returns. Since the petitioner has been in operation since 1997, it is also not clear why the petitioner only amended its 2001 and 2002 tax returns. It is noted that the changes in the amended income tax returns are so significant and so timely to the needs of the petitioner, that the AAO would need to see further proof that such returns were actually filed with the IRS. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. The AAO gives no weight to the amended returns, and will examine the petition based on the tax returns initially submitted by the petitioner.

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. As established by the ETA Form 750, the petitioner employed the beneficiary from April 1999 to the present. The petitioner did not submit W-2 forms or Forms 1099-MISC to further substantiate any compensation of the beneficiary by the petitioner. As previously noted, the beneficiary's tax return for 2002 corresponds to the petitioner's DE-6 forms that indicate the beneficiary earned \$5,600 in 2002. Without more evidentiary documentation, it is not clear whether the petitioner paid the beneficiary \$4,012 in 2001, as indicated by the beneficiary's 2001 tax return. Neither wage figure for 2001 or 2002 is equal to or greater than the proffered wage of \$13,998. Therefore the petitioner did not establish that it paid the beneficiary the proffered wage as of the priority date and onward.

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 submitted its 2001 and 2002 federal income tax returns with the original petition. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing. As previously stated, the petitioner's amended tax returns, submitted on appeal, are not considered in these proceedings. The initially submitted 2001 and 2002 tax return documents reflect the following information:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ -23,345	\$ -6,585
Petitioner's gross receipts or sales (Schedule C)	\$ 74,500	\$ 128,600
Petitioner's wages paid (Schedule C)	\$ 0	\$ 19,200
Petitioner's net profit from business (Schedule C)	\$ -6,984	\$ 10,765

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$13,998 in 2001 and onward. As previously stated, there is insufficient evidence to clearly establish that the petitioner paid the beneficiary \$4,012 in 2001, while, based on the petitioner's DE-6 Forms and the beneficiary's income tax returns, it appears that the petitioner paid the beneficiary \$5,600 in 2002. If both sums were considered to be the beneficiary's wages, the petitioner would have still lacked \$9,986 to pay the proffered wage in 2001, and \$8,398 in 2002 to pay the proffered wage. The petitioner's negative adjusted gross incomes of -\$23,345 and -\$6,585 are not sufficient to cover the difference between any salaries paid to the beneficiary and the proffered wage as of the priority date of February 5, 2001.

In addition, 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 her 2001 and 2002 federal income tax returns, the petitioner indicated that she is married filing jointly and listed four dependents, including herself, her husband, a sister, and a brother. The petitioner submitted no further information on any of her and her dependents' personal expenses. Such a listing would have to be considered in the analysis of the petitioner's ability, as a sole proprietor, to pay the proffered wage. It is noted that the petitioner, in its second response to the director's second request for evidence, submitted evidence with regard to a certificate of deposit opened on November 10, 2003 for \$17,000, as well as a personal checking account opened in March 2003, with a balance in the range of \$35,000 from March to September 2003. While these financial resources are viewed as liquid assets sufficient to pay the proffered wage in 2003, they do not establish the petitioner's ability to pay the proffered as of the priority of February 7, 2001. With regard to employment-based visa petitions, a petitioner must establish the elements for the approval of the petition at the priority date for the labor condition application. Despite the contention that the beneficiary will increase profits, a petition may not be approved if the beneficiary does not have the requisite experience at the priority date, or the petitioner does not have sufficient financial resources, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, the deed and grant documents submitted by the petitioner for various real estate properties are not considered liquid assets.

Without more persuasive evidence, the petitioner has not established its ability, as a sole proprietor, to pay the proffered wage in 2001 and onward. Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing through 2002. Accordingly, the director's decision will stand and the petition will be denied.

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 with regard to the petitioner's ability to pay the proffered wage.

**ORDER:** The appeal is dismissed.