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

U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: WAC-03-141-53590 Office: CALIFORNIA SERVICE CENTER Date: APR 13 2005

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 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 general machine shop. It seeks to employ the beneficiary permanently in the United States as a boring-mill set up operator. 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 director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, the petitioner submits additional evidence.

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 first issue to be discussed in this case is whether or not the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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 August 25, 1997. The proffered wage as stated on the Form ETA 750 is $12.33 per hour, which amounts to $25,646.40 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 1997, 1998, 1999, 2000, and 2001.

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

	1997	1998	1999
Proprietor's adjusted gross income (Form 1040)	$154,147	$194,544	$192,514
Petitioner's gross receipts or sales (Schedule C)	$490,967	$526,242	$458,896

Petitioner's wages paid (Schedule C)	$0	$0	$54,675
Petitioner's cost of labor (Schedule C)	$113,425	$96,290	$107,651
Petitioner's net profit from business (Schedule C)	$132,092	$164,720	$74,650

	2000	2001
Proprietor's adjusted gross income (Form 1040)	$95,884	$72,191
Petitioner's gross receipts or sales (Schedule C)	$259,285	$376,948
Petitioner's wages paid (Schedule C)	$9,697	$0
Petitioner's cost of labor (Schedule C)	$48,472	$73,235
Petitioner's net profit from business (Schedule C)	$33,842	$33,642

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 July 17, 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 properly signed or IRS-certified tax returns, evidence for 2002, any evidence of wages paid to its employees or the beneficiary, and a list of the sole proprietor's monthly expenses. The director also noted that multiple petitions had been filed by the petitioner and requested evidence that the petitioner could pay all of the wages offered in connection with each petition.

In response, the petitioner submitted a letter from the sole proprietor stating that he sought an extension to file his 2002 tax return. The petitioner provided signed tax returns and copies of Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for wages paid to the beneficiary in 1996, 1997, 1998, 1999, 2000, 2001, and 2002, evidencing payments of $7,735.02, $19,517.29, $20,646.75, $20,042.64, $16,594.13, $17,506.50, and $4,167 in each year, respectively. The petitioner indicated that the beneficiary worked part-time for another employer in 2002 due to a slow down in its business, but returned to work again for the petitioner.

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 November 18, 2003, denied the petition, noting the petitioner's failure to provide the sole proprietor's monthly expenses and certified IRS tax records.

On appeal, the petitioner submitted a letter from its accountant detailing additional submissions of evidence including the sole proprietor's individual income tax return, unemployment tax return for 2002, quarterly federal tax returns for all four quarters in 2002, Form W-3, Transmittal of Wage and Tax Statements for 2002, W-2 forms issued to the beneficiary from the petitioner for 2002 reflecting wages paid of $4,167 in that year, documentation illustrating the petitioner's amended tax filings in 1998, and a detailed spreadsheet of the sole proprietor's monthly expenses for 2002 and 2003, which were $66,238 and $67,798, respectively.

The 2002 tax return reflects the following information:

	2002
Proprietor's adjusted gross income (Form 1040)	$50,223
Petitioner's gross receipts or sales (Schedule C)	$262,226

Petitioner's wages paid (Schedule C)	$0
Petitioner's cost of labor (Schedule C)	$41,287
Petitioner's net profit from business (Schedule C)	$28,503

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, however, the petitioner has provided evidence from 2002 and 2003. The petitioner provided an explanation and supporting documentation for its failure to provide its 2002 tax records in its response to the director's request for evidence. The petitioner did not explain its failure to provide its detailed monthly expenses and only submits this evidence on appeal. That evidence is for 2002 and 2003, however, which would not have been available prior to the appeal, so it will be accepted into evidence.

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 $19,517.29, $20,646.75, $20,042.64, $16,594.13, $17,506.50, and $4,167 in 1997, 1998, 1999, 2000, 2001, and 2002, respectively. Since the proffered wage is $25,646.40, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is $6,129.11, $4,999.65, $5,603.96, $9,052.27, $8,139.90, and $21,479.40 in 1997, 1998, 1999, 2000, 2001, and 2002, respectively.

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 1997, the sole proprietorship's adjusted gross income of $154,147 covers the remaining proffered wage of $6,129.11. It is probable that the sole proprietor could support himself and his family on $148,017.89 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even though the sole proprietor failed to submit evidence of his expenses for 1997, assuming that they are approximately $65,000 per year, which was the approximate amount of the sole proprietor's 2002 and 2003 annual expenses, the sole proprietor's family is left with ample resources to both support themselves and pay the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage in 1997.

In 1998, the sole proprietorship's adjusted gross income of $194,544 covers the remaining proffered wage of $4,999.65. It is probable that the sole proprietor could support himself and his family on $189,544.35 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even though the sole proprietor failed to submit evidence of his expenses for 1998, assuming that they are approximately $65,000 per year, which was the approximate amount of the sole proprietor's 2002 and 2003 annual expenses, the sole proprietor's family is left with ample resources to both support themselves and pay the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage in 1998.

In 1999, the sole proprietorship's adjusted gross income of $192,514 covers the remaining proffered wage of $5,603.96. It is probable that the sole proprietor could support himself and his family on $186,910.04 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even though the sole proprietor failed to submit evidence of his expenses for 1998, assuming that they are approximately $65,000 per year, which was the approximate amount of the sole proprietor's 2002 and 2003 annual expenses, the sole proprietor's family is left with ample resources to both support themselves and pay the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage in 1999.

In 2000, the sole proprietorship's adjusted gross income of $95,884 covers the remaining proffered wage of $9,052.27. It is probable that the sole proprietor could support himself and his family on $86,831.73 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even though the sole proprietor failed to submit evidence of his expenses for 1998, assuming that they are approximately $65,000 per year, which was the approximate amount of the sole proprietor's 2002 and 2003 annual expenses, the sole proprietor's family is left with ample resources to both support themselves and pay the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage in 2000.

In 2001, the sole proprietorship's adjusted gross income of $72,191 covers the remaining proffered wage of $8,139.90. It is probable that the sole proprietor could support himself and his family on $64,051.10 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Even though the sole proprietor failed to submit evidence of his expenses for 1998, assuming that they are approximately $65,000 per year, which was the approximate amount of the sole proprietor's

2002 and 2003 annual expenses, the sole proprietor's adjusted gross income covers both his family and the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage in 2001.

In 2002, the sole proprietorship's adjusted gross income of $50,223 covers the remaining proffered wage of $21,479.40; however, fails to leave enough income for the sole proprietor to support himself and his family on. The remaining amount of $28,743.60, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, is insufficient to cover the sole proprietor's stated expenses in 2002 of $66,238. The petitioner also conceded that his business declined in 2002 in both a response to the director's request for evidence and in a letter from the petitioner's accountant submitted on appeal, forcing the beneficiary to accept employment elsewhere in that year. Thus, the petitioner has failed to establish its *continuing* ability to pay the proffered wage in 2002[1].

Additionally, the AAO is concerned about a discrepancy in the evidence contained in the record of proceeding. Contrary to the figure presented on the petitioner's Schedule C form to the sole proprietor's individual income tax return for 2002, the W-3 and quarterly federal tax returns for 2002 show that the petitioner paid a total of $35,042.87 in wages. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, in any additional proceedings pursued by the petitioner in this matter, certified IRS tax returns and an explanation must be submitted to allay the AAO's concerns as well as the director's concerns stated in his decision.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2002. Although the sole proprietor's spreadsheet indicates potentially substantial personal assets, such as cash, dividends from stock holdings, and income from real estate holdings, the record of proceeding does not contain any independent corroborating evidence of them, which would have been accounted for in the sole proprietor's adjusted gross income on his individual income tax return[2].

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is August 25, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor

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[1] This evaluation is made without considering any pending multiple petitions filed by the petitioner, which would need to be addressed in any additional proceedings if additional evidence is presented.

[2] As noted above, since the petitioner is structured as a sole proprietorship, CIS will consider substantive and probative evidence of appropriate easily liquefiable and unencumbered personal assets of the sole proprietor.

> certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of boring-mill set up operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	N/A
	High School	N/A
	College	N/A
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states the following:

> Sets up and operates boring, drilling, and milling machine to perform machining operations, such as milling, drilling, boring, and reaming metal workpieces, such as machine, tool, or die parts, analyzing specifications and deciding on tooling according to knowledge of shop mathematics, metal properties, and machining procedures: Studies machining instructions, to determine machining requires, sequence of operation, tooling, feed, and speed rate. Lifts workpiece either manually or with crane or hoist onto machine table. Positions and secures workpiece to table or angle plate. Selects and mounts tool in spindle. Moves controls to set feeds, speeds, and depth of cut, and to position tool and workpiece in relation to each other, verifying position visually with instruments. Starts machine and observes operation, making one or more trial passes with manual control before engaging feed. Verifies dimensions of machined workpiece with measuring instruments. Works to tolerance of plus or minus-0.001 inch. Lay out reference lines and machining locations on workpiece, according to blueprints.

Item 15 indicates that there are no special requirements other than detailing break times and business hours.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated employment with the petitioner April 1996 in the same position with similar duties as the proffered position, and prior employment as a machine operator with Talleres "Martinez" in Jalapa, Guatemala from February 1992 to August 1995.

With the initial petition, the petitioner did not provide any evidence of the beneficiary's qualifications for the proffered position.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on July 17, 2003. The director specifically requested a letter certifying the beginning and ending date of any qualifying employment experience prior to the petition's priority date in August 1997.

In response to the director's request for evidence, the petitioner provided a letter in Spanish, with a certified English translation, from [redacted] of Talleres "Martinez," corroborating the beneficiary's employment as a machine operator. The translation states that the employment occurred from January 2, 1992 to August 28, "2003," but the underlying letter in Spanish clearly shows that the translation was an error, and the ending date of employment was actually 1995. The letter did not provide details about the duties performed by the beneficiary with that employer.

The director's decision stated that the letter was deficient as it failed to provide details about the duties performed by the beneficiary while employed with Talleres "Martinez."

On appeal, no evidence is submitted and no argument is made that the director's decision was made in error. This portion of the appeal and appellate issue could be summarily dismissed for that reason[3]. The AAO will review the record of proceeding substantively in its discretion, however, and concurs with the director's decision.

The letter presented into the record of proceeding is not probative evidence of the beneficiary's qualifications for the proffered position as it fails to comply with the regulation set forth at 8 C.F.R. § 204.5(l)(3)[4] as the regulation clearly requires that any letter evidencing a beneficiary's prior employment experience provide a description of the work performed. Thus, the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

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[3] As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

[4] The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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.