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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-03-012-51147 Office: CALIFORNIA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [redacted]
Beneficiar

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 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 dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental lab technician. 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 brief.

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 December 27, 2000. The proffered wage as stated on the Form ETA 750 is $19.20 per hour, which amounts to $39,936 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted copies of its sole proprietor's Forms 1040, U.S. Individual Income Tax Return, with accompanying Schedules C, Profit and Loss From Business, for the years 1999 through 2001.[1]

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

	1999[2]	2000	2001
Proprietor's adjusted gross income (Form 1040)	$6,971	$16,798	$27,000
Petitioner's gross receipts or sales (Schedule C)	$72,085	$83,242	n/a
Petitioner's wages paid (Schedule C)	$12,963	$12,316	n/a

[1] The 2001 return did not include Schedule C.
[2] The 1999 taxes are not necessarily dispositive to establishing the petitioner's ability to pay the proffered wage since the priority date is in 2000.

Petitioner's net profit from business (Schedule C)	$12,096	$18,030	n/a

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 March 4, 2003, 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 the sole proprietor's monthly expenses, and the petitioner's quarterly wage reports.

In response, the petitioner submitted the sole proprietor's Form 8453, U.S. Individual Income Tax Declaration for an IRS e-file Return with accompanying Schedule C, Profit and Loss From Business, and Form 1040, U.S. Individual Income Tax Return for 2002 with accompanying Schedule C, Profit and Loss From Business.

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

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$27,000	$36,435
Petitioner's gross receipts or sales (Schedule C)	$108,738	$118,927
Petitioner's wages paid (Schedule C)	$8,570	$14,400
Petitioner's net profit from business (Schedule C)	$28,781	$37,838

Instead of presenting an itemized list of the sole proprietor's monthly expenses, the sole proprietor presented a credit card statement from American Express, which counsel stated reflects the sole proprietor's monthly expenses. The credit card statement reflected a new balance of $614.52 and a previous balance of $662.48, paid in full. The statement demonstrates charges for clothing, Internet service, food, general merchandise, phone services, and gas. Additionally, the sole proprietor submitted a letter stating that his additional household monthly expenses are as follows:

House payments	[$]817
Utilities	[$]250
Food	[$]600
Insurance	[$]350

Thus, adding together the average of the two credit card monthly balances, which is $638, with the list of additional household monthly expenses, which is $2,017, the sole proprietor's total monthly expenses are $2,655, which is $31,860 per year.

The sole proprietor submitted a copy of his life insurance annual statement to reflect a net cash value of $9,963.91 in assets. Additionally, a letter from Washington Mutual Bank is in the record of proceeding reflecting two balances maintained by the sole proprietor there – one with an average balance of $65,625.77 and one with an average balance of $7,040.70. Finally, the petitioner also submitted quarterly wage reports for the quarters ending March 31, 2002, September 30, 2002, June 30, 2002, December 31, 2002, and March 31, 2003. Those quarterly reports do not reflect that the petitioner actually employed and paid any wages to the beneficiary during the quarters represented by those filings.

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 July 21, 2003, denied the petition.

On appeal, counsel states the following on the appellate form: "The upward trend of the [p]etitioner's finacial [sic] capability is an indication of his future ability to pay the alien's wages. Other factors such as 9-11 tragedy have affected his past financial status." An accompanying letter from the sole proprietor states that he intends to expand the dental business with a new laboratory upon the approval of the visa petition and the beneficiary's adjustment to lawful permanent resident. The sole proprietor states that his business expansion and customer satisfaction relies upon the beneficiary.

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. 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, 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 four. In 2000, the sole proprietorship's adjusted gross income of $16,798 could not pay the proffered wage of $39,936 let alone its annual stated expenses of $31,860. Likewise, in 2001, the sole proprietorship's adjusted gross income of $27,000 could not pay the proffered wage of $39,936 let alone its annual stated expenses of $31,860. In 2002, the sole proprietorship's adjusted gross income of $36,435 only covers its annual stated expenses with little left over to put towards the

proffered wage. The petitioner's net profits are also quite modest, and from 200 through 2002, always a lesser amount than the proffered wage.

Finally, the sole proprietor's assets may be examined to support the petitioner's demonstration of it ability to pay the proffered wage. The sole proprietor maintains an average balance of $65,625.77 and $7,040.70 in a two bank accounts. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. However, since there is only a couple of statements, the average balance merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage. Additionally, the balances, even if considered in the aggregate, which is $72,666.47, would be insufficient as it barely covers the proffered wage for one year (two years of the proffered wage equaling $79,872), without consideration of cash still required to cover the sole proprietor's living expenses which were at a deficit from the adjusted gross income as discussed above. The sole proprietor's cash value of his life insurance policy adds little to the equation.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2000, 2001, or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 through 2002. 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.