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U.S. Citizenship
and Immigration
Services

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FILE: WAC-03-141-54364 Office: CALIFORNIA SERVICE CENTER Date: APR 18 2005

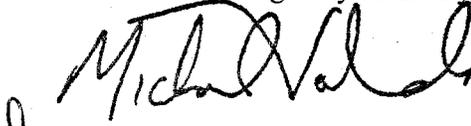
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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 construction company. It seeks to employ the beneficiary permanently in the United States as a drywall supervisor. 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 and 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$29.96 per hour, which amounts to \$62,316.80 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted Schedules C, Profit or Loss from Business statements to the sole proprietor's individual income tax returns, for 2000 and 2001, without the remaining tax documents; the petitioner's quarterly federal tax return for the fourth quarter in 2001; a W-2 form indicating the petitioner paid a total of \$1,409,387.38 in wages to employees in 2001; two months of the petitioner's checking account statements reflecting ending balance on one of \$19,132.28 and an average daily balance of \$9,078 on the other; and an unaudited list of job orders, which the petitioner stated in an accompanying letter is the basis for its business "making even higher profit."

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 18, 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 evidence pertaining to 2002, complete tax returns, payroll summaries, and a list of the sole proprietor's monthly expenses. The director also sought clarification about the beneficiary's

employment since he indicated self-employment with a contract building company in his name since April 2001¹.

In response, the petitioner submitted its Schedules C, Profit or Loss from Business statements, for 2001 and 2000², along with other schedules but omitting the sole proprietor's individual income tax form portion of the tax filing. The petitioner also provided a breakdown of the sole proprietor's monthly expenses that total \$3,068 per month or \$36,816 per year. The petitioner also submitted previously submitted evidence and more quarterly federal tax returns for 2002.

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 21, 2003, denied the petition, noting that the petitioner failed to provide signed or complete tax returns.

On appeal, counsel's letter shows a lack of awareness that the sole proprietor's financial situation, as reflected on his tax returns, is as important as the petitioner's financial situation. She urges the consideration of the petitioner's gross income and total wages paid to employees³. The petitioner submits complete tax returns without an explanation about why they were not submitted when previously requested.

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

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$81,331	\$90,956
Petitioner's gross receipts or sales (Schedule C)	\$3,271,410	\$3,286,851
Petitioner's wages paid (Schedule C)	\$1,409,387	\$1,272,934
Petitioner's net profit from business (Schedule C)	\$57,298	\$76,985

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.* Consequently, the appeal will be dismissed.

¹ The petitioner's responsive submission indicates that the beneficiary owns an S corporation reporting losses in 2001 and 2002.

² Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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.

Even if the appeal were adjudicated on its substantive merits as it will be discussed below, however, the AAO would have concurred with the director's decision based on the record of proceeding at the time the director made his decision, and the AAO would not find in the petitioner's favor with a substantive analysis of all evidence including that which was submitted on appeal.

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.

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 adjusted gross income of \$81,331 covers the proffered wage of \$62,316.80, and leaves the sole proprietor with \$19,014.20 after reducing the adjusted gross income by the proffered wage. The sole proprietor's stated annual expenses are \$36,816, which is greater than the remaining amount after reducing the sole proprietor's adjusted gross income by the proffered wage. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage beginning on the priority date in 2001.

Likewise, in 2002, the sole proprietorship's adjusted gross income of \$90,956 covers the proffered wage of \$62,316.80, and leaves the sole proprietor with \$28,639.20 after reducing the adjusted gross income by the

proffered wage. The sole proprietor's stated annual expenses are \$36,816, which is greater than the remaining amount after reducing the sole proprietor's adjusted gross income by the proffered wage. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage beginning on the priority date in 2002.

Finally, the petitioner maintains a balance of anywhere between approximately \$10,000 and \$20,000 in a checking account. Thus, it could have been argued that the petitioner could use these funds to pay the proffered wage. The record contains bank statements covering the period September 2002 through October 2002. The balance is not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage.

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 petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 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.