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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC-02-287-53390 Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Director, California Service Center, denied the preference visa petition and subsequently affirmed his decision upon the petitioner filing a motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a lighting manufacturer. It seeks to employ the beneficiary permanently in the United States as a fixture maker. 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 makes a brief statement.

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 January 25, 2001. The proffered wage as stated on the Form ETA 750 is $16.10 per hour, which amounts to $33,488 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted the sole proprietor's Forms 1040, U.S. Individual Income Tax Returns for 2001 and 2000[1], with accompanying Schedules C, Profit or Loss from Business.

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 December 11, 2002, 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 a signed copy of the sole proprietor's 2001 tax return and copies of any forms W-2 issued by the petitioner to the beneficiary.

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[1] The petitioner's financial situation in 2000, which precedes the priority date in 2001, is not necessarily dispositive of the continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted the sole proprietor's signed tax return and a Form W-2, Wage and Tax Statement, issued by the petitioner to an [redacted] for 2001 reflecting wages paid of $14,675.84. The tax return reflects the following information:

	2001
Proprietor's adjusted gross income (Form 1040)	$13,755
Petitioner's gross receipts or sales (Schedule C)	$711,852
Petitioner's wages paid (Schedule C)	$0
Petitioner's cost of labor (Schedule C)	$342,866
Petitioner's net profit from business (Schedule C)	-$21,983

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 February 7, 2003, denied the petition. The director specifically found that even if concluding that [redacted] is the beneficiary, the combination of wages paid plus the sole proprietor's adjusted gross income did not add up to the proffered wage.

On motion to reopen or reconsider, counsel asserted that the petitioner's cost of labor expenses exceeds the proffered wage and evidences the petitioner's ability to pay the proffered wage. Additionally, counsel stated that the petitioner's tax returns illustrate its "business potential" and likelihood of continued profitability because of its "business volume of $711,852." Counsel also asserted that the director erred by failing to consider profits derived from the sole proprietor's second business as reflected by a second Schedule C to the individual tax returns. Finally, counsel submitted additional evidence in the forms of property deeds and real estate values and bank account statements, and urged the director to consider the value of the sole proprietor's real estate property holdings and cash assets.

The director determined that the evidence submitted still did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 18, 2003, denied the motion. The director specifically found that the real estate holdings were not liquefiable assets available to pay wages and that the bank accounts did not show substantial and continuous revenue to pay the proffered wage.

On appeal, counsel asserts that the director abused its discretions and erred in its analysis. Counsel indicates that a brief and additional evidence would be forthcoming within sixty days of filing the appeal. Counsel filed the appeal on May 16, 2003. To date, more than 15 months later, nothing further has been received. Thus, the record of proceeding will be considered complete as currently constituted. Counsel also requests a copy of "the entire A file" related to these proceedings. Counsel is hereby notified that there is no "A file" related to the instant petition and there is a process through the Freedom of Information Act (FOIA) by which he may obtain a copy of any public record.

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 $14,675.84 in 2001. Since the proffered wage is $33,488, the petitioner must illustrate that it can pay the remainder of the proffered wage, which is $18,812.16 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 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 (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 supports a family of five. In 2001, the sole proprietorship's adjusted gross income of $13,755 is less than the remaining proffered wage of $18,812.16. Since the adjusted gross income does not even cover the remaining proffered wage, it is not necessary to evaluate the probability of whether or not the sole proprietor could support himself and his family on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage because it would be a negative figure.

Finally, the sole proprietor shows an ending balance of $13,917.47 in an account held by his other business and an ending balance $10,046.74 in an account held by the petitioner. There is only one statement of each bank account in the record of proceeding and it reflects the accounts' statuses in January 2003, which is thirteen months after the timeframe under analysis. It is argued that the petitioner could use these funds to pay the proffered wage. Using a literal interpretation and application of that argument, the ending combined balances of $23,964.21 results in $18,907.05 for the sole proprietor to sustain himself and four dependents upon. However, the problem with this analysis is that it merely shows the amounts in accounts on a given date, January 2003, without illustrating a sustainable ability to pay the proffered wage. The petitioner failed to submit bank records for 2001, the critical timeframe under analysis in this proceeding and to show continuous sustainable cash funds in the petitioner's and sole proprietor's bank accounts.

Additionally, counsel's motion asserted that funds could be used from the sole proprietor's other net profit from his second business, H&J Metals, of $36,189 in 2001. This amount is reflected on the second Schedule C to the sole proprietor's individual income tax return. This profit, however, factored into the sole proprietor's adjusted gross income, which shows insufficient funds for the sole proprietor to pay the proffered wage and sustain himself and his family in 2001. No corroborative evidence illustrates that that net profit was additional funds available to the petitioner.

The AAO concurs with the director that real estate holdings are not the type of liquefiable assets utilized by employers to pay employee wages.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has 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.