

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

BG



FILE: [REDACTED]
WAC-02-280-50424

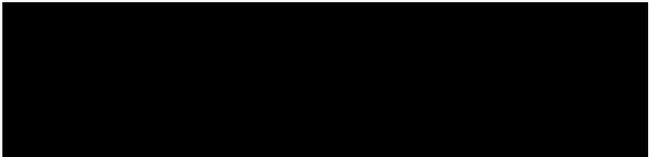
Office: CALIFORNIA SERVICE CENTER

Date: JAN 25 2005

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

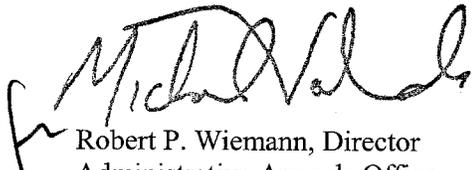
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 provides dental services. It seeks to employ the beneficiary permanently in the United States as a dentist. 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 and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 June 22, 1999. The proffered wage as stated on the Form ETA 750 is \$48.12 per hour, which amounts to \$100,089.60 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 Returns for 2001, 2000, and 1999, with accompanying Schedules C, Profit or Loss from Business, statements. The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$84,723	\$16,263	\$19,482
Petitioner's gross receipts or sales (Schedule C)	\$305,726	\$313,399	\$208,419
Petitioner's wages paid (Schedule C)	\$85,175	\$102,130	\$37,141
Petitioner's net profit from business (Schedule C)	-\$7,967	\$17,500	\$20,963

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 October 22, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested complete tax returns with appropriate signatures and any Form W-2s issued to the beneficiary from 1999 to the time of the director's request.

In response, the petitioner submitted copies of Forms 1099, Miscellaneous Income, issued to the beneficiary from the petitioner for 1999, 2000, and 2001, showing compensation of \$44,450, \$50,750, and \$23,100, for each respective year. The petitioner also re-submitted copies of its sole proprietor's tax returns.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 24, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested IRS-generated tax returns as well as the sole proprietor's itemized monthly expenses, such as water, electricity, garbage, rent, groceries, etc.

In response, the petitioner submitted a copy of its request for copies of tax returns from the IRS. No information was provided concerning the sole proprietor's expenses.

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 4, 2003, denied the petition, noting that the sole proprietor's adjusted gross income was less than the proffered wage in each relevant year.

On appeal, counsel states that the petitioner's gross revenues should be considered in determining the petitioner's continuing ability to pay the proffered wage as of the priority date, instead of the sole proprietor's adjusted gross income. The petitioner submits IRS print-outs of its sole proprietor's tax returns which corroborate the figures from copies submitted previously.

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 established that it employed and paid the beneficiary \$44,450, \$50,750, and \$23,100 in 1999, 2000 and 2001, respectively. Since the proffered wage is \$100,089.60¹, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$55,639.60 in 1999, \$49,339.60 in 2000, and \$76,989.60 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 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

¹ Counsel erroneously relied upon the director's miscalculation of \$92,160 as the annual proffered wage; however, the difference between the two figures would not have changed the outcome.

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 a family of four. In 1999, the sole proprietorship's adjusted gross income of \$84,723 covers the remaining proffered wage of \$55,639.60. It is likely that the sole proprietor could support himself and his family on \$29,083.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, but not dispositive, since the petitioner failed to provide its itemized expenses. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide its itemized monthly expenses. The monthly expenses would have further revealed the petitioner's ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In 2000, the sole proprietorship's adjusted gross income of \$16,263 does not cover the remaining proffered wage of \$49,339.60. Since the adjusted gross income does not even cover the remaining proffered wage, it is impossible for the sole proprietor to support himself and his family on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Likewise, in 2001, the sole proprietorship's adjusted gross income of \$19,482 does not cover the remaining proffered wage of \$76,989.60. Since the adjusted gross income does not even cover the remaining proffered wage, it is impossible for the sole proprietor to support himself and his family on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2000 or 2001.

Despite the petitioner's proven ability to pay the proffered wage in 1999, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 or 2001. 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.