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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2005
WAC-03-120-52847

IN RE: Petitioner: [REDACTED]
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

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 The director's decision will be withdrawn and the petition will be remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

The petitioner is a cleaning and janitorial service. It seeks to employ the beneficiary permanently in the United States as a janitor and cleaner. 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 letter and additional evidence from the petitioner.

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 March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's U.S. Individual Income Tax Return on Form 1040 for 2001 with accompanying Schedule C, Profit and Loss From Business. The petitioner also submitted IRS tax correspondence showing an amount owed for the tax years 1998, 1999, and 2000 and quarterly statements of deposits and filings generated by Automatic Data Processing.

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 April 30, 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 completed and signed tax returns for the year 2002 and quarterly wage reports.

In response, the petitioner submitted internally generated quarterly wage reports and the sole proprietor's individual income tax return for 2002 with accompanying Schedule C. The sole proprietor's taxes were prepared by Maurice Joffe Tax Service.

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

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$28,043	\$23,301
Petitioner's gross receipts or sales (Schedule C)	\$338,050	\$265,106
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$80,852	\$97,719
Petitioner's net profit from business (Schedule C)	\$30,163	\$25,692

The internally generated quarterly wage reports do not show any wages paid to the beneficiary.

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 9, 2003, denied the petition.

On appeal, counsel states that because of the adverse decision, the sole proprietor obtained a consultation with a different tax preparer, which informed him his prior tax returns were incorrectly prepared. Thus, counsel and the petitioner present amended tax returns and a letter from the sole proprietor's new tax preparer, stating that errors previously made were corrected by filing an amended return. The amended returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$56,243	\$47,929
Petitioner's gross receipts or sales (Schedule C)	\$338,050	\$275,106
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$80,852	\$97,719
Petitioner's net profit from business (Schedule C)	\$60,507	\$25,192

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 has not established that it has previously employed the beneficiary. The beneficiary did not indicate that she worked for the petitioner on the ETA 750B but she indicated employment during the last five years with the petitioner on a Form G-325, Biographic Information, sheet submitted in connection with her application to adjust status to lawful permanent resident. She did not specify the timeframe of employment with the petitioner on the Form G-325. *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.

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 2001, the sole proprietorship's amended adjusted gross income of \$56,243 covers the proffered wage of \$20,800. It is difficult to assess whether or not the sole proprietor could support himself and his family on \$35,443 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, since the director failed to seek and the sole proprietor did not provide, his monthly expenses.

Likewise, in 2002, the sole proprietorship's amended adjusted gross income of \$47,929 covers the proffered wage of \$20,800. It is difficult to assess whether or not the sole proprietor could support himself and his family on \$27,129 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, since the director failed to seek and the sole proprietor did not provide, his monthly expenses.

The amended tax returns are not IRS-certified or generated. Monthly expenses are not in the record of proceeding. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002. The AAO cannot make an accurate assessment based on the current state of the record of proceeding.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to obtain the sole proprietor's monthly expenses and IRS-certified amended tax returns. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide

additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.