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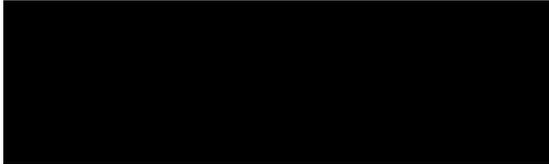
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PETITION

B6



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 21 2005
WAC-03-073-52724

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:



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 sustained. The petition will be approved.

The petitioner is a real estate company. It seeks to employ the beneficiary permanently in the United States as a janitorial supervisor. 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, the petitioner's counsel briefly states that the director's analysis was flawed and based on "speculation and conjecture."

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 January 15, 1998. The proffered wage as stated on the Form ETA 750 is \$16.20 per hour, which amounts to \$33,696 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a letter from its sole proprietor who stated that the petitioner's business involves managing commercial real estate located in Santa Clara County, California. The sole proprietor states that the petitioner's gross annual income from operations from 1998 through 2001 has averaged \$800,000.00. He also states that "[t]he net annual income for my operations over the same period of time has averaged significantly less. Due to the depreciation of the respective properties most to all of the income is off set and therefore does not report as income."

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 December 17, 2003, 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 beneficiary's W-2 forms from 1989 to 1997 while employed by

the petitioner, documentation of the business, and regulatory-prescribed evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date from January 15, 1998 to the present.

In response, the petitioner submitted unaudited financial statements and a letter from its accountants who asserted that the petitioner's business is not incorporated and has no annual report, and that it has good cash flow and has the ability to pay the proffered wage. The petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns with accompanying Schedules E, Supplemental Income and Loss statements, for 1998 through 2002.

The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>
Proprietor's adjusted gross income (Form 1040)	\$2,064,556	\$261,908	\$448,275
Petitioner's gross rents received (Schedule E)	\$894,353	\$1,022,829	\$887,358
Petitioner's profit from Camden Almaden (Schedule E)	\$106,467	\$379,097	-\$493,004
Petitioner's total profit from all properties (Schedule E)	\$76,737	\$371,073	-\$452,326
	<u>2001</u>	<u>2002</u>	
Proprietor's adjusted gross income (Form 1040)	\$44,541	-\$87,148	
Petitioner's gross rents received (Schedule E)	\$931,966	\$825,978	
Petitioner's profit from Camden Almaden (Schedule E)	-\$8,416	-\$128,939	
Petitioner's total profit from all properties (Schedule E)	-\$4,178	-\$130,518	

In addition, the petitioner submitted copies of W-2 forms issued by the petitioner to the beneficiary from 1992 to 2003¹. The W-2 forms reflect that the beneficiary earned wages in the amounts of \$9,360 in 1998, \$10,410 in 1999, \$10,560 in 2000, \$10,120 in 2001, \$11,000 in 2002, and \$12,150 in 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, and, on May 4, 2004, denied the petition, stating that the petitioner appears to have the ability to pay the proffered wage from 1998 through 2000 but not in 2001 or 2002 based on its sole proprietor's total reported income.

On appeal, counsel merely asserts that the director's analysis was flawed and based on "speculation and conjecture." On the appellate form, counsel indicated that he would submit a brief and additional evidence within thirty (30) days, but failed to respond to a subsequent faxed notice from the AAO that the record of proceeding did not contain any additional brief or evidence pertaining to the instant matter. Thus, the AAO is adjudicating the appeal as the record is currently constituted.

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

¹ Evidence preceding the priority date in 1998 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary \$9,360 in 1998, \$10,410 in 1999, \$10,560 in 2000, \$10,120 in 2001, \$11,000 in 2002, and \$12,150 in 2003. Since the proffered wage is \$33,696, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$24,336 in 1998, \$23,286 in 1999, \$23,136 in 2000, \$23,576 in 2001, \$22,696 in 2002, and \$21,546 in 2003.

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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. For a company owning and managing rental properties, the business-related income and expenses are reported on Schedule E 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 a family of two. In 2002, the sole proprietorship's adjusted gross income is negative and could neither support the sole proprietor's family expenses nor the proffered wage.

In 1998, the sole proprietor's adjusted gross income of \$2,064,556 is greater than the proffered wage. It is most likely that the sole proprietor could support himself and his family on \$2,040,220 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the remaining proffered wage, despite the inability to consider the sole proprietor's personal expenses, since the director failed to request and the petitioner never submitted its sole proprietor's monthly expenses.

In 1999, the sole proprietor's adjusted gross income of \$261,908 is greater than the proffered wage. It is most likely that the sole proprietor could support himself and his family on \$246,622 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the remaining proffered wage, despite the inability to consider the sole proprietor's personal expenses, since the director failed to request and the petitioner never submitted its sole proprietor's monthly expenses.

In 2000, the sole proprietor's adjusted gross income of \$448,275 is greater than the proffered wage. It is most likely that the sole proprietor could support himself and his family on \$424,699 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the remaining proffered wage, despite the inability to consider the sole proprietor's personal expenses, since the director failed to request and the petitioner never submitted its sole proprietor's monthly expenses.

In 2001, the sole proprietor's adjusted gross income of \$44,541 is greater than the proffered wage. It is possible that the sole proprietor could support himself and his family on \$21,845, however, the AAO cannot make an informed analysis without the sole proprietor's monthly expenses for that year. Thus, the petitioner's ability to pay the proffered wage in 2001 is inconclusive.

The AAO notes that while the petitioner's Camden Almaden property generated substantial rental income for the sole proprietor in every relevant year, its other properties report losses and its expenses reduces its income to a reported loss in 2002. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The sole proprietor receives income through dividend interest in both 2001 and 2002 from which to pay the proffered. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it has the continuing ability to pay the proffered wage from 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 appeal is sustained. The petition is approved.