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FILE: LIN-03-258-51497 Office: NEBRASKA SERVICE CENTER Date: **SEP 20 2005**

IN RE: Petitioner:   
Beneficiary: 

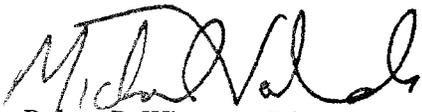
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 October 12, 2001. The proffered wage as stated on the Form ETA 750 is \$9.77 per hour, which amounts to \$20,321.60 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted the sole proprietor's Form 1040, U.S. Individual Income Tax Return, with the petitioner's accompanying Schedule C, Profit or Loss from Business statement for 2001; the petitioner's bank statements from its checking account for 2001; the sole proprietor's bank statements from its checking account 2001; and a statement from the sole proprietor's home mortgage lender.

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 March 5, 2004, 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 the petitioner's 2002 tax return, the sole proprietor's monthly living expenses, and checking and savings account balances.

In response, the petitioner submitted the sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with the petitioner's accompanying Schedules C, Profit or Loss from Business statements for 2002 and 2003; additional bank statements from the petitioner's checking account; statements from the sole proprietor's savings account; and statements from two of the sole proprietor's lenders with respect to a home mortgage and car loan.

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

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$25,916	\$28,434	\$42,391
Petitioner's gross receipts or sales (Schedule C)	\$315,588	\$293,312	\$266,703
Petitioner's wages paid (Schedule C)	\$95,654	\$76,824	\$87,757
Petitioner's net profit from business (Schedule C)	\$3,513	\$2,051	\$11,351

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 May 14, 2004, denied the petition, noting that the sole proprietor failed to submit an itemized list of his household expenses; that there was no indication the beneficiary was already employed and receiving wages; and that the sole proprietor's adjusted gross income, the petitioner's net profit from business, and the ending bank balances in the petitioner's and sole proprietor's checking and savings accounts were all too low to support a finding that the petitioner could pay the proffered wage.

On appeal, the petitioner submits a notarized and sworn statement from the sole proprietor stating that he has been working as a cook in his restaurant and intends to retire soon and replace himself with the beneficiary. Additionally, the sole proprietor states that his cost of living is low because his family eats at the restaurant so they have no food expenses and receive and make telephone calls from the restaurant because they are there all of the time. The sole proprietor also states that he regularly makes payments on his home and car and the only other expenses he has are the electricity and water bills. Finally he states that he loaned \$25,000 to a friend in 2000, which was not returned to him on time but he never pressured the friend because of their personal relationship, but the friend returned the money to him upon learning that the petition would not be approved because the petitioner failed to demonstrate its ability to pay the proffered wage.

On appeal, the petitioner also submits a notarized and sworn statement from [REDACTED] (Mr. [REDACTED]), who states that the sole proprietor loaned him \$25,000 when he experienced financial difficulties with his business, which he promised to repay by 2001. However, Mr. [REDACTED] stated that he failed to return the money on time but he is "now returning the money." The date of Mr. [REDACTED] statement is May 28, 2004 and a copy of a promissory note is attached evidencing the personal loan.

On appeal, the petitioner resubmits copies of the sole proprietor's individual income tax returns, along with W-2 forms reflecting wage payments from the petitioner to the sole proprietor in the amounts of \$18,000 in 2001, \$16,500 in 2002, but the record of proceeding does not contain any W-2 form for 2003. The petitioner also submits an unaudited income statement; as well as copies of the petitioner's checking account balances at Bank of the West from 2001 through 2004 reflecting ending balances ranging from a high of \$10,431.85 to a low of \$930.62; and a copy of a deposit receipt at Bank of the West in the amount of \$25,000 as well as a computer print out of a balance in the amount of \$31,072.65 on June 2004 with corresponding account numbers; a copy of a letter reflecting an account held by the sole proprietor at Wells Fargo bank in the amount of \$4,540.80 in June 2004; a copy of another account held by the sole proprietor at Bank of the West

in the amount of \$79.40; and copies of recent invoices for the sole proprietor's car and home loans and utility bills.

Substituted counsel submits a copy of an unpublished AAO decision that he asserts applies to the petitioner's case as well as a copy of the purchase and sale agreement reflecting that the sole proprietor purchased the restaurant in 2000 for \$60,000, leaving \$20,000 to pay through a payment plan. Counsel asserts that the sole proprietor's restaurant is thus an asset to be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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).

The unaudited financial statements that the petitioner submitted on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Substituted counsel refers to a decision issued by the AAO but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 the instant case, the sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of \$25,916 covers the proffered wage of \$20,321.60. It is improbable that the sole proprietor could support himself and his family on approximately \$5,000 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, in light of his remaining payments on his business, home, and car loans in addition to utility bills. The same is true for 2002, where the sole proprietor's adjusted gross income of \$28,434 is greater than the proffered wage of \$20,321.60. It is improbable that the sole proprietor could support himself and his family on approximately \$8,000 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, in light of his remaining expenses. Thus, the petitioner has failed to establish its continuing ability to pay the proffered wage beginning on the priority date out of its net income.

For 2003, the sole proprietor's adjusted gross income of \$42,391 is greater than the proffered wage of \$20,321.60, and the \$22,000 left over seems sufficient to cover the sole proprietor's annual mortgage, car payments, and utility bills<sup>1</sup>. Thus, the petitioner has established its continuing ability to pay the proffered wage in 2003.

The sole proprietor, however, has stated that he wishes to replace himself with the beneficiary. The AAO has no evidence of adverse information to not accept this sworn testimony from the sole proprietor. The sole proprietor was paid \$18,000 in 2001 and \$16,500 in 2002, and these wages can be attributed towards the proffered wage since technically the petitioner paid these funds towards the proffered position if the beneficiary will replace the individual who was paid for work performed in the proffered position.

Additionally, the AAO may consider the sole proprietor's personal assets. The AAO will not, however, consider the sole proprietor's asset in the petitioner's business value since liquidating the business would not leave a petitioning entity in existence and able to extend a permanent offer of employment to the beneficiary, as substituted counsel urges on appeal<sup>2</sup>. The AAO accepts the sole proprietor's testimony concerning its \$25,000 in cash assets that was owed to him from his friend since 2001. Although Mr. [REDACTED] did not return that cash to the sole proprietor until 2004, that money was owed to the sole proprietor and the sole proprietor

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<sup>1</sup> The sole proprietor's annualized mortgage payments are \$15,096. The sole proprietor paid off his car loan in March 2004. It is difficult to ascertain the sole proprietor's monthly payments in 2003 based upon the 2004 statement since he paid \$298.16 in February 2004 and \$582.12 in March 2004, and the AAO notes that the director specifically requested a breakdown of the sole proprietor's monthly expenses in his request for evidence. Using the lower payment rate, which is presumably the minimum amount he had to pay, he would pay \$3,577.02 per year. His electric bill is approximately \$45 per month, which annualizes to \$540 and his water bill for three months was approximately \$200, which annualizes to \$800 per year. Thus, the sole proprietor's total annual expenses in 2003 were \$20,013.02, which is less than the amount the sole proprietor would have left over from his adjusted gross income after paying the proffered wage.

<sup>2</sup> Additionally, this argument works against the petitioner because it exposes its indebtedness of \$20,000. However, that liability should be part of the petitioner's net profit as detailed on the petitioner's tax return and will not be held against the sole proprietor's assets.

could have successfully enforced the promissory note to obtain that cash at anytime in 2001 onwards<sup>3</sup>. Thus, the AAO accepts that the sole proprietor had an additional \$25,000 in cash at the petitioner's disposal in 2001 and 2002 from which to pay the proffered wage.

The petitioner maintains nominal balances in various checking accounts. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balance is 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.

The \$25,000 in personal assets would be sufficient to pay the proffered wage in either 2001 or 2002 but not both years. Applying the sole proprietor's wages towards income used to pay the proffered wage does not overcome the deficiency either since it reduces the sole proprietor's adjusted gross income. The AAO does not have sufficient information and evidence concerning the sole proprietor's monthly expenses since the sole proprietor would have to show that he could pay his personal expenses out of the difference between his adjusted gross income and the wages he received that he would transfer to the petitioner in order to pay the proffered wage. The record of proceeding does not have sufficient information and evidence concerning the sole proprietor's personal expenses for 2001 and 2002<sup>4</sup> and fails to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date while leaving the sole proprietor with enough personal funds or adjusted gross income to cover his personal expenses.

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.

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<sup>3</sup> The reason this is important is because of the application of *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) which holds that a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time.

<sup>4</sup> Based on the evidence in the record of proceeding, it seems unlikely the sole proprietor could pay his personal expenses in 2002 if he used the \$25,000 to pay the proffered wage in 2001, even with the remaining approximate \$5,000 after paying the proffered wage left over for 2002. From what evidence was submitted into the record of proceeding, the sole proprietor's expenses seem to annualize around \$20,000. *See* note 1, *supra*. In 2002, reducing the sole proprietor's adjusted gross income by the wages he received that year of \$16,500, leaves him with approximately \$12,000 to pay his personal expenses which is insufficient even with the \$5,000 left over from 2001 to pay approximately \$20,000 in annualized personal expenses. Additionally, since almost the entire amount of the sole proprietor's adjusted gross income is required to cover his personal expenses in 2001, we cannot not use his wages from that year in 2002.