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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
WAC 03 130 53839

Office: CALIFORNIA SERVICE CENTER

Date: MAR 16 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 The decision of the director will be withdrawn and the petition remanded to the director for further action.

The petitioner is an elder care facility. It seeks to employ the beneficiary permanently in the United States as a supervisor in the elder care home. 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 asserts that the director erred in deciding the petitioner's ability to pay without adding back his depreciation deductions in calculating net operating profits.

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 6, 1996. The proffered wage as stated on the Form ETA 750 is \$1,865.80 per month, which amounts to \$22,389.60 annually.

With the petition, the petitioner submitted a Form ETA 750, a certified Application for Employment Certification; a G-28 for [REDACTED] which like [REDACTED] is owned by the petitioner; the petitioner's letters to the Labor Department amending the labor certification application; the petitioner's Form 1040 tax returns for 1996 through 2001; 2001 Form DE-6, employer quarterly state reports of wages; and letters of qualification from the beneficiary's prior employers.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on June 16, 2003, sent the petitioner a request for evidence (RFE) 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, and evidence of valid business licenses and of complete Form 1040 tax returns for the years 1997, 2000, and 2002.

In response, the petitioner submitted the requested returns.

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 September 24, 2003, denied the petition.

On appeal, counsel asserts that the director erred in not calculating ability to pay by adding back each year's depreciation expense into adjusted gross income. Counsel asserts that depreciation deductions do not represent a real diminution in the petitioner's resources for operating the [REDACTED] senior living facility if the depreciable assets remain in proper repair. Counsel also asserts that imputed earnings on the petitioner's investments as reported on the petitioner's tax returns are an additional asset from which the petitioner could cover 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 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).

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 tax returns reflect the following information for the following years:

	1996	1997	1998	1999	2000	2001
Proprietor's adjusted gross income (Form 1040)	\$(21,635)	\$(154,671)	\$(308,601)	\$26,410	\$71,780	\$97,027
Petitioner's gross receipts or sales (Schedule C)	\$749,165	\$757,997	\$776,171	\$778,753	\$811,534	\$856,468
Petitioner's wages paid (Schedule C)	\$155,561	\$101,871	\$173,437	\$179,970	\$179,201	\$173,228
Petitioner's net profit from business (Schedule C)	\$(52,296)	(\$8,497)	(\$73,744)	(\$94,995)	(\$77,567)	(\$19,922)

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 (7<sup>th</sup> Cir. 1983). The AAO notes that here the director did not request a statement of the petitioner's monthly expenses in the June 16, 2003 RFE.

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 supported a family of four in 1996, of three in 1998 and 1997 and two in 1999 – 2001. A further analysis of the petitioner's income, that examines adjusted gross income and interest/dividend income separately, demonstrates that the petitioner's adjusted gross income is not large enough to pay the \$22,389.60 proffered wage.

Tax Year	Adjusted Gross Income	Proffered Wage	Surplus (Deficit)
1996	\$21,635	\$22,389.60	(\$566.60)
1997	(\$154,671)	\$22,389.60	(\$176,873)
1998	(\$308,601)	\$22,389.60	(\$330,803)
1999	\$26,410	\$22,389.60	\$4,208
2000	\$71,780	\$22,389.60	\$49,578
2001	\$97,027	\$22,389.60	\$74,825

Because interest and dividends are part of the figures that represent the petitioner's adjusted gross income, as stated above, CIS uses the adjusted gross income figure to determine whether the petitioner has shown the ability to pay. Nevertheless, while counsel does not attempt to assert that the petitioner's interest income is

sizeable enough to establish the petitioner's ability to pay, he does state that the interest income from stocks, bonds and certificate of deposit "represents between \$60,000 and \$1.1 million in cash which she could use to pay the alien." Counsel did present the petitioner's interest income drawn from her tax returns for tax years 1997 through 2001.<sup>1</sup> However, counsel did not take the further step of detailing the size and makeup of the petitioner's assets and investments that he contends are responsible for generating the foregoing interest and dividends.<sup>2</sup> The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further asserts that in spite of *Matter of Sonogawa*, 12 I&N Dec. 612 (1967), the petitioner's submitted tax returns "establish that she has more than sufficient financial ability to pay the petitioner's salary, shown by the value of the real property and other liquid assets." However, he did not provide – nor had the director asked that he provide – a tally of the petitioner's monthly household expenses or of the petitioner's assets and liabilities.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director in consideration of the above stated issue, namely, that the petitioner shall be afforded an opportunity to elaborate on the source of her interest income or show other personal assets, as well as to list her monthly household expenses. The director may request any additional evidence he considers pertinent. Similarly, the petitioner may provide such additional evidence and within such reasonable time period as the director shall determine. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

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<sup>1</sup> The petitioner also reported \$16,766 interest income on Schedule B of her 1996 tax return .

<sup>2</sup> Schedule B of the petitioner's tax returns reports that the interest derives from American Savings, Bank of America, Wells Fargo Bank, Manhattan National Life Insurance co., and New York Life.