

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

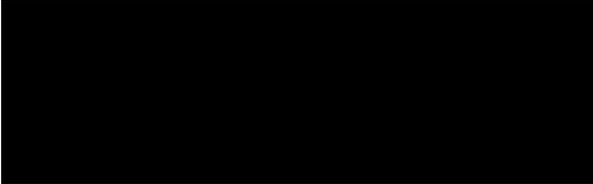
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



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

PUBLIC COPY

B6



FILE: WAC-03-036-52590 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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. This case is a substitution case. A letter submitted with the initial petition indicates that the originally intended beneficiary found alternative employment.

On appeal, the petitioner submits a 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 December 19, 1997. The proffered wage as stated on the Form ETA 750 is \$16.52 per hour, which amounts to \$34,361.60 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, with accompanying Profit or Loss from Business statement on Schedule C, for 1998, 1999, 2000, and 2001

The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>
Proprietor's adjusted gross income (Form 1040)	\$47,812	\$52,382
Petitioner's gross receipts or sales (Schedule C)	\$230,792	\$213,640
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$0	\$110,271
Petitioner's net profit from business (Schedule C)	\$29,163	\$33,128

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$n/a	\$69,033
Petitioner's gross receipts or sales (Schedule C)	\$260,498	\$313,965
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$n/a	\$0
Petitioner's net profit from business (Schedule C)	\$43,558	\$36,697

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 April 3, 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 IRS-generated tax returns and a complete tax return for 2000, as well as payroll records such as the petitioner's quarterly wage reports.

In response, the petitioner submitted IRS-generated tax returns for 1998 through 2002 corroborating the figures presented in its prior submission and showing that the sole proprietor's adjusted gross income in 2000 was \$64,434 and in 2002 was \$66,106. Additionally, an accompanying letter from an unaccredited representative states that the petitioner only had seven employees when it filed the petition but had to hire "unreliable and blood thirsty [independent] contractors" since it cannot find individuals willing to accept permanent employment. The petitioner submitted a Form 1096 indicating that it paid \$211,133.38 to independent contractors in 2002. The petitioner's IRS-generated profit or loss statement to the sole proprietor's 2002 individual tax return indicates that the petitioner reported \$0 for its "cost of labor" and \$1,992 in wages paid.

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 July 8, 2003, denied the petition, citing the sole proprietor's adjusted gross income (AGI) and that it was "not reasonable to assume that the petitioner's household of two (2) family members can live off the amount of income remaining after the beneficiary's proffered wage has been subtracted [from the AGI]."

On appeal, the petitioner states that the director erred and submits a letter from [REDACTED] Registered Tax Preparer of [REDACTED] Inc. who states that his accounting firm has been preparing taxes for the petitioner for a number of years. Mr. or Ms. [REDACTED] states that the petitioner pays significant amounts towards contract labor and refers to "Commissions and Cost of good Sold" portions of the petitioner's profit or loss from business statements to the sole proprietor's individual tax returns. The sole proprietor, Mr. [REDACTED] (Mr. [REDACTED] also submitted a letter in which he explains that he must use subcontractors to handle his dental laboratory fabrication work since he cannot find individuals seeking permanent employment. Mr. [REDACTED] states that subcontractors are more expensive than permanent employees and provide less quality work with greater delays thus adversely impacting his business operations.

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 (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 three in 1998 and two in 1999 onwards¹. In 1998, the sole proprietorship's adjusted gross income of \$47,812 covers the proffered wage of \$34,361.60. It is unclear, however, that the sole proprietor could support himself and his family of three on \$13,450.40 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 did not provide, and the director did not request², the sole proprietor's living expenses or other sources of income³, so it is difficult to determine if the sole proprietor could live on \$13,450.40 for an entire year.

In 1999, the sole proprietorship's adjusted gross income of \$52,382 covers the proffered wage of \$34,361.60. It is unclear but likely that the sole proprietor could support himself and his family of two on \$18,020.40 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 did not provide, and the director did not request, the sole proprietor's

¹ The petitioner failed to provide any evidence of its financial situation in 1997.

² The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

³ Sole proprietors may show evidence of liquieifiable and unencumbered personal assets to bolster the petitioning entity's continuing ability to pay the proffered wage beginning on the priority date.

living expenses or other sources of income, so it is difficult to determine if the sole proprietor could live on \$18,020.40 for an entire year.

In 2000, the sole proprietorship's adjusted gross income of \$64,434 covers the proffered wage of \$34,361.60. It is likely that the sole proprietor could support himself and his family of two on \$30,072.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2001, the sole proprietorship's adjusted gross income of \$69,033 covers the proffered wage of \$34,361.60. It is likely that the sole proprietor could support himself and his family of two on \$34,671.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2002, the sole proprietorship's adjusted gross income of \$66,106 covers the proffered wage of \$34,361.60. It is likely that the sole proprietor could support himself and his family of two on \$31,744.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The sole proprietor and his accountant claim that certain amounts were paid to independent contractors over the years. It is implied in this claim that those independent contractors perform the work the beneficiary would perform and thus the petitioner would not need to pay one or more independent contractors if the beneficiary were hired. This is a viable claim and would tip the balance of this decision in the petitioner's favor; however, the petitioner has failed to provide adequate documentation concerning this factual assertion. The petitioner's accountant states that the petitioner itemized its fees paid to independent contractors under its "Commissions and Cost of Good Sold." A review of the itemization categories in Schedule C, Profit or Loss from Business statements, does not contain that item either as one item or as "Commissions" and "Cost of Good [sic] Sold." There is a section for "Commissions and fees" and a section for "Cost of goods sold" but the figures in both items do not add up to the accountant's figures. Additionally, typically reporting for wages paid to independent contractors is itemized as "Cost of labor." Additionally, the form 1096 does not provide adequate detail. For the petitioner to prevail on this theory, the petitioner must present independent evidence of its use and wages paid to independent contractors. The record does not name these independent contractors, state their wages, or verify the projects they worked on. Moreover, there is no evidence that the position of the independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented that the position or duties of the independent contractors performed the duties of the proffered position. If those independent contractors performed other kinds of work, then the beneficiary could not have replaced him, her, or them. 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 1997.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, and 1999. 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.

WAC-03-036-52590

Page 6

ORDER: The appeal is dismissed.