U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 07 2005
EAC-03-018-54481

IN RE: Petitioner: [redacted]
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:

[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 sustained. The petition will be approved.

The petitioner is a private household employed as an interior architectural designer. It seeks to employ the beneficiary permanently in the United States as a live-in 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 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 March 5, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour, which amounts to $26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2000.

The petitioner is a private household. In support of the petition, the petitioner submitted a letter stating that he was capable of paying the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 18, 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.

In response, the petitioner submitted both his individual income tax returns and his corporate tax returns for his business for the years 2001 and 2002. The tax returns reflect the following information for the following years:

For Charles Worthington, Inc., the petitioner's business:

	2001	2002
Net income[1]	$3,092	$34,225
Current Assets	$17,384	$51,975
Current Liabilities	$0	$0
Net current assets	$17,384	$51,975

For the petitioner, in his individual capacity:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$17,398	$51,893

In addition, counsel submitted copies of the petitioner's Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2001 and 2002. The Forms W-2 Wage and Tax Statements reflect wages of $16,090.96 in 2001 and $20,000 in 2002, which are $9,909.04 less than the proffered wage in 2001 and $6,000 less than the proffered wage in 2002.

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 December 19, 2003, denied the petition.

On appeal, the petitioner submits a letter detailing his personal assets and stating that the beneficiary's salary is paid out of his business; compiled but not audited financial statements of his business; and corroborating evidence of his personal assets, many of which correlate to his reported dividend and interest income on his individual income tax returns. The petitioner also submits evidence that he paid the beneficiary $26,000 in 2003.

The unaudited financial statements that the petitioner submits on appeal 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.

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 $16,090.96 in 2001, $20,000 in 2002, and $26,000 in 2003. Since the proffered wage is $26,000, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is $9,909.04 in 2001 and $6,000 in 2002. The petitioner has established that it can pay the proffered wage in 2003.

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

[1] Ordinary income (loss) from trade or business activities as reported on Line 21.

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, as a private household, is most akin to 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, and in this case, the private household'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 petitioner supports a family of two. In 2001, the petitioner's adjusted gross income of $17,398 barely covers the remaining proffered wage of $9,909.04. It is improbable that the petitioner could support himself and his family on $7,488.96 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The petitioner explains on appeal that he was hospitalized in 2001 and thus paid only partial wages to the beneficiary in that year.

In 2002, the petitioner's adjusted gross income of $51,893 covers the remaining proffered wage of $6,000. It is probable that the petitioner could support himself and his family on $45,893 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Thus, the petitioner has demonstrated that he can pay the proffered wage out of his adjusted gross income in 2002.

The petitioner has significant personal assets and a business that grosses half a million dollars annually and does not report losses or negative net current assets. While the petitioner's adjusted gross income accounts for the income he receives from his S corporation and thus does not represent funds in addition to those of the adjusted gross income, on appeal, the petitioner also submits other evidence of his personal assets. For example, the petitioner submits copies of accounts he or his wife maintain at Wachovia Bank, First Union Bank, AIG Annuity Insurance Company, Merrill Lynch Mutual Funds, Chevy Chase Bank, and Riggs Bank. The Wachovia Bank account was opened in 1999 as an individual retirement account and shows a value of $59,144,60 at the end of 2003. The First Union account was opened in 1986 as a certificate of deposit and shows a value of $46,910.55 in 2003. The AIG Annuity account shows a value of $54,740.08 in 2003. The Merrill Lynch Mutual Funds reflect substantial, multiple, and varied funds held by the petitioner and his spouse. The Chevy Chase bank account shows that the petitioner holds two certificates of deposit in the amount of $12,132.44 and $8,497.97 in 2003, in addition to another savings account. The Riggs Bank shows a money market account with an average balance of $2,432.32 in 2003. While none of these account statements are dated in 2001, which is the year the petitioner's adjusted gross income does not reflect an ability to pay the proffered wage and leave sufficient funds available for

personal expenses, many of the accounts were open during that timeframe, and the petitioner reported interest and dividend earnings on his 2001 individual income tax return schedules. All of the accounts are easily liquefiable and show financial strength. Based on a review of all evidence contained in the record of proceeding, the totality of circumstances weigh in the petitioner's favor that he has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.