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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC-03-031-54704 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential elderly care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 a letter and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 February 5, 2001. The proffered wage as stated on the Form ETA 750 is \$1,166.53 per month, which amounts to \$13,998.36 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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 25, 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 evidence pertaining to 2001-2002, the petitioner's quarterly wage reports for the last four quarters, payroll summaries, and any evidence of wages paid to the beneficiary.

In response, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 2001 and 2002.

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

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	-\$23,345	-\$6,585
Petitioner's gross receipts or sales (Schedule C)	\$74,500	\$128,600
Petitioner's wages paid (Schedule C)	\$0	\$19,200
Petitioner's cost of labor (Schedule C)	\$0	\$0
Petitioner's net profit from business (Schedule C)	-\$6,984	\$10,765

In addition, the petitioner submitted copies of its quarterly wage reports for the last three quarters in 2002 and first two quarters in 2003. Those quarterly wage reports reflect that the petitioner employed and paid the beneficiary wages in the aggregate of \$5,600 in 2002 and \$6,633.30 in 2003. The petitioner submitted its Forms W-3, Transmittal of Wage and Tax Statements, reflecting total wages paid to its employees in 2001 and 2002, which were \$15,097.13 and \$16,796.72 in each year, respectively. The petitioner also submitted a bank statement for an account held by its sole proprietor.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 12, 2003, the director again requested additional evidence pertinent to that ability. The director notified the petitioner that if it wished to supplement its evidence of ability to pay the proffered wage with bank records, it should submit them from 2001 to the most recent statement.

In response to the director's second request for evidence, the petitioner submitted its checking account statements from December 2001 through January 2003 showing ending balances with the highest amount being \$9,917.99 and the lowest amount being -\$108.23; the sole proprietor's mutual fund account showing a balance of approximately \$35,000 for four months in 2003; an additional checking account held by the sole proprietor showing a balance of approximately \$90,000 in 2003; a certificate of deposit held by the sole proprietor showing a balance of \$17,000 in November 2003; and a letter from [REDACTED] showing that the sole proprietor holds another account there with an average balance of approximately \$3,300 in November 2003. Additionally, the petitioner submitted a copy of a grant deed evidencing the sole proprietor's ownership of properties.

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 January 9, 2004, denied the petition. The director noted discrepancies in the evidence, such as the total wages paid on the W-3 form submitted that conflicted with the report of wages paid on the petitioner's tax return. The director also stated that real property as an asset is not easily converted into cash and is not viable evidence of the petitioner's continuing ability to pay the proffered wage. The director noted that the petitioner had filed at least one other petition and its bank cash assets were insufficient to show a sustainable ability to pay the proffered wage. Finally, the director also stated that the petitioner's adjusted gross income of "17,331" in 2002 after being reduced by the proffered wage leaves insufficient funds for the sole proprietor to live on.

On appeal, the petitioner submits amended tax returns, its 2003 taxes, and asserts that there were errors "in the computation of the total gross income and the expenses for [the petitioner]..." The petitioner also submits its Form W-3 for 2003 and a letter from a property investment company stating that the sole proprietor's two properties are unencumbered and transferable.

The amended tax returns reflect the following:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$53,130	\$50,285	\$63,436
Petitioner's gross receipts or sales (Schedule C)	\$101,800	\$102,950	\$70,620
Petitioner's wages paid (Schedule C)	\$24,497	\$27,997	\$8,800
Petitioner's cost of labor (Schedule C)	\$0	\$0	\$0
Petitioner's net profit from business (Schedule C)	\$26,958	\$27,675	\$12,186

Accompanying W-3 forms shows that the petitioner's total wages in 2001 was \$15,097.13 with an additional \$9,400 paid out in miscellaneous income in that year; in 2002, the petitioner's W-3 form reflects total wages paid of \$35,996.72; and in 2003, the petitioner's W-2 form reflects total wages paid in the amount of \$36,796.

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 established that it employed and paid the beneficiary \$5,600 in 2002 and \$6,633.30 in 2003. Since the annual proffered wage is \$13,998.36, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$8,398.36 in 2002 and \$7,365.06 in 2003. The petitioner did not establish that it paid any wages to the beneficiary in 2001.

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's amended tax returns on appeal raise doubts concerning the veracity of its financial representations since the amendments appear to have been contrived as a means to overcome the deficiencies addressed by the director. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Likewise, a petitioner may not materially alter its supporting evidentiary submissions to meet its burden or proof. Additionally, the amended tax returns substantially alter the sole proprietor's adjusted gross income, and the petitioner's gross receipts and net profits, and the W-3 forms still conflict with the wages reported by the petitioner in 2002 and 2003. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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.

The petitioner's tax returns are unreliable evidence as noted above. The AAO cannot provide a meaningful analysis of the petitioner's financial representations since the petitioner went from reporting a loss to a substantial profit. The petitioner did not submit IRS-certified tax returns or explain how such a significant change suddenly impacted its tax status to dramatically.

Finally, the petitioner presents cash assets from its bank account as well as its sole proprietor's accounts. The AAO concurs with the director that real estate holdings are not the type of easily liquefiable asset used by employers to pay its employees wages. The record contains bank statements covering varying periods of time with modest ending balances. The balances are not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months.

While the sole proprietor's mutual fund balance is substantial and could plausibly be used by the petitioner to pay the proffered wage, the problem in this case remains that doubt surrounds other evidentiary submissions contained in the record of proceeding. Any additional proceedings in this matter would need to address the concerns expressed in this decision above.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage and has therefore 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.

**ORDER:** The appeal is dismissed.