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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005  
WAC-03-052-51098

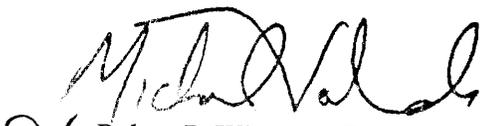
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[REDACTED]

**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 Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 statement and previously submitted 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$11.62 per hour, which amounts to \$24,169.60 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 for 2001 with accompanying Schedule C, Profit or Loss from Business statement. The petitioner also submitted copies of its state wage and withholding reports for the first three quarters in 2002 that did not reflect the beneficiary as one of its paid employees.

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 10, 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 signed and certified tax returns for documentation for 2002.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002 with accompanying Schedule C, Profit or Loss from Business statement. The tax returns submitted

initially and in response to the director's request for evidence reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$452	\$8,430
Petitioner's gross receipts or sales (Schedule C)	\$372,462	\$436,183
Petitioner's wages paid (Schedule C)	\$118,791	\$0 <sup>1</sup>
Petitioner's net profit from business (Schedule C)	\$3,048	\$11,632

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 June 11, 2003, denied the petition, noting that the sole proprietor's adjusted gross income was lower than the proffered wage.

On appeal, counsel states that the petitioner lost two full-time cooks, who were employed during the 2001 and 2002 tax years and were compensated, but need to be replaced now by the beneficiary. Counsel asserts that the petitioner's gross receipts and wages paid illustrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner resubmits its tax returns.

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.

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).

<sup>1</sup> Cost of labor as reported on Line 37 was \$137,380.

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 four. In 2001, the sole proprietorship's adjusted gross income of \$452 fails to cover the proffered wage of \$24,169.60. Since the adjusted gross income cannot cover the proffered wage, it is impossible that the sole proprietor could support himself and his family on a negative figure, which is what would remain after reducing the adjusted gross income by the amount required to pay the proffered wage.

Likewise, in 2002, the sole proprietorship's adjusted gross income of \$8,430 fails to cover the proffered wage of \$24,169.60. Since the adjusted gross income cannot cover the proffered wage, it is impossible that the sole proprietor could support himself and his family on a negative figure, which is what would remain after reducing the adjusted gross income by the amount required to pay the proffered wage.

Counsel advised that the beneficiary will fill vacancies created by the anticipated departure of two cooks. The assertions of counsel 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). The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner terminated and intends to replace them with the beneficiary. Such evidence must also confirm that the position of the terminated employee or employees involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. 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).

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.