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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

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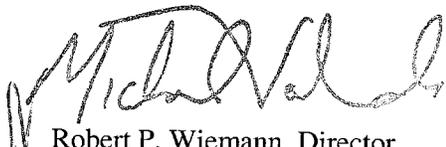
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: 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.


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 petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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, the petitioner submits additional evidence and asserts that the business relies on the beneficiary's services as a cement mason.

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:

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 January 5, 1998. The proffered wage as stated on the Form ETA 750 is \$22.96 per hour, which amounts to \$47,756.80 annually. On Form ETA 750B, signed by the beneficiary on December 22, 1997, the beneficiary does not claim to have worked for the petitioner. A letter submitted with the petition, dated June 11, 2002, states that he has worked for Bergon Construction in Short Hills, New Jersey, since 1993.

On Part 5 of the visa petition, the petitioner claims that it was established in 1996 and currently employs three workers. It claims to have a gross annual income of \$261,550 and a net annual income of \$44,948.

In support of its ability to pay the beneficiary's proposed wage offer of \$47,756.80 per year, the petitioner initially submitted copies of the sole proprietor's individual federal income tax returns for 1998, 1999, 2000, and 2001.

They show that the sole proprietor files her returns as a head of household and claims one dependent. The tax returns contain the following information:

	1998	1999	2000	2001
Adjusted Gross Income (Form 1040)	\$40,230	\$42,589	\$48,811	\$ 51,383
Net Business Income (Sched. C)	\$42,879	\$44,948	\$51,456	\$ 53,888
Gross Income (Sched. C)	\$73,675	\$73,092	\$97,838	\$116,735
Total Expenses (Sched. C)	\$30,796	\$28,144	\$46,382	\$ 62,847
Wages	-0-	-0-	-0-	-0-
Cost of labor	\$104,070	\$106,500	\$134,200	\$138,150

Because the petitioner failed to submit sufficient evidence supporting its continuing ability to pay the proffered wage, on April 22, 2003, the director requested additional documentation pertinent to that ability. The director advised the petitioner that it must demonstrate that it has the ability to compensate the beneficiary at the proffered salary in addition to paying the living expenses of the sole proprietor and any dependents.

In response, the petitioner submitted copies of Form 1099, Miscellaneous Income as evidence of "non-employee compensation," averaging \$50,351 yearly, paid to [REDACTED] in 1998 through 2002. According to a letter from the sole proprietor, dated July 5, 2003, which accompanied these documents, [REDACTED] plans to retire when the beneficiary obtains his permanent residence status.

On November 4, 2003, the director denied the petition. 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 of January 5, 1998. The director concluded, that after considering the information presented in the sole proprietor's tax returns, the petitioner had failed to demonstrate that the sole proprietor could sustain herself and dependent after paying the full proffered wage. The director further noted that the statement that a beneficiary will replace an employee was not sufficient to demonstrate an ability to pay the proffered wage.

On appeal, the petitioner submits an unsigned letter, dated December 5, 2003, from the petitioner's sole proprietor. She states that the beneficiary was hired in June 2003 and is being paid \$1,720 bimonthly. She further adds that the beneficiary is the only mason working for the company as the "previous mason has retired and replaced by the [beneficiary]." The petitioner also attaches copies of four checks issued to the beneficiary in September and October 2003.

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 credible 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 during a given period. In the instant matter, the sole proprietor's letter indicates that the beneficiary was not hired until June 2003.

CIS will also 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 or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. 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.

In this case, the petitioner has submitted copies of the sole proprietor's individual tax returns for 1998, 1999, 2000, and 2001. A sole proprietorship is 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, cash or cash equivalent 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's returns show that the alien's proposed wage offer of \$47,756.80 represented approximately 98% of the sole proprietor's adjusted gross income in 2000 and 93% of the sole proprietor's adjusted gross income in 2001. In 1998 and 1999, the sole proprietor's adjusted gross income was \$7,526.80 and \$5,167.80 less than the proffered wage in each respective year. Although the sole proprietor's household was comprised of fewer dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income in each of the relevant years suggests that it was highly improbable that reasonable living expenses, as well as the proffered wage, could be met out of the sole proprietor's adjusted gross income during any year. After paying the proffered wage, the sole proprietor and one dependent would have been left with -\$7,526.80 in 1998 and -\$5,167.80 in 1999 to pay household expenses. In 2000, only \$1,054.20 would have been left to pay living expenses.

In this case, however, it is alleged that the alien has replaced another mason who has retired. The monies already expended by the petitioner on other employees' salaries are not considered to be readily available funds to pay the proffered wage as of the visa priority date. The exceptions to this rationale is if the beneficiary is being hired to replace another individual employed by the petitioner and the other employee has left the business. On appeal, the sole proprietor's unsigned letter states that the existing mason has retired. The mason is not named. Although it is noted that a visa petition may not be approved based on speculation of future eligibility or after eligibility is established under a new set of facts, this set of circumstances suggests that further investigation should be conducted to verify that such events may justify approving the employment based petition.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the petitioner's ability to pay the proffered wage and the purported employment of the beneficiary as a replacement to a retired employee. The director may also request any updated financial information pursuant to 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the 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.