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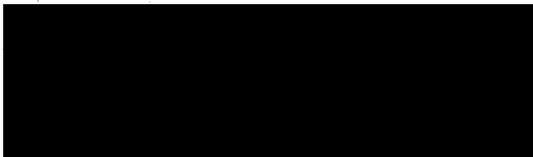
Office: VERMONT SERVICE CENTER

Date: MAY 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:



INSTRÚCTIONS:

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*  
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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is a consulting firm. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 asserts that the director erred in his analysis of the evidence submitted in support of the petition and contends that the petitioner has established its ability to pay the proffered wage.

The notice of appeal, filed December 30, 2003, indicates that additional evidence and/or a brief will be submitted to the AAO within thirty days. A letter, dated December 10, 2003, signed by the petitioner's owner, [REDACTED] accompanies the notice of appeal. Mr. [REDACTED] requests an additional 180-day extension of time to file a brief or statement in support of the appeal. As of this date, more than sixteen months later, nothing further has been received to the record. Therefore, this decision will be rendered based on the record as it currently stands.

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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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, 2000. The proffered wage as stated on the Form ETA 750 is \$35,820 per annum. On the Form ETA 750B, signed by the beneficiary on January 24, 2002, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed September 9, 2002, the petitioner claims to have been established in 1949, have a gross annual income \$85,000, and to currently employ one individual. The petitioner describes itself as a computer and information technology business.

As the petitioner initially failed to submit any evidence in support of its continuing ability to pay the proffered wage, the director requested additional evidence pertinent to that ability. In an undated request for evidence, the director advised the petitioner that such evidence must demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date of November 14, 2000 and continuing until the present. The director further instructed the petitioner to provide copies of the petitioner's federal tax returns for 2000, 2001, and 2002, as well as any Wage and Tax Statements for 2000, 2001, and 2002 if it employed the beneficiary during that period. The director informed the petitioner that if its business is a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business, as well as the owner's date of birth and an itemized list of monthly expenses for 2000-2002.

In response, the petitioner, through counsel, supplied a copy of a joint venture agreement, executed January 2, 2003, between the petitioner, "Remote, Incorporated, and Daya Sales and Services." This agreement describes its purpose as a joint venture between the entities in order to pursue international sales and consulting in information technology and computer software and hardware.

The petitioner also provided a copy of an unaudited financial statement<sup>1</sup> for the period ending December 31, 2002, relating to Remote Management, Inc., copies of Remote Management, Inc.'s 2001 and 2002 corporate tax returns, a copy of the monthly expenses of ██████████ Sales and Service, DOB: October 8, 1921," which showed "none" under every category, and a document titled "Joint Venture Comments," dated September 1, 2002, and signed by "██████████ Sales & Services." Mr. ██████████ explains that Daya Sales & Service, a business registered in Sri Lanka, and Davies Sales & Services are two sole proprietorships engaging in a joint venture. He states that the beneficiary's salary of \$35,820 shall be provided under the joint venture agreement heading "contributions of capital and resources." Mr. ██████████ statement does not mention Remote Management, Inc. and no evidence of any joint venture agreement between Daya Sales & Service and the petitioner is contained in the record.

Counsel's transmittal letter, dated June 27, 2003, indicates that Davies Sales and Services and Remote Management, Inc. have negotiated since 2000 and formalized their joint venture agreement as shown by the January 2, 2003, document submitted with the petitioner's response to the request for evidence.

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<sup>1</sup> The regulation at 8 C.F.R. § 204.5(g)(2) specifies that if financial statements are offered to demonstrate an ability to pay a proffered salary, they must be audited.

The director denied the petition on December 1, 2003. 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. The director noted that the agreement between the Davies Sales and Services and the other entities was not executed until January 2, 2003. No evidence had been submitted to show that the petitioner, Davies Sales and Services had the ability to pay the offered salary in 2000 or any subsequent year. The director further noted that even if Remote Management, Inc.'s 2001 corporate tax return could be considered, it reported less net income (-\$60) than the proffered salary.

On appeal, counsel states that Remote Management, Inc.'s 2002 income reflected the necessary funds to pay the beneficiary's proposed wage offer. He contends that CIS should have considered other items such as an annual financial statement or projected income along with the income tax returns.

In this case, counsel cites no authority for these assertions and nothing provided to the record persuasively establishes the petitioner's ability to pay the proffered wage. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish its continuing ability to pay a proffered wage beginning at the priority date through its federal tax returns, audited financial statements, or annual reports. Relevant to the petitioner named in the Immigrant Petition for Alien Worker (I-140) and on the approved labor certification, other than the monthly expense statement of [REDACTED] Sales and Service, DOB: October 8, 1921," nothing in the record relates to this petitioner's ability to pay the proffered wage.

Further, the joint venture agreement, executed in January 2003, does nothing to establish that the petitioner, [REDACTED] and Services, should be regarded as a merged entity with Remote Management, Inc. Rather it emphasizes that "each member of the joint venture shall still keep his separate identity and shall continue to operate independent of the others." As noted above, the prospective U.S. employer identified on the approved labor certification and on the I-140 is the petitioner and not one of these other entities. As the prospective U.S. employer, the petitioner bears the burden to show its ability to pay the proffered wage. Neither the statutory nor regulatory provisions relevant to employment based immigrant petitions provide for multiple or co-employers. The regulation at 20 C.F.R. § 656.3 further identifies an "employer" in relevant part as follows:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. (Original emphasis).

In *Matter of Smith*, 12 I&N Dec. 772, 773 (Dist. Dir. 1968) it was found that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. In this matter, there is no mention of the beneficiary or other salaried employees within the documentation submitted to the record. The only related paragraph in the 2003 joint venture agreement simply states that management shall be according to the joint venture arrangement between the petitioner and Daya Sales and Services. That joint venture agreement is not part of the record. In this case, there is no persuasive evidence that the prospective

employer of the alien beneficiary is any entity other than the petitioner. A contrary finding would bring into question the validity of the representations identifying the petitioner appearing on the labor certification and I-140. Moreover, it is noted that CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). See also, *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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 this case, the record does not suggest that the petitioner may have employed the beneficiary.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, as asserted by counsel, 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). 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. at 1084, 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.

If a petitioner is a sole proprietorship, it is 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 a proposed wage offer. 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).

As noted above, the petitioner failed to submit either federal tax returns, audited financial statements, or annual reports to establish its ability to pay the proffered wage as of November 14, 2000, the petition's priority date, and continuing until the present. The record fails to establish that the financial information of Remote Management, Inc. offers any probative support to the petitioner's own continuing obligation to demonstrate its ability to pay the beneficiary's proposed wage as of the visa priority date as set forth in the ETA 750, merely because the petitioner entered in to a joint venture agreement over two years subsequent to the priority date.

Counsel's assertion on appeal that the petitioner's projected income should have been considered is not convincing and does not outweigh the evidence contained in the record. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Upon review of the evidence contained in the record and upon further consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage as of the priority date in any of the relevant years.

Beyond the decision of the director, it is noted that the petition may not be approved based on the petitioner's failure to establish eligibility under a visa classification as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act. The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. The educational, training, and experience requirements are set forth in Item 14 and Item 15. In this case, no specific time requirement for training or experience is listed. The only requirement clearly listed in Item 14 is under academic credentials, which states "10" under the "grade school" category and "7" under the category of "high school." Item 14 also requires that an applicant must have a "diploma in shorthand, computer applications." The major field of study should be secretarial/computer applications. Under Item 14, "training," no period of time is listed, but the type of training is specified only as "practical experience." Item 15 further states that an applicant must be "fluent in Sinhalese and proficient in computer applications."

These requirements fit those of an "other worker" under Section 203(b)(3)(A)(iii) of the Act in that there is less than two years training or experience required by the position. The petitioner, however, has requested a visa classification as a skilled worker, which, under section 203(b)(3)(A)(i) of the Act, requires a minimum of least two years training or experience. It is the petitioner's burden to correctly identify a visa classification on its petition and submit the appropriate documentation. It is noted that if evidence of ineligibility is contained in the record, a petition or application shall be denied on that basis notwithstanding any lack of required initial evidence. 8 C.F.R. § 103.2(b)(8).

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.