U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-190-50905 Office: CALIFORNIA SERVICE CENTER Date: JUN 22 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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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
for Administrative Appeals Office

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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 facility. It seeks to employ the beneficiary permanently in the United States as a mental retardation aide. 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 written statement and evidence previously submitted.

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 June 23, 1998. The proffered wage as stated on the Form ETA 750 is $8.05 per hour, which amounts to $16,744 annually.

With the petition, the petitioner submitted the petitioner's owner's Forms 1040 U.S. Individual Income Tax Returns for 2000 and 2001 along with its Schedules C, Profit and Loss from Business statements.

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

	2000	2001
Adjusted gross income for the owner (Form 1040)	$61,976	$67,263
Gross receipts or sales for the petitioner (Schedule C)	$61,200	$59,000
Gross profit for the petitioner (Schedule C)	$46,200	$44,000
Net profit for the petitioner	$19,754	$15,240

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 13, 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 evidence pertinent to the years 1998 and 1999.

In response, the petitioner submitted the petitioner's owner's Forms 1040 U.S. Individual Income Tax Return for 1998 and 1999 along with its Schedules C, Profit and Loss from Business statements.

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

	1998	1999
Adjusted gross income	$77,204	$45,685
Gross receipts or sales	$51,300	$56,010
Gross profit	$39,750	$45,010
Net profit	$18,096	$22,317

Because the evidence submitted was still insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 18, 2002, the director requested additional evidence pertinent to that ability. Specifically, the director requested evidence of the petitioner's monthly expenses.

In response, the petitioner submitted its owner's personal income and expenses summary for the year ending December 31, 2001 and the petitioner's unaudited income statement for the year ending December 31, 2001. The personal income and expenses summary for the petitioner's owner demonstrates that the owner, [redacted] and his wife, [redacted] have monthly expenses of $3,855.79, which total $47,269.48.

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 6, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's owner's have financial resources outside of the sole proprietorship to utilize to pay the proffered wage and that the petitioner's net profits as reflected on the owners' Schedule Cs are sufficient to cover the amount of the proffered wage. The petitioner submits evidence previously submitted.

The unaudited financial statements submitted with to the director's second request for evidence 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.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 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).

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.

In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), 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 about thirty percent (30%) of the petitioner's gross income. In the instant case, the petitioning sole proprietorship's stated annual expenses for 2001 were $47,469. In 2001, reducing the sole proprietorship's adjusted gross income of $67,263 by the sole proprietor's annual expenses of $47,469 leaves the sole proprietor with $19,794. It is unlikely that the sole proprietor, with six dependents, could sustain himself and his family and pay the proffered wage on that amount, which is a similar amount in the facts described in *Ubeda v. Palmer, id.*

There is no evidence concerning the sole proprietorship's expenses for the year 1998 through 2000. However, since the petitioner cannot demonstrate an ability to pay the proffered wage in 2001, it is not necessary to examine the other years since the petitioner must show an ongoing ability to pay the proffered wage.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998, 1999, 2000, or 2001. In 2001, the petitioner shows an adjusted gross income that could not sustain the sole proprietor and the sole proprietor's family as well as pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.[1] The petitioner has not, therefore, shown the ability to pay the proffered

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[1] Counsel references the income of Amabel Sampang from her nursing occupation, Remigio Sampang's social security pension, nominal bank interest, and tax refunds as additional evidence of the petitioner's ability to pay the proffered wage. One year shows a $20,000 dividend distribution. However, these amounts are income that would have already been reflected on their tax return.

wage during 2001. The remaining years under analysis are inconclusive without evidence of the petitioner's expenses.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, or 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.