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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2005
WAC 03 010 54655

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. The Administrative Appeals Office (AAO) subsequently summarily dismissed the appeal. On motion, counsel submits additional documentation and claims the documentation was initially submitted on appeal. The motion to reconsider the petition is granted. The appeal will be dismissed. The petition will be denied.

The petitioner is a law office. It seeks to employ the beneficiary permanently in the United States as a trilingual secretary. 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 June 17, 2004, the AAO summarily dismissed the appeal. Although the petitioner indicated on Form I-290B that it was sending a brief or evidence to the AAO within 30 days, no such evidence was received. The AAO further stated that the petitioner did not specifically identify any erroneous conclusion of law or statement of fact on the I-290B form. On motion, the petitioner submits a brief and supplemental documentation it states were submitted to the California Service Center along with Form I-290B on May 23, 2003.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must 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 Service policy. Although the petitioner claims that it submitted the additional documentation with its Form I-290B, and supplies documentation of a submission in May 2003 to the California Service Center, such documentation does not establish whether the petitioner provided the additional documentation within 30 days following the initial submission of the I-290B. Nevertheless, the petitioner has submitted additional information with regard to its financial resources. This evidence is viewed as sufficient to reopen the proceedings.

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 February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$21.31 an hour, or an annual salary of \$44,324.80. On the Form ETA 750B, the beneficiary claimed to have prospective employment with the petitioner as of the date she signed the Form ETA 750B, namely, February 1, 2001. In a subsequent correction to the ETA 750B that was approved by the Department of Labor (DOL), the beneficiary claimed that she began her present employment on or about September 5, 1999.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1988, to have four employees, to have a gross annual income of over \$278,000, and a net annual income of over \$59,000.

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 27, 2001, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide evidence of its ability to pay the beneficiary's wage by submitting either copies of annual reports, federal tax returns with all schedules and tables, or audited financial statements from February 20, 2001 to the present. The director also requested the petitioner provide documentation of the beneficiary's two years of work experience as stipulated on the Form ETA 750. The director states that such documentation should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information, as well as the beneficiary's title, duties, dates of employment/experience, and number of hours worked per week. The director also requested that the petitioner submit the original Form ETA 750 issued by the Department of Labor (DOL). Finally, the director requested that the petitioner submit copies of the petitioner's California Employment Development Department (EDD) Form DE-6 for all employees for the last four quarters. The director asked that the forms include the names, social security numbers, job titles, and number of weeks worked for all employees, as well as a brief description of each employee's duties.

In response, the petitioner submitted a letter signed by V. Abrahamyan, president, Gazificator, Yerevan, Armenia. The writer identified the company as a closed joint-stock company, and stated that the beneficiary worked as a translator of English, Russian, and Armenian languages from January 15, 1997 to September 7, 1999. The petitioner also submitted the original Form ETA 750, and the petitioner's Form 1040 for 2001, with accompanying Schedule C. This latter document indicated that the petitioner's adjusted gross income in 2001 was \$59,515. The petitioner also submitted copies of Forms DE-6 for the four quarters of 2002. These documents indicated the petitioner primarily had three employees in 2002. The petitioner identified its employees as [REDACTED] a part-time Spanish/English immigration secretary; Genevieve Rosenberg, a full time Spanish/English immigration secretary/office manager; and Sawsan A. Sharweed, fulltime attorney. The third quarter DE-6 reflects wages paid to a fourth employee, [REDACTED] whom the petitioner identified as an attorney replaced by Sawsan Sharweed. The petitioner finally submitted its bank statements from California Bank Trust for January through December 2002 with an annotation of "total 2002, \$347,386.18."

In his cover letter, the petitioner stated that the beneficiary began working for the law office in 2001 on a part time basis, and that in 2002, the beneficiary became a full time employee. The petitioner stated that in 2001, the beneficiary was paid \$29,300, as an outside laborer, and that in 2002, she was paid approximately \$38,000, also as an outside laborer because she lacked work authorization and a social security number. The petitioner further stated that the employment of the beneficiary allowed the petitioner to obtain clients from the Russian and Armenian community which resulted in an increase in both clients and the petitioner's income. The petitioner stated that its income in 2001 was \$278,000, and in 2002, was \$347,386.18.

On April 2, 2003, the director denied the petition. In his denial, the director identified the petitioner's annual gross income as \$59,515. The director stated that although the petitioner's gross annual income was more than the proffered wage of \$44,324.80, it was not reasonable to assume that the petitioner, as a family of three, could live off the remaining funds after the income was applied towards the petitioner's cost of living, and that any income that the petitioner earned must first be applied toward the maintenance of his or her cost of living and then the remaining funds might be used to pay the beneficiary's proffered wage. The director also stated that the bank statements submitted were viewed as secondary evidence and did not represent any financial resources that were not reflected in the petitioner's tax return or financial statements. Finally, the director stated that since the petitioner had not established its ability to pay the proffered wage as of February 20, 2001, the petitioner had not established that it had the ability to pay the proffered wage from the priority date and to the present.

On appeal, the petitioner noted on Form I-290B that Citizenship and Immigration Services (CIS) had erred in its evaluation of the petitioner's ability to pay the proffered salary to the beneficiary. The petitioner then submitted two enquiries with regard to the submitted appeal. As previously stated, the AAO received no further documentation and summarily dismissed the appeal on June 17, 2004.

On motion to reopen, the petitioner states that the director mistakenly confused the petitioner's adjusted gross income as the income of the petitioner; however, the petitioner's actual gross income as reflected in the profit and loss entries on the petitioner's Schedule C for 2001 was \$278,360. The petitioner states that the beneficiary, as an outside independent contractor, earned part of the sum of \$29,000 identified in the petitioner's tax return as "other expenses." The petitioner also submits its 2002 Form 1040 which the petitioner points out indicates an increase of gross income to \$347,386, and a deduction of just under \$85,000 for other expenses. The petitioner states that the other expenses item on its 2002 tax return, includes \$53,040 paid for outside labor. The petitioner further states that the outside labor is for two persons, including the beneficiary, who do translations and some secretarial work for Russian and Armenian clients.

The petitioner also resubmits bank records from California Bank Trust for January 2002 to December 2002 and submits bank records for the months January to April 2003. The petitioner indicates that in 2001 the petitioner's bank deposits totaled \$278,360, and that bank deposits during the first four months of 2003 totaled \$115,747.81. The petitioner asserts that the director's denial is based on the misunderstanding of the figures of the petitioner's tax return. The petitioner states that by calling the figure upon which the petitioner pays its taxes the petitioner's gross income, rather than the adjusted gross income, the director is able to ignore the fact that the petitioner had paid the beneficiary through its expenses of wages to outside workers. The petitioner further states that a petitioner can demonstrate its ability to pay a proffered wage by providing

profit and loss information that reflects there is sufficient income to pay the proffered wage, or by providing monthly bank statements showing that the monthly deposits exceed the proffered wage. The petitioner asserts that it has submitted sufficient evidence to establish both manners of establishing its ability to pay the proffered wage.

In its response to the director's request for further evidence and on appeal, the petitioner submitted bank statements from the petitioner's checking account covering the entire year of 2002 and also for the first four months of 2003. Although the petitioner asserts that the total amount of deposits into the petitioner's banking account can be utilized to establish the petitioner's ability to pay the proffered wage, the petitioner's reasoning is not persuasive. First, the priority date for the instant petition is February 20, 2001. If the petitioner chooses to submit bank statements that would provide documentation as to the additional assets available to pay the proffered wage as of the priority date, these bank statements should be for the year 2001. Second, the total amount of deposits to a bank account is an irrelevant measurement when applied to the examination of the sole proprietor's financial resources. The sum total of deposits does not reflect the petitioner's adjusted income. The total amount of deposits does not take into account the deduction of expenses, and as such does not reflect a true picture of any additional financial resources available to pay the proffered wage. Furthermore, 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, such as the petitioner's adjusted gross income (income minus deductions).

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.

Although the petitioner asserted in its response to the director's request for further evidence, that, as an outside laborer, the beneficiary earned \$29,300 in 2001 and \$38,000 in 2002, the petitioner provided no further evidentiary documentation to further substantiate this assertion. Although the petitioner points to the "outside expenses" items on his returns as evidence of the beneficiary's compensation, the petitioner provides no documentation demonstrating her duties, or payments for her work. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Although the petitioner states that the beneficiary's wages are included in the aggregate amounts of the other expenses items identified in the Forms 1040 submitted to the record, the record does not contain any documentation as to the specific wages paid to the beneficiary or any other independent contractor in 2001 and 2002.

Furthermore the petitioner has provided confusing testimony with regard to the beneficiary's actual employment with the petitioner. On the correction to the Form ETA 750, the beneficiary stated that she began her present employment in 1999, while the petitioner stated that the beneficiary had been working with the firm since 2001. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without more persuasive evidence, the petitioner has not establish the time periods in which the beneficiary has worked for the petitioner, and the beneficiary's specific wages. In the instant

case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 himself, his wife, and one child. The petitioner's adjusted gross income in the years 2001 and 2002 are the following: \$59,515 and \$75,711. Since the director did not request an itemized list of household expenses such as mortgages, car loans, clothing, school expenses, food, and insurance, and the petitioner did not provide a breakdown of its monthly household expenses, it is not possible to accurately identify the amount of adjusted gross income that would remain to pay the proffered wage of \$44,324 after the petitioner's monthly expenses were taken into consideration.¹ However, it appears improbable that a family of three could exist on \$15,191 in 2001, which is the sum left after the proffered wage is subtracted from the petitioner's adjusted gross income. Although the petitioner's adjusted gross income of \$75,711 in 2002 may be sufficient to both pay the petitioner's household expenses and pay the proffered wage, the petitioner needs to establish it has the ability to pay the proffered wage as of the February 2001 priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971):

¹ As previously noted, the petitioner did not establish that it paid the beneficiary any wages in 2001 or 2002. Therefore the petitioner has to establish it has sufficient adjusted gross income to pay both the petitioner's household expenses and the entire proffered wage, out of the petitioner's adjusted gross income.

Thus, the petitioner has not established that it can cover the existing business expenses, sustain himself, his wife and child, and pay the proffered wage, based on his adjusted gross income as of 2001 and to the present.

In addition, as previously stated, the petitioner's checking account deposits do not establish the petitioner's ability to pay the proffered wage, based on additional financial resources. Without demonstrating additional assets or providing evidence of payments to the beneficiary, the petitioner has not established that it has the ability to pay the proffered wage as of 2001 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.

ORDER: The appeal is dismissed.