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U.S. Citizenship  
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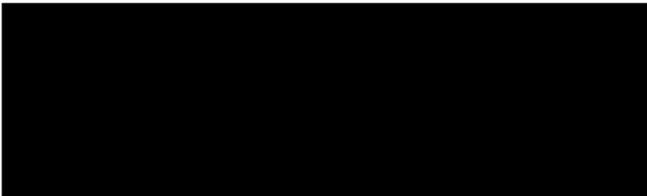
Date: MAY 01 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Acting Center 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 residential painting firm. It seeks to employ the beneficiary permanently in the United States as a painter. 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 asserts that the director erred in her analysis of the evidence submitted and maintains that the petitioner has the financial ability to pay the proffered wage.

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.

Citizenship and Immigration Services [CIS] jurisdiction includes a determination of whether the petitioner is making a realistic job offer. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

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 \$22.68 per hour, which amounts to \$47,174.40 per annum. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary does not claim that she has worked for the petitioner.

On Part 5 of the preference petition, filed November 26, 2003, the petitioner claims that it was established in 1995, has a gross annual income of \$50,273, a net annual income of \$21,935 and currently employs no workers.

The petitioner is structured as a sole proprietorship; a business in which an individual operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its ability to pay the proffered wage, the petitioner initially submitted partial copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return(s) for 2001 and 2002, consisting only of Schedule C, Profit or Loss from Business. Pertinent to the petitioner's business operation these schedules contain the following information:

	2001	2002
Petitioner's gross receipts or sales	\$56,540	\$50,273
Petitioner's gross Income (Schedule C)	\$36,971	\$38,143
Petitioner's total expenses (Schedule C)	\$17,318	\$22,505
Petitioner's net profit (Sched. C)	\$19,653	\$15,638

On August 3, 2004, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage. She instructed the petitioner to submit a complete individual tax return for 2001.

In response, the petitioner provided copies of the sole proprietor's 2001 and 2003 individual federal income tax return(s). The returns indicate that the sole proprietor files his taxes jointly with his spouse and declared one dependent in 2001 and no dependents in 2003. The 2001 return shows that in addition to the information set forth above, the sole proprietor reported \$29,616 in adjusted gross income. The 2003 individual tax return reflects the following:

	2003
Petitioner's gross receipts or sales (Schedule C)	\$42,176
Petitioner's gross income (Schedule C)	\$34,692
Petitioner's net profit (Sched. C)	\$15,283
Sole Proprietor's adjusted gross income (Form 1040)	\$31,078

With these returns, the petitioner provided an undated letter from the sole proprietor stating that his son is no longer a dependent on his tax returns. The petitioner also supplied four notarized letters signed by a person whose signature is deemed "official" and appears to be "Ava Laudry." The letters are each on "People's Bank" letterhead and are notarized on September 11, 2004. On each, Ms. Laudry affirms the opening date of an account and the balance as of September 10, 2004. The information is summarized as follows:

Acct. No.	Opened with People's Bank	Closing 9/11/04 balance
	8/10/99 (joint spousal names)	\$12,657.39
	5/09/97 ("Chris Painting- 	\$ 9,541.06
	5/29/04 (wife's name)	\$ 3,503.88
	8/12/2004 (wife's name)	\$ 237.13 (checking)
		\$ 25.00 (savings)

The petitioner also included a letter, dated August 30, 2003, from ". He states that he is so impressed with the beneficiary's work that he has agreed to contract for the petitioner's services as soon as the beneficiary is available to begin.

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 October 29, 2004, denied the petition. The director noted that the sole proprietor's 2001 reported income of \$31,005 (total income prior to self-employment tax deduction) was less than the proffered salary of \$47,174.40. The director also acknowledged the submission of the verification letters from the bank but determined that it was unclear if this money was in the bank at the time of filing.

On appeal, counsel submits documents previously contained in the record and additionally provides further information relating to the sole proprietor's financial profile in the form of copies of bank statements from People's Bank related to the bank accounts held by the petitioning business and by the sole proprietor and his spouse during 2001. The business account held in the name of [REDACTED] had a balance of \$2,935.00 as of the end of December 2001. The account held by the sole proprietor and his spouse, [REDACTED] had a balance of \$2,439.23 as of the end of December, 2001. Accompanying these documents is a copy of mortgage information from the Washington Mutual Home Loans. It refers to the sole proprietor's spouse and the home address of the sole proprietor and his spouse, although counsel refers to this as rental income property. The 2001 tax return lists the holding as 50% owner occupied.

On appeal, counsel asserts that the director would have determined that the petitioner had the ability to pay the proffered wage if he had considered the petitioner's entire financial picture when determining the ability to pay. Counsel cites *Ranchito Coletero*, 2002-INA-105 (2004 BALCA), *Ohsawa America*, 1988-INA-240 (BALCA 1988) and *O'Connor v. Attorney General of the United States*, 1987 WL 18243 (D. Mass. 1987) to support her argument.

Counsel assertions are not persuasive. Although the director focused on the sole proprietor's 2001 tax return, she also determined that it wasn't clear that the cash reported in 2004 by the bank had been available since the priority date. The AAO does not disagree with counsel that a sole proprietor's individual assets (and liabilities) may also factor into the determination of a petitioner's ability to pay the proffered salary. In this matter, however, we note that while we will consider cash or cash equivalent assets, the balance held in the petitioner's business bank account would be reflected as part of the day-to-day operations encompassed within the figures of receipts and expenses already presented on Schedule C of the 2002 tax return. Moreover, we do not consider real property assets such as the sole proprietor's residence as a readily available unrestricted liquid asset which would be readily available to pay the proffered wage.<sup>1</sup>

It is also noted that Board of Alien Labor Certification Appeals (BALCA) decisions are not binding upon CIS. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, in [REDACTED] the ability to pay analysis was applied to a corporation, not to a sole proprietorship, in which the major shareholder was worth over four million dollars. Further, we find that the director's review of the sole petitioner's adjusted gross income (prior to self-employment tax deduction) is consistent with [REDACTED] where the Board determined that the certifying officer erred in focusing only on Schedule F, Profit or Loss from Farming when considering the ability to pay, rather than, for example, the employer's adjusted gross income.

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<sup>1</sup> We do not find this inconsistent with the facts described in [REDACTED] where the petitioners sold their real estate and received other cash income.

Similarly, we do not agree with counsel's assertion that the 2001 Schedule C gross sales figure of \$56,540 is the "true" income that should be used to review the petitioner's ability to pay the proffered wage. Counsel's hypothesis that the sole proprietor could have adjusted expenses to accommodate any necessary salaries is conjecture and does not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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. Wages amounting to less than the proffered salary will also be considered. If the difference between the actual wages paid and the proffered wage can be covered by a petitioner's net income or net current assets in a given period, the ability to pay the proposed wage offer will be deemed to have been established for that period. In this case, the record fails to indicate that the petitioner has employed the beneficiary.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

As discussed above, the petitioner is a sole proprietorship; a business in which an individual 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. As noted above, 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses. In this case, such a summary was not provided or solicited.

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, starting with 2001, if the proffered wage of \$47,174.40 were reduced by the \$2,439.23 held in the joint bank account, the remaining \$44,735.17 still exceeded the sole proprietor's adjusted gross income of

\$29,616 by \$15,119.17, even without considering any household expenses. It is noted that the sole proprietor's rental income of \$14,400 that counsel maintains should be added to the Schedule C gross receipts or sales has already been reflected on Schedule E and carried forward to line 17 of Form 1040 as -\$2,601 after relevant expense deductions. The petitioner failed to demonstrate the ability to pay the certified salary in 2001.

Other than the incomplete tax return consisting of Schedule C and showing net business profit of \$15,638, the record contains no other tangible evidence of cash or cash equivalent assets that would support the petitioner's ability to pay the proffered salary in 2002. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

In 2003, the record does not indicate the level of the sole proprietor's bank accounts. The tax return reflects that his adjusted gross income of \$31,078, without consideration of living expenses, was \$16,096.40 less than the certified wage of \$47,174.40. The ability to pay the proffered wage has not been established for this year.

The AAO notes that the director's request for evidence was deficient in some respect, however pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), it remains the petitioner's burden to provide sufficient documentation to establish its continuing ability to pay the proffered wage beginning at the priority date and continuing until the beneficiary obtains lawful permanent resident status. Moreover, the appeal process set forth in 8 C.F.R. § 103.3 allows the submission of additional evidence for consideration on appeal.

With respect to the beneficiary's potential to generate income as being included as part of the examination of the petitioner's ability to pay the proposed salary, it is noted that the record contains a letter from Mr. ██████ praising the beneficiary's work.<sup>2</sup> Although the beneficiary may be a talented painter, it cannot be predicted with any certainty what effect her employment might have on the petitioner's net profit and this sentiment cannot be concluded to outweigh the documentation provided to the record.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.

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<sup>2</sup>*See Masonry Masters Inc. v. Thornburgh* 875 F.2d 898 (C.A.D.C. 1989). That case primarily held that INS [n/k/a CIS] had erred in insisting on evidence of the petitioner's ability to pay anything more than the prevailing wage at the time of the application for labor certification. At the conclusion of the decision, the court opined that CIS' focus on requesting an income statement from the petitioner appeared to assume that the worker would contribute nothing to the income. The court noted that it would be helpful if CIS revealed its theory as to how it assessed the ability to pay a wage.