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FILE: [Redacted]  
WAC 02 207 54052

Office: CALIFORNIA SERVICE CENTER Date: AUG 26 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:

SELF-REPRESENTED

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garage door repair and sales service company. It seeks to employ the beneficiary permanently in the United States as a repairer and installer of garage doors. 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. Accordingly, the director denied the petition.

On appeal, the petitioner submits a new statement.

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 June 21, 1999. The proffered wage as stated on the Form ETA 750 is \$24.74 per hour, which amounts to \$51,459.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1970, to have a net annual income of \$30,000 in 2002, and to currently employ no workers. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary from Curry Brothers Garage Door Company, Chatsworth, California, and a profit and loss statement for the petitioner for January to May 2002. This statement indicated that the petitioner had net income of \$12,709.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 5, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns with all accompanying schedules and tables, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date in 1999 to 2001. The

director also requested that the petitioner submit a job offer letter on behalf of the beneficiary, as well as state of California Forms DE-6, Quarterly Wage Report for the last three quarter for all employees. Finally, the director requested that the petitioner submit its W-3 forms for the years 1999 to 2001.

In response, the petitioner submitted a copy of its Schedules C for the tax years 1999 to 2001, an offer of employment letter on behalf of the beneficiary, and a profit and loss statement for the entire year of 2002 that indicated the petitioner had net income of \$38,410.90. The petitioner's Schedules C indicated the following adjusted gross income for the years 1999 to 2001: in 1999, \$10,897, in 2000, \$7,663, and in 2001, \$3,461. The petitioner also stated that it could not provide DE-6 Forms or a W-3 document since it did not have any employees at the time. The petitioner finally noted that it was completely necessary for his business to have the beneficiary as an employee since the petitioner's business was increasing and the petitioner was not able to fulfill the demands of his clients.

On April 23, 2003, the director sent an Intent to Deny Processing coversheet to the petitioner that accompanied a Notice of Intent to Deny (NOID) the petition. In the notice, the director examined the net profits on the petitioner's Schedules C, and determined that the petitioner had not established its ability to pay the proffered wage. The director further noted that the tax returns lacked the first part of the petitioner's IRS Forms 1040 for the years 1999 to 2001, and requested that the petitioner submit a complete Form 1040 with appropriate schedules and tables for tax year 2002.

In response, on May 19, 2003, the petitioner submitted Forms 1040 for 1999, 2000, 2001, and 2002, with accompanying Schedules C. The petitioner also stated that while its business net income does not appear sufficient to pay the beneficiary the proffered wage, it was also true that the business income will increase with the employment of the beneficiary and that the increased income would easily cover the proffered wage. The petitioner also stated that he had some assets to guarantee any required payment.

On June 25, 2003, the director sent the petitioner a second request for evidence. The director requested that the petitioner submit its monthly bank statements for the years 1999 to 2002, and again asked the petitioner to provide evidence of the petitioner's ability to pay the beneficiary's wage, and specifically asked for the petitioner's federal tax return for 2002.

In response, the petitioner submitted checking account bank statements for two accounts with Fidelity Federal Bank, Glendale, California: Account number 50059501 for statements from 1999 to October 2001, and a second account, number 50072306, from October 2001 to November 2002. The last 2002 bank account statement submitted to the record is from California National Bank in Van Nuys, California. The petitioner also submitted a complete 1040 for tax year 2002, with all accompanying statements and attachments. This document established that the petitioner had an adjusted gross income of \$3,340 in 2002.

The director then sent the petitioner a second NOID dated December 13, 2003. The director reviewed the net profits identified on the petitioner's Schedules C for 1999 to 2002 and determined that the petitioner did not have sufficient income to pay the proffered wage. The director also noted that while the petitioner's monthly bank statement indicated that he had sufficient funds to pay the beneficiary's monthly wage, the petitioner did not have

sufficient funds in its ending balances in the monthly bank statements for 2000 to 2003 to pay the monthly proffered wage.

In response to the second NOID, the petitioner stated that based on the documentation sent previously to Citizenship and Immigration Services (CIS), the petitioner had \$25,000 in savings, real estate equity in his residence of \$290,000, equity in three rental units of \$660,000, personal property worth \$100,000, and business assets of \$75,000. The petitioner reiterated that the addition of the beneficiary as an employee would increase the petitioner's business income.

On March 2004, the director denied the petition. In his denial, the director noted the petitioner's statement submitted in response to the second NOID with regard to business and personal assets. The director further stated that after a review of this evidence, there was still insufficient documentation to support the petitioner's ability to pay the proffered wage.

On appeal, the petitioner states that the documentation previously sent establishes that he had a savings account with a balance of approximately \$25,000, real estate equity of approximately \$950,000, personal property of \$100,000, and business assets of \$75,000. The petitioner further states that he has been in business for 30 years, and he wanted to continue to serve his clients efficiently. For this reason, the petitioner stated that it needed to employ someone as experienced as the beneficiary.

It is further noted that the director, in his second request for further evidence dated June 25, 2003, requested that the petitioner submit its monthly banking statements from 1999 to 2002.<sup>1</sup> Furthermore, the director in his decision stated that the petitioner had established its ability to pay the beneficiary's monthly wage based on the petitioner's bank statements for 1999. Reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

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. As established by the ETA Form 750, the petitioner did not employ or pay the beneficiary prior to or following the priority date.

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

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<sup>1</sup> Although the director in his denial of the petition referred to the petitioner's 2003 bank statements, these documents were neither requested by the director nor submitted by the petitioner to the record.

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 (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.

In the instant case, the sole proprietor supports himself and his wife. As previously stated, the petitioner's adjusted gross income in the years 1999 to 2002 is the following: in 1999, \$10,897, in 2000, \$7,663, in 2001, \$3,461, and in 2002, \$3,440. It is noted that in his requests for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal expenses. Nevertheless, even without such information, the sole proprietorship's adjusted gross income for any of the years from 1999 to 2002, minus the proffered wage of \$51,459.20, leaves substantial negative adjusted gross income to support a household of two family members. Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his one dependent, based on his adjusted gross income.

In addition, while the petitioner indicated at least twice in the proceedings that he had additional assets with which to pay the proffered wage, the documentation submitted to the record does not clearly establish any of the assets that he identified, such as real estate equity, and a savings account. Furthermore several of the assets to which the petitioner referred, such as personal property or rental property equity, are not viewed as liquidable enough assets to be utilized to pay the proffered wage. In other words, in order to use the equity in his personal property to pay the proffered wage, the petitioner would have to sell some of the property. The equity in the petitioner's real estate holdings is not readily available. In addition, as previously stated, the petitioner's checking account balances do not establish the petitioner's ability to pay the proffered wage.

Finally, the petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in the instant petition, the petitioner provides no detail or

documentation to explain how the beneficiary's employment will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the petitioner's tax returns.

Without more persuasive evidence with regard to the petitioner's assets, the petitioner has not established that it has the ability to pay the proffered wage as of 1999 and onward. 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 with regard to the petitioner's ability to pay the proffered wage. The appeal will be dismissed. The petition will be denied.

**ORDER:** The appeal is dismissed.