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U.S. Citizenship
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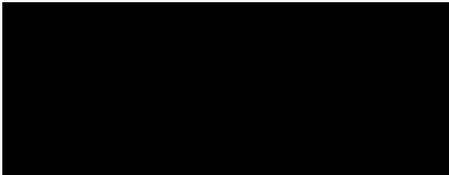
Office: VERMONT SERVICE CENTER

Date: **JUL 22 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

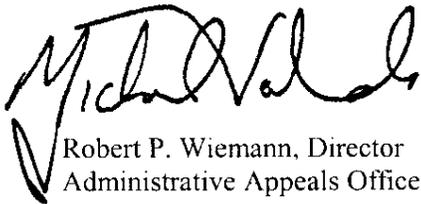
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager, night shift. 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 has filed 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.08 per hour, which amounts to \$39,686.40 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted:

- The original Form ETA 750;
- The petitioner's Form 1040 tax return for 2001 showing adjusted gross income of \$33,186;
- The petitioner's unaudited consolidated financial reports for the subject convenience store, showing year-to-date net income totaling \$19,100.18 as of August 2001, with total payroll of \$49,283.41; and net income totaling \$56,325.91 as of August 2002, with total payroll of \$18,828.16; and,
- An August 1, 2002 letter from the beneficiary's former employer in Pakistan stating that the beneficiary had worked full time as a supervising retail store manager from April 1985 to July 1988.

On May 7, 2003, the director requested additional evidence, and 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 evidence:

- The petitioner had ever paid the beneficiary the proffered wage, including Form W-2 Wage and Tax statements issued to him;
- The petitioner's monthly expenses;
- A statement from a bank or other financial authority indicating the petitioner's available assets at the end of 2001; and,
- A statement of how many workers the petitioner employed in 2001 and 2002, their job titles and duties.

In response, counsel submitted a letter from the petitioner dated June 2, 2003. The letter stated that the beneficiary is working in the proffered position at the proffered wage, though it adds that in 2001 the petitioner paid the beneficiary \$10 an hour or \$20,800¹ for the year, which then increased in 2002 to \$12 an hour or \$24,960 for the year. The store's gross income in 2001 was \$910,867.12, and in 2002 was \$901,405.17. It had four employees, two of them cashiers paid at an hourly rate of \$5.75. The letter states that the petitioner previously worked as the store manager, until in 2001 he hired the beneficiary. It states that because the beneficiary lacked a Social Security number, the petitioner never issued the beneficiary a Form W-2 and has only paid him in cash.

Counsel further submitted unaudited year-to-date income and expense summary printouts from the 7-ELEVEN franchise system of Philadelphia-franchise-operated stores that show:

- As of December 2000, a net profit of \$33,380.38, with a total payroll of \$69,933;
- As of December 2001, a net profit of \$36,977.02, with a total payroll of \$65,829.33; and,
- As of December 2002, a net profit of \$87,243.39, with a total payroll of \$30,881.38.

Counsel also submitted the petitioner's Form 941s for all quarters of 2001 and 2002.

The Form 1040 tax return for 2001 reflects the following information:

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$33,186
Petitioner's gross receipts or sales (Schedule C)	\$840,118
Petitioner's wages paid (Schedule C)	\$51,401
Petitioner's net profit from business (Schedule C)	\$22,184
Proprietor's adjusted gross income (Form 1040)	\$33,186
Monthly Expenses (Petitioner's estimate)	\$550 ²
Yearly Expenses	\$6,000
Available Income	\$26,586

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 10, 2003, denied the petition.

¹ The \$20,800 and \$24,960 figures appear to be calculated rather than based upon the petitioner's records, because the dollar amounts equal the specified hourly wage for each year times exactly 2080 hours of work each year.

² First submitted on appeal.

On the appeal, filed November 12, 2003, counsel asserts that the proffered wage of \$39,686.40 will be covered by doing without with his own wages of \$16,200 (Form 1040) that, when combined with the petitioner's 2001 net income of \$22,184 (Schedule C net profits), totals \$38,384. Additionally, counsel asserts that another \$5,519 taken for depreciation in 2001 brings the amount available to pay the proffered wage to \$40,273. Counsel also asserts as error the director's finding that she had not submitted evidence of the petitioner's monthly expenses, which she asserts she did by submitting the franchise printouts of the financial summaries.

With the appeal counsel submits additional documents, many of them duplicates of others previously submitted:

- Quarterly employer's Form 941 reports for the eight quarters in 2001 and 2002 combined;
- The petitioner's June 2, 2003 letter explaining how he can afford to pay the proffered wage;
- Financial summaries, as of December 2001 and December 2002, for the petitioner's 7-Eleven store;
- The petitioner's 2001 Form 1040 return; and,
- Monthly financial summaries of the petitioner's store for the months of July 2001 through July 2002.

On May 14, 2004, counsel submitted a second batch of documents to be considered in the appeal, along with a list of the petitioner's personal monthly expenses for 2001 and 2002, each totaling \$550.

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 claims it employed and paid the beneficiary \$10 an hour in 2001, \$12 an hour in 2002, and is currently paying him \$19.08 an hour. However, counsel has not backed up the petitioner's assertions with any documentation specific to the beneficiary. 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)).

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). Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

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. Further, the petitioner's detailed franchise printouts, while appearing authentic and accurate, are unaudited and for the owner's private use and only reflect his perception of the company's financial strengths.

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 claims he supports a family of two. In 2001, the sole proprietorship's adjusted gross income of \$33,186 does not cover the proffered wage of \$39,686.40. Since paying the proffered wage could result in a deficit, there would be no funds available for the support of the sole proprietor and his family.

Further, counsel not only failed to submit proof of the petitioner's monthly expenses prior to the director's decision but months after the November 12, 2003 appeal deadline, even though requested in the RFE. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) & (b)(12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *Id.*

Furthermore, the adjusted gross income for 2001 does not clearly show that it takes into account the \$20,800 allegedly paid to the beneficiary, as Schedule C for that year does not list what part, if any, of the \$51,401 the petitioner listed as wages expenses went to the beneficiary and the petitioner listed no "cost of labor" under schedule C's "Cost of Goods Sold" section. Thus, we need not add the \$20,800 back into the sole proprietor's adjusted gross income.

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

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The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.