

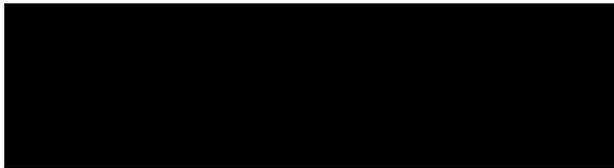
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U.S. Citizenship
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Services

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AG



FILE: WAC 02 219 54676 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2005**

IN RE: Petitioner: 

Beneficiary: 

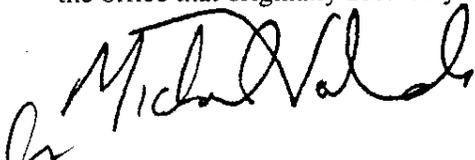
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 remanded for further consideration.

The petitioner is an interpreter/translator business. It seeks to employ the beneficiary permanently in the United States as a translator. 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 November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$43,196 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner from April 1997 until the present.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted a copy of the owner's 1997 through 2000 Forms Schedule C, Profit or Loss From Business, from the petitioner's Forms 1040, U.S. Individual Income Tax Returns. Counsel also submitted a copy of the petitioner's 2001 Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, and copies of the beneficiary's 1997 through 2001 Forms W-2, Wage and Tax Statements. The 1997 Schedule C reflected gross receipts of \$187,103, wages paid of \$30,433, and a net profit of \$35,583. The 1998 Schedule C reflected gross receipts of \$202,429, wages paid of \$34,261, and a net profit of \$35,550. The 1999 Schedule C reflected gross receipts of \$190,387, wages paid of \$35,771, and a net profit of \$30,601.

The 2000 Schedule C reflected gross receipts of \$240,039, wages paid of \$40,334, and a net profit of \$27,830. The beneficiary's 1997 through 2001 Forms W-2 reflected earnings of \$14,480, \$20,709, \$20,692, \$24,239, and \$26,828, respectively.

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 October 30, 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 for the years 1997 to the present. The director also specifically requested that the petitioner provide all schedules and tables that accompany the submitted tax return. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that she may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc.

In response, the petitioner submitted complete copies of the owner's 1997 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business. The 1997 through 2000 tax returns reflected adjusted gross incomes of \$4,572, \$26,427, \$25,293, and \$32,544, respectively. The 2001 tax return reflected an adjusted gross income of \$42,590, and the 2001 Schedule C reflected gross receipts of \$249,590, wages paid of \$44,380, and a net profit of \$38,214.

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 May 28, 2003, denied the petition.

On appeal, the petitioner, through counsel, submits a brief and a letter, dated June 24, 2003, from [REDACTED] CPA. The letter from Mr. [REDACTED] states:

After careful consideration and analysis, it is my opinion that:

THE PETITIONER, COSSIOS INTERNATIONAL LINGUISTS SHOWS THE ABILITY TO PAY THE BENEFICIARY THE PROFFERED WAGE.

As per the attached Schedule of Income and Expenses, the Gross Income of \$187,103 in 1997 continues to increase each year to \$249,754 in 2001. Each year from 1997 the Petitioner's entity clearly pays both contract labor for interpreting and translating of \$75,218 in 1997 to \$122,049 in 2001. In addition the petitioner pays wages including payroll for the beneficiary of \$30,433 in 1997 to \$44,380 in 2001. These labor payments are made in addition to other operating expenses, which still result in a Net Operating Income each year.

It would be inappropriate to solely look at the Adjusted Gross Income on an individual tax return as an indicator of a Sole Proprietor's ability to pay wages. You must look at the Schedule C Gross, the Expenses and Net Income (Loss) to properly evaluate the financial capability of the entity.

This information supports and reinforces the continued ability from 1997 to present by the petitioner to pay wages and contract labor of over \$100,000 in 1997 to over \$150,000 in 2001, while still generating a positive Net Income after depreciation expense each year. Thus, the Petitioner's ability to pay the proffered wage of \$43,196 has been supported and documented.

In my opinion, the information presented in the accompanying schedules are presented fairly in conformity with standard accounting principles which I have consistently applied.

	2001	2000	1999	1998	1997
Gross Receipts	\$249,754	\$240,039	\$190,387	\$202,429	\$187,103
Expenses					
Interpreting Contracts	\$113,739	\$108,392	\$ 72,917	\$ 66,665	\$ 75,218
Translators Contracts	\$ 8,310	\$ 14,374	\$ 6,995	\$ 13,354	\$ -
Wages	\$ 44,380	\$ 40,334	\$ 35,771	\$ 34,261	\$ 30,433
Total Labor	\$166,429	\$163,100	\$115,683	\$114,280	\$105,651
Other Operating Expenses	\$ 45,111	\$ 49,109	\$ 44,103	\$ 52,599	\$ 45,869
Total Expenses	\$211,540	\$212,209	\$159,786	\$166,879	\$151,520
NET INCOME	\$ 38,214	\$ 27,830	\$ 30,601	\$ 35,550	\$ 35,583
W-2 Applicant (See Attached)	\$ 26,828	\$ 24,239	\$ 20,692	\$ 20,709	\$ 14,481

Counsel reiterates Mr. [REDACTED] assertions and states:

The Service's denial decision does not fairly exercise discretion, nor provide due process, in considering the petitioner's tax returns. Instead of considering whether petitioner can realistically afford to pay the offered salary to the beneficiary, the denial is based wholly and conclusorily on the fact that the adjusted income figure (line 33) of the petitioner's Individual

Tax Return (Form 1040) for each year, is less than the offered yearly salary. This view completely overlooks and disregards the plain fact that the adjusted gross income figure is reached only after accounting for all salary and other labor costs of the petitioner, which in this case easily cover the beneficiary's offered salary for every one of petitioner's tax years under review.

* * *

The denial decision furthermore fails to consider or even acknowledge beneficiary's filed W-2 forms evidencing the fact of her actual continual paid employment with the petitioner since 1997. This additional abuse of discretion on the part of the Service appears to fly in the face of business reality.

The denial decision also violates due process requirements by failing to provide the petitioner with reasonable notice that the Service intended to rely solely on the adjusted gross income figure stated in the petitioner's income tax returns, to determine the petitioner's financial ability to pay the offered salary. The immigration regulations do not sanction such a specific narrow standard as a sole basis for determining the employer's financial ability to pay, and the Immigration Service in the instant case never provided the petitioner with any prior notice of its intent to rely solely on such a standard. Lacking prior notice, the petitioner also lacked a fair opportunity to rebut the Service's standard prior to denial, and now may be forced to resort to lengthy and costly appellate review to litigate this complaint.

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 established that it employed and paid the beneficiary \$14,480 in 1997, \$20,709 in 1998, \$20,692 in 1999, \$24,239 in 2000, and \$26,828 in 2001. Since the proffered wage is \$43,196, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$28,716 in 1997, \$22,487 in 1998, \$22,504 in 1999, \$18,957 in 2000, and \$16,368 in 2001.

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. Contrary to the assertions of counsel, 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 supported a family of two in 2001 and a family of three in 1997 through 2000. In 1997, the sole proprietorship's adjusted gross income did not cover the remaining amount needed to pay the proffered wage. In 1998 the adjusted gross income covered the remaining amount needed to pay the proffered wage by only \$3,940; in 1999 by only \$2,789; in 2000 by only \$13,587; and in 2001 by \$26,222. As the petitioner failed to provide a statement of monthly expenses for the years 1997 through 2001 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and her household expenses with the remaining incomes.

Counsel and Mr. [REDACTED] CPA, assert that the petitioner pays wages and contract labor of over \$100,000 in 1997 to over \$150,000 in 2001. Counsel has not, however, claimed that the beneficiary will replace any of the independent contractors currently used by the petitioner. In addition, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The visa petition, as well as the petitioner's documents submitted to the record, suggests that the petitioner employed more than one contractor. The record contains no evidence directly relating the tax return figures for contract labor to translating services the beneficiary may have performed.

Moreover, there is no evidence that the position of the other independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 1997 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of its household expenses, other sources of income, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 28, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.