U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B-6

[redacted]

FILE: WAC-01-035-53173 Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DUPLICATE COPY

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 care home. It seeks to employ the beneficiary permanently in the United States as an uncertified nurse's assistant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 2, 1995. The beneficiary's salary as stated on the labor certification is $1,291.33 per month or $15,495.96 per year.

With the initial petition, counsel submitted copies of an amended 1999 Form 1040 U.S. Individual Tax Return indicating adjusted gross income of - $7,050; the initial 1999 Form 1040 and Schedule C reflecting the finances of the petitioning company; the sole proprietor's 1998 Form 1040 and Schedule C reflecting adjusted gross income of -$12,614 and a net loss from business of -$12,626, gross receipts of $93,806, gross profits of $93,806, wages of $11,348; and a net loss of $12,626; and the sole proprietor's 1997 Form 1040 and Schedule C reflecting adjusted gross income of -$3,994, gross receipts of $92,861, gross profits of $92,861, wages of $3,600; and a net loss of $4,007.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 10, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's federal tax returns for the years 1995 and 1996, Form DE-6 Quarterly Wage Reports for th3ew State of California for the last 10 quarters and evidence that the beneficiary possesses the experience listed on the Form ETA 750 Application for Alien Employment Certification.

In response to the director's request for evidence, counsel submitted a copy of a 1997 Form W-2 indicating that the beneficiary earned $3,600 during 1997. Counsel also submitted a copy of the sole proprietor's 1995 Form 1040. This tax return indicates that the sole proprietor had an adjusted gross income of $45 during 1995. Schedule C of the return indicates a gross income of $77,927; a gross profit of $77,927; wages of $0; and a net profit from business of $0. In addition, a 1998 Form W-2 Wage and Tax Statement from the petitioner to the beneficiary indicates that the beneficiary earned $9,300 during 1998 and a copy of a 1999 Form W-2 indicates that the beneficiary earned $10,298.40 during 1999.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. In her decision, the director noted that the petitioner had provided no evidence establishing its ability to pay the proffered wage for the years 1995, 1996, and 2000. The director concluded that

the documentary evidence submitted, while indicating that the petitioner was employing the beneficiary at less than the full proffered wage, did not reflect sufficient resources to pay the remainder of the proffered wage.

On appeal, counsel submits a letter from a tax representative, who states that the petitioner is excluded from having to pay federal income taxes for 2001 under Section 131 of the Internal Revenue Code as she is a provider of foster care to various individuals. Counsel supports this assertion with a copy of page 271 of the U.S. Master Tax Guide stating:

> **Income Received for Foster Care**. Payments made by a state or tax-exempt placement agency as "difficulty of care payments" or to reimburse a foster home provider for the expenses of caring for individuals placed in the home by a state agency or tax-exempt placement agency are excludable from gross income (Code Sec. 131).

Counsel also submits various documents reflecting the conditions of the beneficiary's employment. In order to satisfy the eligibility requirements for the preference visa petition, the petitioner must justify that it has the ability to pay the beneficiary the proffered wage from the date of the petition is filed, or priority date and continuing.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner has submitted no evidence of income or any ability to pay the proffered wage for the years 1996 or 2000. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason the petition may not be approved.

In addition, the tax returns submitted for the years 1995, 1997 and 1999 on their face are not sufficiently probative to establish that the petitioner had the ability to pay the proffered wage because her adjusted gross income is too low to support herself and pay the proffered wage or the difference between wages paid and the proffered wage.

Counsel's claim on appeal that the petitioner is excluded from having to pay federal taxes on income for foster care services is corroborated by sufficient documentary evidence. Not only did the petitioner provide the relevant tax code section, we note that on the Schedules C relating to the petitioning entity, all of the income is deducted as an "other expense" on line 27. On Part V of the Schedules, listing "other expenses," the petitioner listed the income from foster care as a Code Section 131 Exemption. While this exemption suggests that this income was not necessarily spent as an expense of the foster care business and may have been available to pay the proffered wage, we note that, according to the Master Tax Guide section provided on appeal, some, if not all, of this income is reimbursement for expenses incurred in caring for foster children. The record contains no evidence of how many foster children the sole proprietor cares for or what her other monthly expenses for herself and these children may be. Thus, we still cannot determine whether the income reflected on Schedule C would be sufficient to cover all those expenses and the proffered wage or the difference between the wages paid and the proffered wage.

After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.