



**DISCUSSION:** The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Salvadorian and Mexican restaurant. 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. Accordingly, the director denied the petition.

On appeal, counsel submits a brief and additional documentation.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
- (B) *Skilled worker.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The

minimum requirements for this classification are at least two years of training or experience.

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 5, 2001. The proffered wage as stated on the Form ETA 750 is \$13 per hour, which amounts to \$27,040 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December 2000.

On the petition, the petitioner claimed to have been established in December 2000, to have five employees, and did not indicate its gross annual income. The petitioner also submitted documentation of the beneficiary's previous employment in the Philippines.

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 December 23, 2002, the director requested additional evidence pertinent to that ability. The director stated that the petitioner could provide copies of annual reports, federal tax returns with accompanying schedules, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a copy of the beneficiary's 2001 Form W-2 Wage and Tax Statement to establish how much the petitioner had paid the beneficiary. The director also requested that the petitioner submit its 2001 federal corporate income tax return, with all schedules and attachments.

In response, the petitioner submitted a Form 1040, individual income tax for 2001 for a business entitled Canales Delicatessen, at [REDACTED] with an employer ID number of [REDACTED] the petitioner's business license issued on December 26, 2000 for Tortilla Café-Mexican Grill Inc., with an address of [REDACTED] well as the beneficiary's income tax return for 2001. The petitioner also provided a notarized letter on letterhead that stated an individual named [REDACTED] started working as a cook in its establishment as of December 2000 and was paid an hourly salary of 13 dollars. In a cover letter, counsel stated that the petitioner only started operations in December 2000 and was not required to file a federal income tax return for 2000. Counsel also stated that since the beneficiary was paid in cash in 2001, no Form W-2 for that year was available.

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. The director determined that the petitioner's adjusted gross income in 2001 was \$43,581 and its business profit was \$36,670. The director also determined that the petitioner was a sole proprietor, and that as such the petitioner had to demonstrate the ability to sustain itself and any dependents at a level of income that exceeded the federal poverty guidelines in addition to paying the proffered wage. The director determined that if the petitioner paid the proffered salary in 2001, only \$16,541 would be left to sustain the petitioner, his wife and two children. With regard to any wages paid to the beneficiary by the petitioner, the director determined that since no W-2 was available for the beneficiary, her tax return could not be accepted as the petitioner's proof of ability to pay.

On appeal, counsel submits a second notarized statement by the petitioner dated January 24, 2003 that states [REDACTED] started working for the petitioner as a cook in December 2000 and earns an hourly salary of 13 dollars. The two notarized statements are identical except for the name of the employee. Counsel provides no further explanation for the name change on the notarized document, which was notarized on January 23, 2003, the same day as the initial letter of employment verification sent in response to the director's request for further evidence. Counsel resubmits the beneficiary's 2001 Form 1040 federal income tax return. Counsel also submits the beneficiary's 2002 Form 1040 for 2002, which shows a business income of \$23,435 and an adjusted gross income of \$21,779. The beneficiary is identified on both tax returns as [REDACTED] or [REDACTED]. The beneficiary's tax form identifies her as a sole proprietor and the tax return indicates that she pays self-employment taxes. Counsel also submits two Schedule Cs for the petitioner. One Schedule C is on a 2002 Form 1040 Schedule C form and is for Canales Delicatessan [sic] at [REDACTED]. The employer ID number is [REDACTED]. The second Schedule C for Tortilla Café-Mexican Grill, [REDACTED] with an employer ID number of [REDACTED]. Counsel does not submit the rest of the petitioner's 2002 Form 1040, or any accompanying schedules or statements.

Counsel states that the instant petition was denied solely on the evidence of the petitioner's 2001 federal income tax return, and that employers are allowed to submit other corroborative evidence to prove financial capacity to pay the proffered wage. Counsel asserts that the beneficiary's 2001 and 2002 federal income tax returns are further corroborative evidence, especially considering that the beneficiary paid taxes. Counsel also asserts that the petitioner's sworn statement with regard to the beneficiary's employment adds additional weight to the evidentiary documentation provided by the beneficiary's tax returns. Counsel further states that as further proof of the petitioner's continuing capability to pay the proffered wage, the petitioner submits its 2002 profit and loss statements for its businesses showing a combined gross income of \$663,856 and net income of \$68,542, as well as combined wages paid of approximately \$75,600.

With regard to the documentation submitted on appeal, counsel provides no explanation for why two notarized statements with identical wording and different names are placed in the record. A certificate of live birth found in the record identifies the beneficiary as [REDACTED]. CIS computer records reflect no other immigration petitions filed by the petitioner or for Manuela Garcia. Therefore, for purposes of these proceedings, the submission of two different names is immaterial to the issue of whether the petitioner has sufficient financial resources to pay the proffered wage.

Counsel's reference to the petitioner's Schedule C's as profit and loss statements is erroneous. While Schedule Cs in the context of the petitioner's entire Form 1040 sole proprietor income tax return would provide documentation as to gross receipts and net income, these schedules are considered as part of the sole proprietor's adjusted gross income. Without the petitioner's complete 2002 federal income tax return, it is not possible to know the petitioner's adjusted gross income.

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. As established by the ETA Form 750, the beneficiary claimed she worked for the petitioner since the establishment of the petitioner's restaurant in December 2000. In these documents, the beneficiary's tax status appears to be self-employed, and therefore, W-2 forms will not exist.

It is acknowledged that the beneficiary's tax documentation from both 2001 and 2002 support her statements on the ETA 750B with regard to her employment as a cook. The letter submitted by the petitioner also states that the beneficiary worked for the petitioner since 2000 at an hourly wage of \$13 an hour. This salary is consistent with \$27,000 per year at 40 hours, or \$24,000 at 35 hours per week. It is also noted that the director did not find any of the tax documentation to contain derogatory information. Therefore, the AAO will accept the beneficiary's tax documentation as evidence of her wages in both 2001 and 2002. With regard to 2001, the beneficiary earned \$23,940, and in 2002, the beneficiary earned \$23,435. Since the proffered wage is \$27,040, the petitioner did not establish that it paid the proffered wage to the beneficiary in either 2001 or 2002. In 2001, the difference between the proffered wage and the beneficiary's actual wage is \$3,100, and in 2002, the difference between the proffered wage and the actual wage is \$3,695.

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 submitted its 2001 federal income tax return, and an incomplete 2002 federal income tax return. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing. With regard to the petitioner's 2001 federal income tax return, the petitioner filed as married, filing jointly and with four dependents, including himself. The 2001 tax return document reflects the following information:

Proprietor's adjusted gross income (Form 1040)	\$ 43,581
Petitioner's gross receipts or sales (Schedule C)	\$ 309,500
Petitioner's wages paid (Schedule C)	\$ 7,020
Petitioner's net profit from business (Schedule C)	\$ 36,670

The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of \$27,040 in 2001. The petitioner's 2001 adjusted gross income of \$43,581 would have been sufficient to cover the difference between the proffered wage and the beneficiary's actual wage of \$23,940, namely \$3,100. The petitioner did not submit a complete Form 1040 for 2002; therefore, the AAO can not examine the petitioner's adjusted gross income for 2002. Nevertheless the petitioner provided copies of two Schedule Cs for the tax year 2002.

In addition, 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).

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 his 2001 federal income tax return, the petitioner indicated he is married, filing jointly, with two dependent children. In petitions involving sole proprietors, the director usually requests that the petitioner submit a statement of monthly expenses for the petitioner's family that includes the family's household living expenses, such as housing, car payments, insurance, and utilities. In the instant petition, the petitioner did not provide such a statement, nor did the director request it. As stated previously, only \$3,100 would be needed to pay the difference between the beneficiary's wages and the proffered wage, thus, leaving \$40,481 to support the petitioner and his family.<sup>1</sup> This sum is clearly sufficient to support a family of four. Therefore the petitioner has established that it had the ability to pay the proffered wage as of the priority date.

With regard to whether the petitioner continues to have the ability to pay the proffered wage in 2002, the date established by the director for the petitioner to respond to the director's request for further evidence, was March 20, 2003 which is prior to April 15, 2003, at which time the petitioner's federal income tax would be filed, or an extension submitted to file late. The director, in his decision, examined only evidence in the record and submitted with regard to the petitioner's ability to pay the proffered wage as of the priority date. The AAO also will only examine the petitioner's tax information for 2001.

Therefore, the petitioner has established that it had the ability to pay the proffered wage as of the priority date. The director's decision will be withdrawn, and the petition will be sustained. 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 with regard to the petitioner's ability to pay the proffered wage.

**ORDER:** The appeal is sustained.

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<sup>1</sup> The petitioner's adjusted gross income of \$43,581 minus \$3,100, the difference between the beneficiary's wages and the proffered wage, equals \$40,481.