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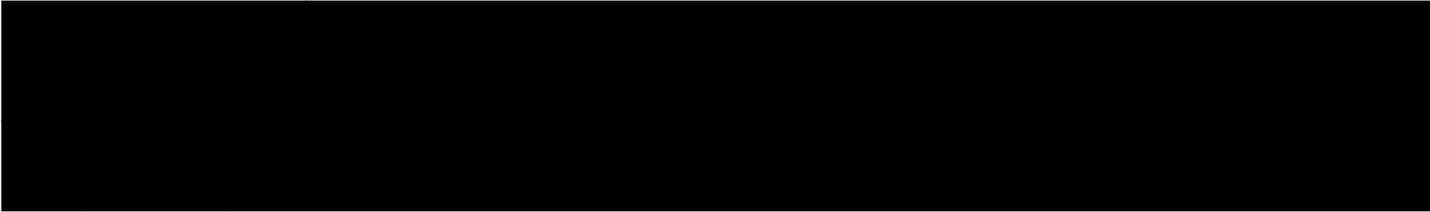
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: WAC 02 174 51094 CALIFORNIA SERVICE CENTER Date: MAR 16 2005

IN RE: Petitioner: 

Beneficiary: FLOSERFINA SANTOS

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*

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 residential care facility for the elderly. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 July 30, 1996. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024 per annum.<sup>1</sup> On the Form ETA 750B, amended by the beneficiary on August 11, 1997, the beneficiary claims to have worked for the petitioner since March 12, 1996.

On Part 5 of the visa petition, the petitioner claims to have been established in July 1997, to have a gross annual income of approximately \$302,000 and a net annual income of \$6,507. In support of its ability to pay the

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<sup>1</sup> The director misstated the proffered annual wage as \$22,176.

beneficiary's proposed wage offer of \$24,024 per year, the petitioner initially submitted copies of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 1997, 1998, and 1999. They reflect that the petitioner files its federal tax returns using a fiscal year running from July 1<sup>st</sup> to June 30<sup>th</sup> of the following year and reflect that the petitioner was incorporated on July 1, 1997. The tax returns contain the following information:

	1997	1998	1999
Net income	\$ -0-	\$ 2,265	\$ 6,507
Current Assets	\$3,698	\$ 14,130	\$26,450
Current Liabilities	\$ -0-	\$ -0-	\$ -0-
Net current assets	\$ 3,698	\$ 14,130	\$26,450

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> Besides net income, CIS will examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay the proffered wage. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Part III of its federal tax return. If its year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On August 13, 2002, the director instructed the petitioner to submit either copies of its annual reports, signed federal tax returns, or audited financial statements for 1996, 2000, and 2001. The director also specifically instructed the petitioner to provide copies of the beneficiary's Wage and Tax Statements (W-2s) for the 1996 through 2001 tax years.

In response, the petitioner provided copies of its 1996 and 2000 tax returns. Despite counsel's transmittal letter referencing a 2000 and 2001 tax return, the 2001 return was not included in the petitioner's response. It is noted that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The 2000 corporate tax return, Form 1120, shows that the petitioner reported a net income of \$8,337. Schedule L shows that the petitioner had \$44,590 in current assets and no liabilities, resulting in \$44,590 in net current assets.

The petitioner's 1996 tax information was reported before it was incorporated when it was structured as a sole proprietorship and reported on Schedule C, Profit or Loss from Business, of the sole proprietor's individual tax return. In 1996, the sole proprietors filed jointly with his/her spouse and declared two dependents. Adjusted

<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

gross income of \$61,895, reported on line 31, included net business income of \$1,057 representing the combined respective net profits of \$680 and \$377 from two business operations.

The petitioner also provided various copies of the beneficiary's W-2s issued by the petitioner for the years 1996 through 2001. The 1996 W-2 shows that the petitioner paid the beneficiary wages of \$8,525. In 1997, the petitioner paid the beneficiary \$5,400. The 1998 W-2 shows that the petitioner paid \$10,800 to the beneficiary. The 1999 W-2 is illegible. The 2000 W-2 shows that the petitioner paid the beneficiary \$13,200 in wages, and the 2001 W-2 also shows that the petitioner paid wages of \$13,200 to the beneficiary.

The director reviewed the petitioner's net income and net current assets as shown on its corporate tax returns concluding that the evidence failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of July 30, 1996. The director erroneously noted that the petitioner had failed to submit a 1996 tax return rather than a 2001 tax return.

On appeal, counsel offers various calculations of the petitioner's ability to pay the proffered wage as inclusive of depreciation and argues that this interpretation of the tax figures should prevail. Counsel cites two previous AAO cases as supportive of his position. The facts of those cases are not before the AAO in the instant matter. Moreover, the case cited by counsel is not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. It is further noted that the June 2003 case relied on the petitioner's net current assets as determinative of its ability to pay the proffered wage and is not inconsistent with the procedure set forth here.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

Based on the figures presented above, the difference between the proffered wage of \$24,024 and beneficiary's 1996 wages of \$8,525 was \$15,499. The difference between the proffered wage and the beneficiary's 1997 salary of \$5,400 was \$18,624. The comparison between the proffered wage and the beneficiary's 1998 wages of \$10,800 results in a shortfall of \$13,224. In 1999, the beneficiary's wages were illegible on the W-2.<sup>3</sup> In 2000, her wages were \$10,824 less than the proffered wage. Finally, in 2001, the petitioner also paid the beneficiary \$10,824 less than the certified wage.

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<sup>3</sup> This will not "penalize" the petitioner because the ability to pay in 1999 has already been shown by its federal tax return.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

The petitioner was initially structured as 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(s). *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, supra*.

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 proprietors filed individually and reported an adjusted gross income in 1996 of \$61,895. Although the director failed to request a summary of the sole proprietors' household expenses during this period, it is recognized that the difference of \$15,499 between the proffered wage and the actual wages paid

to the beneficiary represented 25% of the adjusted gross income, and unlike the *Ubeda* petitioner, involved three less dependents. It would seem reasonable that the sole proprietor could live on the remaining income after paying the \$15,499 difference between the actual wages paid and the proffered wage.

In 1998, the petitioner's net current assets of \$14,130 could also cover the shortfall between the proffered wage and the actual wages paid. In 1999 and 2000, the petitioner's net current assets of \$26,450 and \$44,590, respectively, could also cover the full proffered salary of \$24,024.

The 2001 tax return, however, was not provided and the 1997 tax return, showed no net income and only \$3,698 net current assets. It failed to demonstrate the petitioner's ability to pay the approximately \$18,600 difference between the wages paid and the proffered salary. It is noted that counsel's discussion of the petitioner's assets uses the figure given for total assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, as stated above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires demonstration of a *continuing* ability to pay the proffered wage beginning on the petition's priority date. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.