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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 03 244 54409

Office: CALIFORNIA SERVICE CENTER

Date: JUN 01 2006

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

PETITION: Immigrant Petition for Alien Worker as an Unskilled, Other Worker 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, Chief
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 shelter and service-provider for medically fragile children. It seeks to employ the beneficiary permanently in the United States as a nurse 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, the petitioner, through counsel,¹ submits additional evidence and asserts that the petitioner has established its continuing 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 June 4, 1999. The proffered wage as stated on the Form ETA 750 is \$8.95 per hour, which amounts to \$18,616 annually. The ETA 750B and accompanying cover letter submitted by the petitioner indicate that the petitioner is requesting a substitution for the original alien beneficiary named in the ETA 750A. The current beneficiary indicates on her ETA 750B that she has not been employed by the petitioner. She signed this form on July 28, 2003.²

On Part 5 of the preference petition, filed on August 27, 2003, the petitioner states that it was established in 1995, employs two workers, and has a gross annual income of \$60,000. With the initial petition and in

¹ Counsel is no longer licensed to practice law in California. The petitioner will be deemed to represent itself.

² On the biographic questionnaire, Form G-325A, however, which was signed on July 30, 2003 and submitted with the beneficiary's application for permanent resident status, she indicates that she has worked for the petitioner since July 2002.

support of its ability to pay the proffered wage, the petitioner provided a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax return for 2001. It shows that the sole proprietor files as a head of household and declares three dependents. Her income tax return reflects that she reported \$17,233 in adjusted gross income including -\$6,376 reflected as net business income and \$23,063 received as wages.

The petitioner also provided copies of its Bank of America and Citibank bank statements representing a business checking and savings accounts held in the petitioner's and the sole proprietor's names, covering 2001, 2002 and the first six months of 2003. To the extent that the account balances represent monies held in a business checking account, these funds are most likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses, and as such, are already represented. However, the bank statements also reflect a savings account, and on occasion, a certificate of deposit. The combined average balance for these two accounts in the first six months of 2003 was approximately \$3,135. For 2002, the average monthly balance was approximately \$5,580. For 2001, the average monthly balance was approximately \$8,900.

Accompanying these documents are copies of bank statements from Kaiser Federal held individually in the sole proprietor's name. These statements cover 2002 and January through June of 2003. In 2002, the average monthly balance was approximately \$3,920. For the first six months of 2003 (January - June), the average monthly balance was approximately \$12,040.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, the director requested additional evidence pertinent to that ability on December 21, 2003. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 of June 4, 1999. The director also requested the petitioner to provide "evidence of ability to pay for tax years 1999, 2000, and 2002."

In response, the petitioner, through counsel, submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1999, 2000 and 2002. They indicate that she filed separately from her spouse in 1999 and 2000 and declared two dependents in 1999 and three dependents in 2000. The sole proprietor filed as head of household and reported three dependents in 2002.

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

	1999	2000	2002
Sole Proprietor's adjusted gross income (Form 1040)	\$21,696	\$20,659	\$20,798
Salaries or Wages (Form 1040)	\$23,944	\$23,340	\$24,050
Petitioner's business income or loss (Form 1040)	-\$ 6,287	-\$ 8,520	-\$ 3,280

The petitioner also provided additional copies of bank statements. A personal account held in the name of the sole proprietor by the Kaiser Permanente Federal Credit Union shows that in the period between June 1999 and December 1999, the average monthly balance was approximately \$4,390. The 2000 Kaiser Federal statements provided reflect that the sole proprietor's individual account had a monthly average approximately \$10,800. Additional bank statements also show that the sole proprietor's individual account at Kaiser Federal had a monthly average of approximately \$10,795 in 2003.

The Bank of America bank statements provided in response to the director's request, reflect that for the second six months of 1999, the petitioner's average monthly savings account/CD balance was approximately \$26,000. For 2000, the petitioner's average monthly savings/CD account was approximately \$33,245. Additional copies of 2003 Bank of America statements indicate that the petitioner's average monthly savings balance in 2003 was approximately \$5,050. It is also noted that some bank statements containing the name of "Prostaffing Solutions" have been submitted. As this is not the petitioner's name and does not appear to be mentioned on the sole proprietor's tax returns, its bank statements are not relevant to the petitioner's ability to pay the proffered wage.

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 June 7, 2004, denied the petition. The director determined that after considering reasonable living expenses for the sole proprietor's household, the remaining funds reflected by the sole proprietor's adjusted gross income were insufficient to pay the proffered wage.

On appeal, the petitioner, through counsel, resubmits copies of the bank statements previously provided and asserts that the petitioner's bank statements show that the monthly cash balances are sufficient to cover the beneficiary's monthly wage. Counsel also provides a copy of an August 10, 2000, AAO decision in which an appeal was sustained where a sole proprietor demonstrated additional funds available to pay the proffered wage despite relatively modest levels of adjusted gross income.

On appeal, counsel further describes the recruitment efforts the petitioner undertook in order to obtain an approved labor certification. It is noted that CIS' authority includes determining the petitioner's ability to pay the proffered wage. In *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984), the court determined that the financial viability of the employer to pay the wage stated in the labor certification is within the province of [CIS]. The court stated:

In *Ubeda v. Palmer*, 539 F. Supp. 647, 649-50 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983), the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between [CIS] and DOL, *see Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983), we conclude likewise. . . .

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 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 stated above, the record raises a question as to whether the petitioner has employed the beneficiary. No evidence, however, was solicited or provided to establish whether compensation has been paid to 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 also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as is asserted here. 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). 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.

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, personal 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. Savings and investment amounts may not always be reflected except to the extent that they accrue taxable interest. 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, supra*.

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, as suggested by the director, the sole proprietor's tax returns reflect that the sole proprietor's adjusted gross income barely exceeded the proffered wage of \$18,616 in each of the relevant years. However, the funds available in various individual and savings accounts may be considered in a sole proprietorship. While this case would have been better served if the director had requested the petitioner to provide a summary of actual household expenses during the relevant period, it is noted that the petitioner's savings/CD bank statement balances combined with individual accounts held by the sole proprietor appear to support the petitioner's ability to pay the proffered wage. The combined monthly averages exceeded \$30,000 beginning in June 1999 through 2000. In 2001 and 2002, the combined average monthly balances decreased to approximately \$9,000, and in 2003 they reflect a combined monthly average of approximately \$15,845. While not representing excessive levels, payment of the proffered wage on a monthly basis of \$1551.33 would have been within the scope of these figures.

Upon review of the evidence and argument submitted to the underlying proceedings and on appeal, it can be concluded that the petitioner has provided sufficient evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of the visa 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.