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Office: CALIFORNIA SERVICE CENTER

Date: **APR 04 2006**

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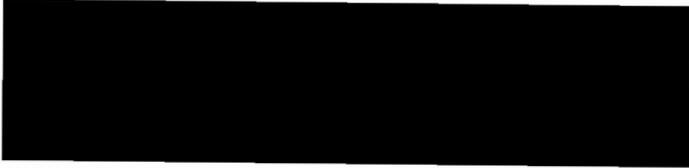
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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 appeal will be sustained. The petition will be approved.

The petitioner is a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. 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 additional evidence and maintains that the petitioner has the financial ability to pay the proffered wage.

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 January 16, 2001. The proffered wage as stated on the Form ETA 750 is \$1,300 per month, which amounts to \$15,600 per annum. On Part B of the ETA 750, signed by the beneficiary on December 1, 2000, the beneficiary does not claim that she has worked for the petitioner. A documents identified as a “certification” signed by the petitioner’s operator and dated September 12, 2002, states that the beneficiary works for the petitioner as a live-in caregiver with free board and lodging as part of the benefits.<sup>1</sup>

On Part 5 of the preference petition, filed on May 9, 2003, the petitioner claims that it was established in 1993, currently employs three workers, has a gross annual income of \$82,645, and an annual net income of \$23,156.

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<sup>1</sup> As subsequently noted in the director’s decision, the certified wage is set in U.S. dollars on the approved labor certification and not on a formula including the value of housing provided. The determination of the prevailing wage is determined pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. The regulation at 20 C.F.R. (c)(3) also provides that the wage offered must not be “based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, biweekly, or monthly basis.”

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietors' Form 1040, U.S. Individual Income Tax Return for 2001, accompanied by the corresponding Wage and Tax Statements (W-2) relating to the sole proprietors' wage income. The 2001 individual tax return reflects that the sole proprietors' filed as jointly as married and no dependents. It contains the following information:

Petitioner's gross receipts (Schedule C)	\$ 49,575
Petitioner's wages paid (Schedule C)	\$ 21,600
Petitioner's total expenses (Schedule C)	\$ 60,127
Petitioner's net profit (Sched. C )	-\$10,552
Total business net income (Form 1040)	-\$10,552
Sole Proprietor's adjusted gross income (Form 1040)	\$10,544

The petitioner also provided copies of the sole proprietors' individual tax returns for 1999 and 2000, as well as a copy of a partnership return for 1999 relating to another business operated with a third party. Additionally, a copy of a 2002 "evidence of property insurance" relating to the petitioner's business location and a copy of a deed were provided. The petitioner also submitted a copy of a state quarterly wage report showing that it paid \$1,944 in wages to the beneficiary for the quarter ending on June 30, 2002. The petitioner further provided copies of documents reflecting assets held individually by the sole proprietors' including a [REDACTED] Company" statement reflecting that a "flexible premium deferred annuity" held by one of the sole proprietors had a cash surrender value of \$139,287.25 as of September 1, 2002, and a beginning accumulation value of \$140,933.35 as of September 1, 2001. Another annuity statement provided, from [REDACTED] indicates that as of December 31, 2001, its cash surrender value was \$43,354.98 and that the contract issue date was December 1, 1999.

A statement from [REDACTED] indicates that one of the sole proprietors had held approximately \$9,000 in that institution as of June 30, 2002, and a Bank of America account statement indicates that the sole proprietors had \$5,366.36 in that account as of August 7, 2002. Finally, a West America account held jointly by the sole proprietors reflects a balance of \$3,601.03 as of September 12, 2002.

On December 23, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested copies of the petitioner's federal tax returns, copies of annual reports, or audited financial statements, including a copy of the petitioner's federal tax return for 2002, as well as copies of the last 8 quarters of the petitioner's eight quarterly wage reports.

The petitioner provided copies of previously submitted tax returns as well as a copy of the sole proprietors' 2002 individual tax return. It shows the following information:

	2002
Petitioner's gross receipts (Schedule C)	\$ 47,000
Petitioner's wages paid (Schedule C)	\$ 32,444
Petitioner's total expenses (Schedule C)	\$ 74,367
Petitioner's net profit (Sched. C )	-\$ 27,367
Pensions and annuities (defense/military retirement)	\$ 11,012
Total business net income (Form 1040)	-\$ 27,367

Sole Proprietors adjusted gross income (Form 1040)     -\$ 8,749

The petitioner also provided copies of the last 8 quarters of its state quarterly wage reports. They reflect that the petitioner paid \$7,128 to the beneficiary in 2002 and \$9,512 in 2003.

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 March 27, 2004, denied the petition. The director noted that the sole proprietors' adjusted gross income claimed on the tax returns was far below the proffered wage for the two years under review considering the wages paid to the beneficiary, as well as living expenses set forth by the federal poverty guidelines.

On appeal, counsel submits additional documentation of the sole proprietors' personal assets including the following:

██████████ statement as of May 12, 2004	\$36,149.45
██████████ statement as of April 30, 2004	\$18,522.13
██████████ bank statement as of May 5, 2004	\$ 1,668.51
██████████ Annuity statement from 9/1/02 to 9/1/03	
Cash Surrender Value as of 9/1/03	\$149,076.38
██████████ insurance policy	
Cash Surrender Value as of June 19, 2003	\$ 18, 650.25
██████████ insurance policy	
Cash Surrender Value as of May 13, 2003	\$ 2,373.82

Counsel urges the consideration of these and other assets that he summarizes in his brief submitted on appeal. Counsel's list includes the use of slightly different amounts and adds figures representing values of the sole proprietors' real estate holdings. With the exception of the Surety insurance policies, the accounts listed above represent the same ones earlier mentioned.

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 may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have 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, as noted above, the petitioner paid the beneficiary \$7,128 in 2002, or \$8,472 less than the proffered wage, and \$9,512 in 2003 or \$6,088 less than the proffered wage in that year.

In determining the petitioner's ability to pay the proffered wage, the CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual(s) operates the business in their 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(s). 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. As noted above, 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses.

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 instant case involves a smaller household than that discussed in *Ubeda*. Although it is noted that it would have been preferable if the director had requested the petitioner to provide a summary of the sole proprietors' actual household expenses or to document all payment of wages to the beneficiary, the sole proprietors had access to other cash or cash equivalent assets beginning in 2001 in the form of the annuity accounts with [REDACTED] and [REDACTED]. These accounts represented liquid assets of approximately \$180,000 that could have reasonably covered the payment of the full proffered wage of \$15,600 and the respective shortfalls of \$8,472 in 2002 and \$6,088 in 2003, as well as provide reasonable household expenses. It is noted that we will not consider real estate holdings because these kinds of assets are regarded as longer-term non-liquid assets that are not reasonably available to pay a proffered wage. Based on these figures, and the evidence contained in the record, we conclude that is unlikely that the sole proprietor could have sufficient funds to pay the full proffered wage as well as support herself and two dependents during the period under consideration.

In this matter, based on the evidence contained in the record and after consideration of the information provided on appeal, we conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.

**ORDER:** The appeal is sustained. The petition will be approved.