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

**U.S. Citizenship and Immigration Services**

BL

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 17 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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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 private household. It seeks to employ the beneficiary permanently in the United States as a tutor. 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.

The petitioner, through counsel, filed a timely appeal.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 14, 1997. The proffered wage as stated on the Form ETA 750 is $650 per week, which amounts to $33,800 annually.

With the original petition, the petitioner submitted documentation regarding the beneficiary's educational qualifications and previous employment. The petitioner also submitted evidence of his 1997, 1998, 1999, 2000, and 2001 federal income taxes, as well as his 1997,1998, 1999, 2000, and 2001 W-2 Wage and Tax Statements. Further, the petitioner submitted a copy of his deed of trust and evidence of the balances for his checking and deposits accounts.

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 27, 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 submit original, date-stamped computer printouts from the IRS evidencing the petitioner's tax returns for 1997 through 2001.

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

| | 1997 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|
| Proprietor's adjusted gross income per (Form 1040) – computer printout date stamped by IRS | $54,628 | $56,474 | $58,338 | $64,253 | $69,524 |
| Petitioner's wages paid (Schedule C) | $53,733 | $55,645 | $56,331 | $62,826 | $66,360 |

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 24, 2003, denied the petition.

To determine the petitioner's ability to pay the proffered wage, we will first examine whether the petitioner employed and paid the beneficiary during the requisite 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 has not established that it has previously employed 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, Citizenship and Immigration Services (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, as a private household, is considered 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 four. In 1997, the sole proprietorship's adjusted gross income of $54,628 barely covers the remaining proffered wage of $33,800. It is improbable that the sole proprietor could support himself and his family on $20,828 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even considering the petitioner's most recent wages (2001), we find it highly unlikely that the petitioner could support himself and his dependents while approximately 48% of the petitioner's gross income is spent paying the beneficiary's proposed salary.

On appeal, the petitioner submits a copy of his home appraisal, a second copy of his deed of trust, and a computer printout from his bank. Counsel relies on the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (R.C. 1967) and argues that Citizenship and Immigration Services (CIS) must consider all of the petitioner's pertinent financial evidence, rather than just his tax returns. Specifically, counsel argues that CIS should consider the net value of the petitioner's home of $131,000 and additional assets of over $50,000.

Because the petitioner is an individual, the AAO agrees that CIS may consider more than the petitioner's tax returns in order to determine the petitioner's ability to pay. However, counsel's reliance on *Sonegawa,* is misplaced as the petitioner in *Sonegawa* was a business rather than a private individual. Further, the AAO does not find counsel's argument that the petitioner would sell his own home in order to obtain the funds to pay the beneficiary's salary to be plausible.

We find counsel's argument that the petitioner could obtain a second mortgage on his home as equally unrealistic. CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). In calculating the ability to pay the proffered salary, CIS gives less weight to loans and debts as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position.

Finally, we consider evidence of the petitioner's accounts which show the petitioner maintained a combined balance of approximately $50,000 in checking and savings accounts and investment CDs. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The record contains bank statements covering the period January 10, 2002 through July 2002. While the average balance may be substantial enough to cover the proffered wage for one year based upon the petitioner's most recent salary, these statements do not demonstrate the petitioner had the ability to pay the proffered wage at the time of filing.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 1997. The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997.

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.