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20 Mass Ave., N.W., Rm. A3042  
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U.S. Citizenship  
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Services

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FILE: WAC 03 053 54115 Office: CALIFORNIA SERVICE CENTER

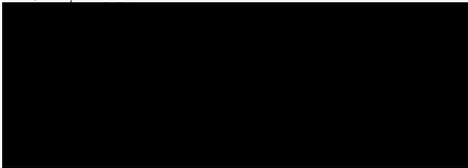
Date: FEB 22 2005

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

The petitioner is a butcher. It seeks to employ the beneficiary permanently in the United States as a meat cutter. 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, through counsel, asserts that the director misinterpreted the evidence and should have approved the petition.

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:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 January 19, 2001. The proffered wage as stated on the Form ETA 750 is \$12.43 per hour, which amounts to \$25,854.40 annually. The ETA 750B, signed by the beneficiary on September 25, 2000, does not indicate that the petitioner has employed him.

On Part 5 of the visa petition, the petitioner claims that it was established on February 1, 2000 and currently has three employees. The petitioner is structured as a sole proprietorship. In support of its continuing financial ability to pay the proposed wage offer of \$25,854.40 per year, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1999 and 2000. They show that the sole proprietor files as head of household and claimed four dependents in each of those years. Schedule C, Profit or Loss from Business, reflects the financial data of the sole proprietor's business

operations. Line 31 of Schedule C shows the net profit of an individual business. Any cumulative business income is carried forward to page 1 of the return and is reflected as a combined total on line 12 and included in the calculation of the sole proprietor's adjusted gross income. The sole proprietor's 1999 and 2000 tax returns contain the following information:

	1999	2000
Sole Proprietor's adjusted gross income (Form 1040)	\$31,520	\$ 32,306
Petitioner's gross receipts or sales (Schedule C)	\$n/a	\$230,896
Petitioner's net profit from business (Schedule C)	\$n/a	\$ 34,762

On May 5, 2003, the director requested additional evidence from the petitioner in support of its ability to pay the proffered salary. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 this evidence for 2001 and 2002. The director also requested that the petitioner submit a summary of monthly household expenses incurred in the support of the sole proprietor and his family, as well as copies of the petitioner's business permit, master payroll list and copies of three photos of the petitioning business.

In response, the petitioner submitted a letter dated July 25, 2003, signed by the sole proprietor [REDACTED]. [REDACTED] itemizes his monthly household expenses at \$2,164 per month, annualized to \$25,968. He also explains that the three employees working in his business are family members and are not on a payroll. [REDACTED] states he is in the process of hiring the first employee to be carried on a payroll. With this letter, the petitioner provides copies of the petitioner's business licensing documentation, along with a copy of the sole proprietor's individual tax return for 2001 and 2002. Both tax returns reflect that the sole proprietor filed jointly with his spouse and claimed three dependents. These tax returns also contain the following information for each of these years:

	2001	2002
Sole Proprietor's adjusted gross income (Form 1040)	\$ 13,629	\$ 16,206
Petitioner's gross receipts/sales (Schedule C)	\$349,858	\$163,352
Petitioner's net profit from business (Schedule C)	\$ 9,810	-\$ 3,158
Additional business (Schedule C) gross receipts/sales	\$242,433	\$529,713
Additional business net profit (Schedule C)	\$ 4,855	\$ 20,596
Cumulative business net income (Form 1040)	\$ 14,665	\$ 17,438

The petitioner also included a letter, dated July 25, 2003, signed by the beneficiary, along with copies of Wage and Tax Statements, W-2s, issued to him by a previous employer, "Numero Uno Markets," in 2000, 2001, and 2002. Three other W-2s issued by "Dairy Food Markets" to "Maria Rendon Rojas," in 1998, 1999 and 2000 are also provided. The beneficiary states that he used his wife's name and social security number in these years because he had been dismissed in an earlier year for not having a social security card. He also indicates that he worked for cash for Numero Uno Markets from 1993 to 1996, but began working for them in 2000 until the present with the issuance of W-2s.

The director denied the petition on October 6, 2003, basing his determination on the evidence contained on the sole proprietor's 2001 and 2002 tax returns. The director concluded that the sole proprietor's adjusted gross income as shown on these returns was insufficient to cover the proffered wage.

On appeal, counsel submits copies of the sole proprietor's two Schedule C attachments filed with the 2001 individual tax return. One is the petitioner's financial data and the other represents the sole proprietor's other meat market, "Cecina Los Amigos." Counsel also offers a copy of an internally generated transaction detail by account showing accounts payable to the beneficiary for contract labor provided in 2001, totaling \$10,025. With this document are what appear to be individual copies of 2001 receipts generated by the petitioner and signed by the beneficiary acknowledging payment of cash for labor performed as a meat cutter. Counsel asserts on appeal that the petitioner employed the beneficiary in 2001, but not in 2002, and combined with the combined gross receipts of the sole proprietor's two meat markets for 2001 and 2002, it demonstrates the petitioner's continuing ability to pay the proffered wage as of the priority date of January 19, 2001.

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 may have employed and paid the beneficiary during a given period. If the petitioner establishes by documentary evidence that it has 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, it is somewhat difficult to ascertain whether the petitioner did employ the beneficiary, as the beneficiary's 2003 letter makes no mention of working for the petitioner either for cash or as any other kind of employee, yet he purportedly was asked to sign weekly cash receipts during the entire year of 2001, as shown by the documents submitted with the appeal. While the sole proprietor's tax return for 2001, prepared by a tax service, does include an expense of \$52,411 for contract labor taken on Part V of Schedule C, the record does not include evidence that the petitioner issued any Form 1099 to the beneficiary, corroborating any non-employee expense. On balance, it cannot be concluded that the evidence submitted on appeal is sufficiently convincing to carry the petitioner's burden in showing such payments to the beneficiary. It is noted that counsel's statements on this issue do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

If the petitioner does not establish that it may have 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). Showing that the petitioner's gross receipts or combined gross receipts of two businesses, as argued here, cover the proffered wage is also insufficient as it does not consider the expenses incurred in order to generate such revenue. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner in this case 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. 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).

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, as shown by the 2001 and 2002 income tax returns, the sole proprietor supports a family of four. The proffered wage is \$25,854.40 per year. Even without considering the sole proprietor's estimated monthly living expenses of \$25,968 per year, the sole proprietorship's 2001 adjusted gross income of \$13,629 is, at the outset, \$12,225.40 less than the proffered salary. Calculated with the household expenses and the full proffered wage, the sole proprietor would need \$51,822.40 to cover both. This represents \$38,193.40 beyond the reported adjusted gross income for 2001. It cannot be concluded that the sole proprietor could support himself, his spouse on -\$38,193.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage and the household expenses.<sup>1</sup> In 2002, the sole proprietor's adjusted gross income of \$16,206 also fell well short of the funds needed to pay the proffered wage and pay household expenses. After reducing the adjusted gross income by the amount needed to cover both the proffered wage and household costs, it is improbable that the sole proprietor and his family could be supported by the remaining sum of -\$35,616.40.

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

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<sup>1</sup> Even considering the purported claim of payment for the beneficiary's contract labor as a dollar-for-dollar adjustment, the shortfall would still be \$28,168.40.