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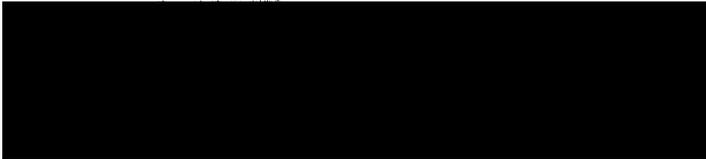
FILE: WAC-02-157-52530 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



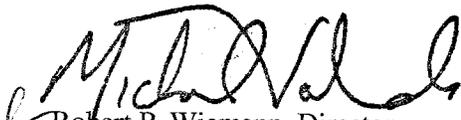
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider¹. The motion will be granted. The prior decision of the AAO will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dental laboratory technician. 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. The AAO subsequently concurred with the director's decision.

The petitioner was self-represented prior to these proceedings and obtained counsel subsequent to the AAO's decision. On motion, new counsel submits additional evidence, and a brief and correspondence. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel asserts that the AAO erroneously failed to consider the sole proprietor's personal assets in determining the petitioner's ability to pay the proffered wage. Counsel submits new evidence for consideration. Thus, the motion would qualify for consideration as a motion to reopen and a motion to reconsider.

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 July 31, 1998. The proffered wage as stated on the Form ETA 750 is \$18.72 per hour, which amounts to \$38,937.60 annually.

¹ Although the motion filed was only titled a motion to reconsider, since no relevant regulatory provision was cited, the motion will be considered as either a motion to reopen and/or a motion to reconsider.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a copy of its sole proprietor's U.S. Individual Income Tax Return on Form 1040, without accompanying schedules, for 2001.

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 June 25, 2002, 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 the petitioner's tax returns from 1998 to 2001.

In response, the petitioner submitted its sole proprietor's U.S. Individual Income Tax Return on Form 1040, without accompanying schedules, for 1998 through 2001.

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 August 8, 2002, denied the petition. The director specifically noted the sole proprietor's negative adjusted gross income reported for 2000 and 2001.

On appeal, the petitioner provided unaudited financial statements for which the AAO properly cited to 8 C.F.R. § 204.5(g)(2) to exclude from consideration in its decision, as well as the sole proprietor's complete tax returns for 2000 and 2001. The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	-\$239,742	-\$197,515
Petitioner's gross receipts or sales (Schedule C)	\$704,897	\$606,910
Petitioner's wages paid (Schedule C)	\$64,160	\$60,147
Petitioner's net profit from business (Schedule C)	\$7,622	\$42,475

On November 25, 2003, the AAO dismissed the appeal determining that the sole proprietor's negative adjusted gross income in 2000 and 2001 fail to evidence its continuing ability to pay the proffered wage beginning on the priority date. The AAO acknowledged that the sole proprietor's adjusted gross income in 1998 and 1999 of \$347,909 and \$100,339, respectively, was sufficient to illustrate its ability to pay the proffered wage in those years.

On motion, counsel asserts that since the petitioner is structured as a sole proprietorship, the sole proprietor's personal assets, such as real estate assets, investments, annuity, and savings accounts, must be considered towards the petitioner's continuing ability to pay the proffered wage. The petitioner also submits a letter from the sole proprietor and the sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C Profit or Loss from Business, for 2002, showing adjusted gross income of \$140,322. The sole proprietor states in his letter dated December 19, 2003, that personal matters affected the distribution of his business income in 2000 and 2001 and he used his business income to offset certain expense acquired elsewhere. The petitioner also submits corroborating evidence of the sole proprietor's personal assets.

In determining the petitioner's ability to pay the proffered wage during a given period, 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.

Since the director and the AAO conceded that the petitioner established its ability to pay the proffered wage in 1998 and 1999, the AAO will only evaluate the petitioner's ability to pay the proffered wage in 2000 and 2001 on motion. The sole proprietor's adjusted gross income of \$140,322 in 2002 is also sufficient to establish the petitioner's ability to pay the proffered wage in that year.

In the instant case, the sole proprietor supports a family of three. In 2000 and 2001, the sole proprietorship's negative adjusted gross income could not support himself or his family or pay the proffered wage. The AAO concurs with the director's decision and the AAO's prior decision based upon the record of proceeding at the time of those adjudications. On motion, however, the petitioner retained counsel and submitted evidence to bolster its burden of proof. Although, the director failed to request evidence of the sole proprietor's personal assets and the AAO failed to remand the petition to the director to request the same, the petitioner ultimately bears the burden of proof to establish its eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Nevertheless, since the director failed to request specific evidence submitted on motion, the evidence will not be deemed precluded by an application of *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel states the following in her motion:

2000

The proper consideration of the petitioner's ability to pay the proffered wage . . . is as follows:

Net income -\$239,742.00

Available Funds

Real Estate \$472,000.00

(1040 Schedule E shows properties owned by the petitioner; 2003 sale of merely one of the properties gave the petitioner the above stated amount) (Exhibit 3)

Investments

(Form K-1/2000 – Exhibit 4). \$223,772.00

\$28,960.00

\$17,080.00

(Form 1099 B/2000) \$93,543.00

\$43,786.00

Annuity Accounts \$1,121,866.00

(Exhibit 5) \$1,022,854.00

Total Funds/2000 \$2,784,119.00

(Available funds minus business income loss)

Please note that the petitioner's investment accounts alone are sufficient to establish his ability to pay in 2000

(Emphasis in original). Counsel prepared a similar breakdown analysis for 2001 determining that the sole proprietor's total available funds minus business income in that year were \$249,200.

The AAO notes that real estate holdings are not the type of liquifiable asset typically used to pay employee wages. Thus, the sole proprietor's real estate assets will not be considered as evidence of the petitioner's continuing ability to pay the proffered wage. Additionally, the deed was signed in 2003 and a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Likewise, the two annuity accounts submitted into the record of proceeding, held by the sole proprietor through The Ohio National Life Insurance Company valued at \$1,022,854.32 and \$1,121,866.28, provide account balances as of December 2003 but do not provide information concerning 2000 or 2001, and thus cannot be included for consideration pursuant to *Matter of Katigbak. Id.*

The remaining assets, however, will be considered. The AAO reviewed counsel's supporting documentation and counsel's cited figures are accurate. The supporting documentation includes a Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for 2000 in the sole proprietor's name for partnership in MSDW [REDACTED] for which he received distributions of \$223,772, \$28,960.00, and \$17,080; a Form

1099-B statement issued by ██████████ Witter in the sole proprietor's name showing mutual fund account holdings of \$93,543.48 and \$43,786.16 in 2000; and a savings account statement issued to the sole proprietor from WM financial services, a Washington Mutual Inc. Company, for the period September 28, 2001 through December 31, 2001, showing an account balance of \$443,136.00. Even excluding the sole proprietor's real estate holdings and 2003 life insurance annuity account balances and reducing the remaining liquid assets by the negative adjusted gross income reported in 2000 and 2001, the sole proprietor has significant liquid assets available to him and the petitioning entity. In 2000, the sole proprietor has \$167,339² in liquid assets, which is greater than the proffered wage of \$38,937.60, and in 2001, the sole proprietor has \$249,200³ in liquid assets, which is also greater than the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. Therefore, the petitioner has established that it has 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 met that burden.

ORDER: The motion to reopen or reconsider is granted. The prior decision of the AAO, dated November 25, 2003, is withdrawn. The appeal is sustained. The petition is approved.

² \$223,772 + \$28,960.00 + \$17,080.00 + \$93,543.00 + \$43,786.00 - \$239,742.

³ \$443,136 - \$193,936.