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U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC 03 101 54195

Office: CALIFORNIA SERVICE CENTER

Date: MAY 23 2006

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Chief  
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 residential treatment center. It seeks to employ the beneficiary permanently in the United States as a member of the direct care staff. 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 she 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 additional evidence and asserts that the petitioner has established her continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 5, 1997. The proffered wage as stated on the Form ETA 750 is \$8.51 per hour, which amounts to \$17,700.80 annually. The beneficiary indicates on her ETA 750B, which she signed on October 22, 1997, that she has volunteered at the petitioning business since December 1992.

On Part 5 of the preference petition, filed on February 11, 2003, the petitioner claims that it was established on January 9, 1989, has a gross annual income of approximately \$300,000, a variable net annual income, and that it employs seven workers.

As suggested by the record, the petitioner is structured as a sole proprietorship. As evidence of its ability to pay the proffered salary, the petitioner initially submitted copies of the sole proprietor's individual federal income tax returns for 1998 through 2001. These returns indicate that the sole proprietor files her tax returns jointly with her spouse and declares no dependents.

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

1998	1999	2000	2001
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Sole Proprietor's adjusted gross income (Form 1040)	-\$ 72,522	-\$ 75,830	-\$ 71,945	-\$80,072
Net Operating Loss Carryover (Form 1040)	-\$ 63,930	-\$ 72,571	-\$ 76,020	-\$76,020
Petitioner's gross income (Schedule C)	\$ 202,770	\$255,894	\$348,976	\$313,864
Petitioner's wages paid (Schedule C)	\$ 40,333	\$ 87,191	\$131,314	\$104,827
Petitioner's net profit from business (Schedule C)	-\$ 1,330	\$ 3,786	\$ 3,665	-\$ 8,279
Petitioner's business income or loss (Form 1040)	-\$ 1,330	\$ 3,786	\$ 3,665	-\$ 8,279

Together with these tax returns, the petitioner submitted a letter, dated August 9, 2002, and signed by the petitioner's accountant, [REDACTED] letter refers to the sole proprietor's 2000 individual tax return and states that although the return reflected a loss, it does not represent the actual cash outlay, due to such deductions allowed to be taken by the Internal Revenue Service (IRS), and also that the return reflects the carryover of net operating losses generated in prior years.

On January 23, 2004, because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 that the petitioner provide copies of its federal tax returns for 1997, 2002, and 2003. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2) if the petitioner has employed her from 1997 to 2003. The director further requested that the petitioner provide a summary of the sole proprietor's monthly household expenses and advised the petitioner that if the sole proprietor will use personal assets to pay the proffered salary, then evidence must be provided showing that she is in the possession of sufficient assets to continuously pay the wage. The director also requested the petitioner to provide copies of the last eight state quarterly wage reports that it had filed.

In response, the petitioner submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1997 and 2002. They contain the following information:

	1997	2002
Sole Proprietor's adjusted gross income (Form 1040)	-\$ 63,842	-\$ 96,998
Net Operating Loss Carryover (Form 1040)	-\$ 42,230	-\$ 80,123
Petitioner's gross income (Schedule C)	\$ 155,470	\$ 358,447
Petitioner's wages paid (Schedule C)	\$ 31,025	\$ 163,181
Petitioner's net profit from business (Schedule C)	-\$ 2,806	-\$ 19,351
Petitioner's business income or loss (Form 1040)	-\$ 2,806	-\$ 19,351

Counsel's transmittal letter accompanying the response indicates that the sole proprietor's 2003 tax return was not yet available, however she submitted a copy of the beneficiary's 2003 W-2, which is represented as the beneficiary's first paid employment by the petitioner. The 2003 W-2 shows that she earned \$7,636.39. The submitted state quarterly wage reports indicate that the petitioner has employed her part-time. According to a personal expenditures chart encompassed within an attached analysis submitted with another letter, dated April 5, 2004, from [REDACTED] the sole proprietor's annualized household expenses for the years from 1997 to 2002 were \$55,287 for 1997; \$48,482 for 1998; \$74,619 for 1999; \$75,824 for 2000; \$106,030 for 2001; and \$89,150 for 2002.

§ letter also advocates adding back to the sole proprietor's income various non-cash deductions such as depreciation, car and truck expenses, as well as tax excludable foster care payments received, which have been reflected under the expenses listed under Part II of the sole proprietor's Schedule C, Profit or Loss from Business, along with the net loss carryover generated by previous years' operations as shown on line 21 of the pertinent Form 1040. As set forth by §, as well as an accompanying copy of Section 131 of the Internal Revenue Code (IRC), this provision allows a business who received qualified foster care payments from the state to exclude this amounts from their gross income, thus representing monies which are not reflected as part of a sole proprietors' income on his/her tax returns. The excludable amounts (referenced on Part V of the tax returns) include the following:

1997	\$ 91,579
1998	\$117,607
1999	\$103,413
2000	\$137,856
2001	\$103,575
2002	\$118,288

The sole proprietor's household expenses are reflected within the petitioner's response to the director's request for evidence. They are shown as:

1997	(55,287)
1998	(48,482)
1999	(74,619)
2000	(75,824)
2001	(106,030)
2002	(89,150)

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, 2004, denied the petition. The director determined that after considering reasonable living expenses, the remaining funds reflected by the sole proprietor's adjusted gross income were insufficient to pay the proffered wage. The director noted that he would not add back expensed funds and deductions taken on the federal tax return in order to arrive at a petitioner's ability to pay a proffered wage. The director noted that in each of the years between 1997 and 2002, the sole proprietor's adjusted gross income was insufficient to cover the proffered wage after consideration of the payment of the household living expenses.

On appeal, counsel resubmits the documentation provided to the underlying record and asserts that CIS should recognize the addition back to the petitioner's net income of various deductions that the sole proprietor took on her tax returns based on what is characterized as "non-cash" expenditures to arrive at a "net cash" figure that reflects the petitioner's ability to pay the proffered salary of \$17,700.80.

Counsel's assertions are not persuasive. 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 may have 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. As mentioned, the

only evidence of wages paid to the beneficiary is indicated by the beneficiary's 2003 W-2, showing that the petitioner paid the beneficiary \$7,636.39, or \$10,064.41 less than the proffered wage.

When CIS examines a petitioner's net income during a given period, it reviews the figure reflected on a 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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, personal cash or cash equivalent 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 (7<sup>th</sup> 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.

It is noted that a depreciation expense taken as a deduction does not require or represent cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. However, the cost of equipment and buildings and the value lost as they deteriorate still represents an actual expense of doing business. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay.

Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

That said, as noted above, and as suggested by the petitioner's accountant, [REDACTED] we are persuaded by the facts in this case to recognize the excludable amounts of income authorized by section 131 of the IRC, since they represent specific sums that were available but excluded from the amounts characterized as the petitioner's gross income.

Further, we will recognize the amounts taken as net operating losses shown on the tax returns. If deductible expenses for a tax year exceed a business' gross income, certain businesses may deduct the loss from their income in another year or years. The loss claimed in a year other than the year in which it was incurred is called a net operating loss, and as suggested by [REDACTED] should not be considered as affecting the operations of the current year's tax return. Taxable income before a net operating loss will be considered in order to determine whether a petitioner had sufficient income in the year of filing to pay the proffered wage. In this case, by considering the sole proprietor's adjusted gross income without the net operating loss carryover figure and without the excludable income amounts and taking into consideration the individual household expenses, the sole proprietor's revised adjusted gross income for 1997-2002 years are:

1997	\$ 14,680
1998	\$ 60,533
1999	\$ 25,535
2000	\$ 66,107
2001	-\$ 6,507
2002	\$ 12,263

The amounts for 1998, 1999, and 2000 exceed the proffered wage of \$17,700.80 and thus demonstrate the ability to pay the wage offer for those years, however amounts shown for 1997, 2001, and 2002 do not reflect an amount equal to or more than the proffered salary and do not establish the petitioner's ability to pay the salary for those years. Moreover, the petitioner failed to provide other acceptable evidence for 2003, such as an audited financial statement, that would reflect sufficient reliable data to determine the petitioner's financial position in that year. Payment of \$7,636.39 to the beneficiary as wages does not demonstrate the petitioner's ability to pay the proffered wage, as it is \$10,064.41 less than the certified salary shown on the labor certification.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its *continuing* ability to pay a proffered salary beginning at the priority date. In the instant case, upon review of the evidence submitted to the underlying record and the evidence and argument provided on appeal, it cannot be concluded that that this petitioner demonstrated its continuing financial ability to pay the certified wage.

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.