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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 02 202 52848

Office: VERMONT SERVICE CENTER

Date: APR 14 2008

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

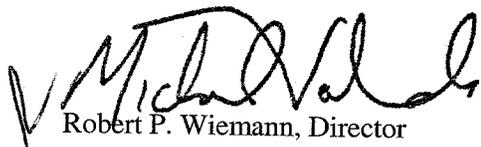
Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a private individual. He seeks to employ the beneficiary permanently in the United States as a household cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that he had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See*, 8 C.F.R. 204.5(d) Here, the petition's priority date is April 23, 2001. The beneficiary's salary as stated on the labor certification is \$20 per hour or \$41,600 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. Along with the petition counsel submitted a certified labor certification application; the petitioner's and the beneficiary's Form 1040 tax returns for 2000 and 2001; and a copy of the probated will of [REDACTED] naming the petitioner residuary beneficiary.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On November 7, 2002, the director made a request for evidence (RFE) that would establish the petitioner's ability to pay the proffered wage as of April 23, 2001.

In response, counsel submitted an undated letter from the petitioner asserting his financial ability to pay the proffered wage based upon the receipt of an inheritance of "over \$900,000.00" in 1992 from decedent [REDACTED] who died April 1, 1992. The petitioner claims he reinvested the inheritance in investment real estate, stocks and mutual funds. The beneficiary did not work for the petitioner in 2001, the letter continues, but resumed cooking for him in 2002, signing a Form W-4 for the petitioner to start income tax withholding. Counsel submitted appointment papers showing he was executor of Booth's estate. Counsel, however, did not submit the petitioner's average monthly household expenses for 2001 as requested in the RFE, nor did the record include details of the inheritance or the petitioner's bank or financial records.

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

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$51,993	\$34,621
Petitioner's gross receipts or sales (Schedule C)	\$77,645	\$52,360
Petitioner's wages paid (Schedule C)	\$0	\$0
Petitioner's net profit from business (Schedule C)	\$19,249	\$19,193

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage and, on June 16, 2003, denied the petition accordingly, stating he could not determine "your financial position at this time."

On appeal, counsel submits various financial and estate tax statements from the [REDACTED], which reveals the following information:

- [REDACTED] federal estate tax return reported a gross estate of \$784,312, of which the petitioner's share was \$659,660;
- Reports of investment earnings during the nine months of 1992 after [REDACTED] died including \$2,256 in taxable income, \$7,989 in tax-exempt interest, and other net gain of \$962, for a total distribution of \$10,245;
- The beneficiary's 2002 Form 1040 return with no Form W-2 issued by the petitioner; and,
- Various financial statements of estate earnings for 1991 – 1997.

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 employed the beneficiary on about September 1, 2002, and has established his payment to the beneficiary of \$9,670 in 2002 and about \$7,000 in 2003, according to the Form W-2 for 2002 and canceled checks for 2003 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 three. In 2001, the sole proprietorship's adjusted gross income of \$34,621 does not cover the proffered wage of \$41,600. The petitioner did not submit a Form 1040 for 2002 but he did pay \$9,670 in wages to the beneficiary that year. In order to establish ability to pay, the petitioner must show that he had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989).

The regulations require proof of eligibility at the priority date. See 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). The evidence on appeal shows that for 2002 the petitioner paid the beneficiary \$9,670 in wages and approximately \$7,000 in 2003, neither of which establishes the petitioner's ability to pay the proffered wage for the respective years. Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that he had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

The record of proceeding below does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001. However, the inheritance records submitted on appeal suggest that the petitioner may possess significant assets, which may be available to pay the proffered. Because the petitioner must establish ability to pay as of the priority date and thereafter until the beneficiary adjusts status, it is important to note that assets inherited in 1992 may no longer be available. Without bank statements, investment portfolios or other competent evidence of these assets available continuously from the priority date, however, this office cannot find that they are sufficient to pay the proffered wage.

Generally, a petitioner's total assets are not available to pay a proffered wage. Many assets, such as real estate, would not be readily available in the ordinary course of business to redeem as cash. Other assets might be more readily convertible and yet converting them to cash could still be too lengthy a process to show the petitioner's ability to pay. Only a petitioner's current assets – those expected to be converted into cash within the coming year – may be considered.

Further, the petitioner's current assets are not available to pay the proffered wage until the petitioner has satisfied his current liabilities. In the case of a sole proprietor, CIS requires a petitioner to submit a list of his or her annual expenses.

While the record shows that the petitioner inherited nearly \$700,000 from [REDACTED] does not establish how many of those assets the petitioner continues to hold or in what form. Thus, the petitioner's Form 1040 for 2000 and 2001 reflect the following assets:

<u>Types of Investment:</u>	<u>2000</u>	<u>2001</u>
<u>Schedule B:</u>		
<u>Taxable Interest:</u>	\$2,860	\$1,379 ¹
Hudson United Bank	\$26	
Riegler Fed. Cr. Union	\$81	
Summit Bank	\$1,113	
Riegel [sic] Fed. Cr. Union	\$60	
Fiserv Secur	\$210	
Unity Bank	\$470	
Hudson United Bank	\$30	
Summit Bank	\$1,063	
Summit Bank	\$17	
<u>Total Taxable Interest:</u>	<u>\$3,070</u>	<u>\$1,379</u>
Less: Tax-exempt interest	-210	
<u>Net Interest for Form 1040:</u>	<u>\$2,860</u>	
<u>Ordinary dividends</u>	<u>\$12,301</u>	<u>\$1,873</u>
Pax World Fund	\$92	
Chas Schwab	\$124	
Strong Balanced FD	\$592	
Strong Large Cap. Growth	\$11,493	
<u>Ordinary dividends</u>	<u>\$12,301</u>	

Schedule D: Capital Gains and Losses:

Long-term Capital Gains:

Sales Prices:

Pax World:	\$49,639
Strong Balanced FD:	\$6,000
Strong Large Cap Growth:	\$15,000
Strong Large Cap Growth:	\$20,000
<u>Total Sales Prices:</u>	<u>\$90,639</u>

Schedule E:

Four Rental Properties:

¹ No Schedule B attached to the petitioner's 1040 return for 2001.

Gross rents:	\$70,052	\$101,157
Less expenses:	\$54,510	\$80,874
Less depreciation.	\$17,246	\$22,286
<u>(Net loss):</u>	<u>(\$1,704)</u>	<u>(\$2,003)</u>

Reviewing the foregoing, it is apparent that the petitioner still holds investment properties along with stocks and bonds, some of which the petitioner has sold, generating taxable capital gains tax liabilities. Investment properties would not qualify as current assets, as discussed, although the petitioner's stocks and bonds would seem to be current assets. This office, however, will not speculate on the amount of the petitioner's current assets available to pay the proffered wage. While the RFE did not inquire into the amount or form of the inheritance still remaining, it did make clear the need for proof of the petitioner's ability to pay the beneficiary in addition to paying his household expenses.

However, the RFE did advise that the petitioner "must be able to demonstrate the ability to sustain yourself and your dependents.... You should submit an itemized list of all of your monthly expenses... for 2001." This the petitioner did not do. Although specifically and clearly requested by the director, the petitioner declined to evidence of his monthly expenses for 2001. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In his letters the petitioner expressly concedes his household income cannot cover the proffered wage. It behooved the petitioner to supply updated financial information to prove the state of his financial affairs, including both his indebtedness and his total current assets.

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