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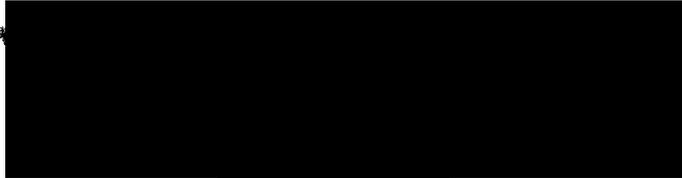
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: JUL 18 2005
EAC-03-066-51465

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

The petitioner is a dental lab. It seeks to employ the beneficiary permanently in the United States as a dental technician ceramist and goldman. 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)(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 April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$17.24 per hour, which amounts to \$35,859.20 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements for 1999, 2000, and 2001¹.

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)	\$19,334	\$27,574	\$47,691
Petitioner's gross receipts or sales (Schedule C)	\$n/a	\$47,472	\$59,215
Petitioner's wages paid (Schedule C)	\$n/a	\$0	\$0

¹ The Schedule C for 1999 contained information pertaining to a different dental lab. However, evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Petitioner's net profit from business (Schedule C)	\$n/a	\$23,782	\$38,691
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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 February 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 noted that the petitioner's tax returns did not show sufficient profit to demonstrate the petitioner's continuing ability to pay the proffered wage and requested additional evidence.

In response, the sole proprietor submitted a letter explaining that the business was sold to him in 2000 and continues to expand. The petitioner submitted copies of bank statements for a checking account reflecting end balances ranging from approximately \$700 to \$5,000. The petitioner also submitted letters from dentists -- one recommending the petitioner's business and one stating it would send more business to the petitioner if it had additional staff.

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 August 6, 2003, denied the petition, stating that the profit realized by the petitioner in 2001 was apparently "the main source of personal income for the owner of the business . . . [and] does not appear that any portion of this net profit would have been available to cover the proposed salary." Additionally, the director notes that the balances reflected by the petitioner's bank statements showed minimal balances and inadequate funds to pay the proffered wage.

On appeal, counsel asserts that the director erred in failing to consider the letters from the petitioner's customers. In a separate letter, the petitioner states that by hiring the beneficiary, "the production of my lab could double, therefore paying him a salary of \$35,000/year would not be a problem." The petitioner also submits a letter from [REDACTED] (Mr. [REDACTED] who does not claim to be a certified public accountant but provides tax and financial services, who states that the petitioner's lab sales have increased each year and "he has to hire an employee to continue to make his business grow." Accompanying Mr. [REDACTED] letter is an unaudited "Projected Income Statement" for 2003 reflecting total projected income of \$150,000 and wages of \$36,000 for 2003, leaving a net of \$68,227. Finally, the sole proprietor submits his Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business statement, for 2002, which reflects \$61,612 in adjusted gross income, \$64,490 in gross receipts or sales, nothing in wages paid, and \$36,857 in net profit.

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 beneficiary².

² The beneficiary represented on his Form ETA 750B and G-325, Biographic Information sheet, submitted in connection with an application to adjust status to lawful permanent resident, that he has worked for the petitioner since June 2000. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec.

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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 (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 two. In 2001, the sole proprietorship's adjusted gross income of \$47,691 covers the proffered wage of \$35,859.20. The AAO concurs with the director that it is improbable that the sole proprietor could support himself and his family on \$11,831.80 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Although in 2002 the sole proprietorship's adjusted gross income of \$61,612 covers the proffered wage of \$35,859.20, there is no evidence of the sole proprietor's personal expenses, but regardless, the petitioner must show it could pay the proffered wage beginning on the priority date in 2001, which it has not.

The AAO also concurs with the director's findings that the petitioner's bank balances are insufficient evidence of sufficient funds to pay the proffered wage. The average balance is not substantial enough to

158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage.

The petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. The petitioner submitted two letters from individuals whose identities and business' financial solvency were not verified. The unaudited projection of future earnings is rejected as noted above because it is unaudited. In this instance, no competent or probative detail or documentation has been provided to explain how the beneficiary's employment as a dental technician ceramist and goldman would significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns. Additionally, the sole proprietor concedes that the petitioner's revenues would increase in the future by stating that the prospective employment would "therefore" result in being able to pay the proffered wage. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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.