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FILE: [REDACTED]
EAC-02-239-53391

Office: VERMONT SERVICE CENTER

Date: **SEP 02 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:



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 Acting Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted three quarterly federal tax returns and copies of statements from its business checking account at Sovereign Bank from July 2001 through May 2002 reflecting an ending balance as low as \$812.07 and as high as \$7,194.52.

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 6, 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 petitioner's 2001 federal income tax return and any evidence of wages actually paid by the petitioner to the beneficiary.

In response, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business statement for 2001.

The tax return reflects the following information:

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$29,286
Petitioner's gross receipts or sales (Schedule C)	\$172,051
Petitioner's wages paid (Schedule C)	\$4,400
Petitioner's net profit from business (Schedule C)	\$21,878

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 March 2, 2004, denied the petition. The director subtracted the proffered wage from the sole proprietor's adjusted gross income and determined that \$4,000 would leave the sole proprietor unable to care for his family of four on that amount for one year¹.

On appeal, counsel asserts that the petitioner has ample personal assets that demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner submits the following: a letter dated April 8, 2004 from Sovereign Bank stating that the sole proprietor's spouse has an active checking account in the amount of \$41,000 that has been opened since March 22, 2002; a letter dated April 13, 2004 from Commerce Bank & Trust Company stating that the petitioner has an account with the bank with a balance of \$37,360.52; a letter dated April 13, 2004 from Sovereign Bank stating that the petitioner has a checking account balance of \$16,024.88 that was opened on October 13, 1998; an undated letter from Commerce Bank & Trust Company stating that the petitioner has a checking account with a balance on April 10, 2004 of \$37,977.65; a letter, dated April 9, 2004, from Remax real estate agency stating that the petitioner's business has an estimated value of \$150,000; additional statements from the petitioner's checking account at Sovereign Bank for a few months of 2003 showing ending balances ranging from approximately \$50.00 to \$5,000; and a copy of a Uniform Residential Loan Application dated November 3, 2003 that the sole proprietor used to refinance his residential real estate listing the sole proprietor's assets and liabilities. The loan application reflects two bank accounts at Sovereign Bank (one in the amount of \$16,024.88 and another worth \$4,000) and liabilities of \$519,266 against the sole proprietor's assets of \$678,451.25, the majority of which includes the value of the sole proprietor's residential real estate, resulting in the sole proprietor's net worth of \$159,185.20.

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 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)

¹ The director referenced the federal poverty line, which is not utilized in the assessment of a sole proprietor's continuing ability to pay the proffered wage because the federal poverty guidelines do not account for specific differences among various geographical costs of living.

(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 a family of four. In 2001, the sole proprietorship's adjusted gross income of \$29,286 covers the proffered wage of \$27,040. It is improbable that the sole proprietor could support himself and his family on \$2,246 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, the petitioner submits evidence of its personal assets. However, the AAO finds the fact that the loan application, submitted to show the sole proprietor's personal assets, failed to account for the very large balances it claims to hold in four accounts at Sovereign Bank and Commerce Bank & Trust Company suggests that such accounts may not have been in existence at the time of the loan application on November 3, 2003. Additionally, the sole proprietor's liabilities are substantial and its positive net worth is only the result of accounting for the sole proprietor's residential real estate value, which is not the type of asset typically liquefied to pay employee wages. The sole proprietor had an interest in representing its substantial cash assets on its loan application and the absence of those accounts either indicates that they did not exist in November 2003 or that there are inconsistent representations in the record of proceeding². Moreover, according to the letter from Sovereign Bank, the sole proprietor's spouse's account of \$41,000 was opened in 2002 so presumably it had been available to list as an asset on the refinancing application.

The four letters from the petitioner and sole proprietor's banking institutions reflect that only the Sovereign Bank account with a balance of \$16,024.88 was available to the petitioner in 2001 since it was opened in

² *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

1998. The Sovereign Bank account held by the sole proprietor's spouse reflects a balance available in 2002 but as indicated above, fails to be a credible evidentiary submission without additional explanation about why it was omitted from the credit application, and in light of that, corroborating evidence concerning its existence and creation. The rest of the letters either established that the accounts were opened in 2004 or merely stated a balance amount in 2004 but did not indicate when the accounts were opened. The AAO finds that the record supports only that the \$16,024.88 balance was available to the petitioner from 2001 until 2004. That amount does not cover the proffered wage for one year. The remaining balances in 2004 have little probative value since 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).

Additionally, it is unlikely that the sole proprietor would sell its business in order to pay the proffered wage. Thus, the value of its business is not a factor for consideration of its continuing ability to pay the proffered wage.

Finally, the petitioner maintains a very modest balance in a Sovereign Bank checking account for which it provided statements. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balances are not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months. In addition, the AAO presumes those funds would be reflected as part of the business income reported on the petitioner's tax returns.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or subsequently.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it had 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 not met that burden.

ORDER: The appeal is dismissed.