



U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: NOV 07 2005

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IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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. On May 26, 2004, the Administrative Appeals Office (AAO) subsequently denied an appeal. The matter is now before the Administrative Appeals Office (AAO) as a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a landscape and stonework design company. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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 appeal, counsel resubmitted documentation and also submitted new documentation pertinent to the petition. On May 26, 2004, the AAO examined the new documents and dismissed the appeal.

On motion, counsel states that Citizenship and Immigration Services (CIS) erred in its evaluation of the petitioner's financial resources because it did not adjust the petitioner's net income for depreciation. Counsel also states that the petitioner's net assets in 2001 were sufficient to pay the difference between the paid wage and the proffered wage in that year. Counsel submits new documentation on the petitioner's April 2003 balance sheet. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

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 \$36.47 an hour, or an annual salary of

\$75,857.60. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from 1999 to the present.

The petitioner is structured as a sole proprietorship.<sup>1</sup> On the petition, the petitioner claimed to have been established in January of 1991, and to have ten employees. In support of the petition, the petitioner submitted an unaudited two page profit and loss statement fro January 1 through August 26, 2002 that indicated net ordinary income of \$21,938 for that period of time; the second page of the petitioner's Form 1040 that on line 34 indicated the petitioner's adjusted gross income for 2001 was -\$7,793; a letter for work verification from [REDACTED] Cryasa Construction Company, Cuernavaca, Mexico, that stated the beneficiary worked as a stone mason for six years.

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 October 25, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its complete 2001 federal tax return, with all statements. The director also noted that the petitioner could submit audited financial statements, profit and loss statements, bank account records for twelve consecutive months and/or personnel records. The director noted that the Form ETA750 indicated the petitioner had employed the beneficiary since 1999. The director also requested the petitioner's payroll statements since 1999, and copies of the beneficiary's W-2 statements.

In response, counsel submitted the petitioner's federal tax return for 2000 and 2001, a copy of the petitioner's profit and loss statement for 2002; a copy of Forms 941, Employer's Quarterly Federal Tax Return for 2002; a copy of the petitioner's check register for a Wells Fargo Bank bank account for January 2002 to December 2002; a copy of the petitioner's check register with Pacific Continental Bank for January 2002 to December 2002, and a letter from the petitioner that stated the tax returns for 2002 are in progress. In addition, the petitioner submitted a copy of the its payroll statements showing wages paid for 2000, 2001, and 2002; Form 941, for all four quarters of 2002; a copy of a printout of the beneficiary's December 27, 2002 check that indicates the beneficiary's year to date wages paid were \$30,543, and a copy of a similar document dated December 28, 2001 that indicated the beneficiary's wages in 2001 were \$32,051.50. Counsel also submitted a letter from the petitioner stating that the business was being reorganized into a limited liability corporation, that the petitioner was unable to locate employment records prior to 2001, and that the sole proprietor had employed the beneficiary since 1999. The petitioner's Form 1040 for 2000 on line 21 indicated other income of net operating loss carryover of -\$48,891, business income as documented by Schedule C of \$18,194, and an adjusted gross income of -\$32,497. For 2001, the sole proprietor's Form 1040 for 2001 on line 21 indicated a net operating loss carryover of -\$39,457, net profit as documented by Schedule C of \$36,544, and an adjusted gross income of -\$7,793.

On April 3, 2003, the director denied the petition. The director stated that there are three basic approaches to establishing a petitioner's ability to pay as of the priority date: the petitioner paid the beneficiary a salary

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<sup>1</sup> It is noted that the sole proprietor submitted a letter to the record dated January 16, 2003 that indicated the petitioner was reorganizing its business structure to that of a limited liability corporation (L.L.C.); however, the only federal income tax returns in the record are the sole proprietor's Forms 1040 for 2001 and 2002.

equal to or greater than the proffered wage in the priority years; the petitioner's net income in the priority year was equal to or greater than the proffered wage; or the petitioner's net current assets in the priority year were equal to or greater than the proffered wage. The director stated that the petitioner's payroll records indicate that the petitioner paid the beneficiary in 2001, the year of the priority date, an hourly wage of \$13 an hour. The director stated that to establish the ability to pay, the petitioner had to demonstrate that it had the ability to pay the difference between the beneficiary's wages, and the proffered wage, namely, approximately \$48,817.<sup>2</sup>

The director further stated that the profit and loss statements submitted by the petitioner to the record had little evidentiary value as they were based solely on the representations of management. The director also noted that the bank account records submitted to the record were for January 1, 2002 to December 31, 2002 and did not establish the petitioner's ability to pay the wage as of April 30, 2001, the priority date. The director then examined the petitioner's business income for 2001 and 2002, as established by the petitioner's Schedules C submitted with its tax returns. The director stated that the business income of \$36,544 for 2001 and \$18,194 for 2000 were not sufficient to pay the difference between the beneficiary's actual wage and the proffered wage. The director also stated that the evidence did not show that the petitioner had net current assets that were equal to or greater than the proffered wage.

In addition, the director stated that CIS records showed that the petitioner had filed a total of six immigrant I-140 immigrant petitions.<sup>3</sup> The director stated that while the petitioner might file multiple I-140 petitions with priority dates that fall within the same year, the petitioner had to also establish the ability to pay the proffered wage for all additional beneficiaries.<sup>4</sup> The director stated that the petitioner sought to employ each of the six beneficiaries at a wage salary of \$36.47 an hour and that the proffered wages totaled \$461,385.60. Based on these calculations and the evidence submitted to the record, the director determined that the petitioner did not have the ability to pay six beneficiaries, and that the evidence did not establish that the petitioner had the ability to pay the beneficiary the proffered wage as of the priority date and continuing to the present.

On appeal, counsel resubmitted the petitioner's Schedules C from the petitioner's Forms 1040 for 2000 and 2001. Counsel also submitted the petitioner's Statement of Income and a Balance Sheet for the first three months of 2003, a letter from its accountant [REDACTED] Portland, Oregon; three letters that express the writers' intent to retain the petitioner's services, and four signed proposals for future work to be performed by the petitioner.<sup>5</sup> The combined amount of prospective revenue to be generated by the letters and proposals

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<sup>2</sup> The director appears to have reached the \$48,817 figure by subtracting the beneficiary's projected annual salary of \$27,040 from the proffered wage of \$75,858.60. He calculated the annual salary by multiplying the \$13 hourly wage by 2080 annual hours of work.

<sup>3</sup> Based on the director's list of filed petitions, and the petitioner's payroll records, four of the individuals listed are the petitioner's employees, including the beneficiary.

<sup>4</sup> In the case of the petitioner's current employees listed in the director's decision, the petitioner would have to establish that it could pay the difference between the actual wages paid to these employees and their proffered wages. Additionally, the petitioner would have to establish it could pay the entire proffered wage for the remaining two non-employees.

<sup>5</sup> Although counsel stated in the cover letter for the appeal, that an original brief in support of the appeal was filed with the Form I-290B, no such document is found in the record.

amounted to \$417,848. In [REDACTED] letter, he states he compiled the submitted balance sheet and statement of income for January to March 2003, and that the compilation is limited to presenting in the form of financial statements information that is the representation of the owner. [REDACTED] stated that he had not audited or reviewed the financial statements.

On May 26, 2004, the AAO examined the new documents and dismissed the appeal. The AAO determined that the profit and loss statement submitted to the record for January to March 2003 was unaudited, and gave it no evidentiary weight. The AAO examined the petitioner's Form 1040 for 2001 and stated that even adding back in the carryover losses from previous years, the petitioner's adjusted gross income would be \$31,664. Schedule C of the tax return reflected a net profit of \$36,544. The AAO determined that the petitioner could not pay the proffered wage of \$75,857 from the adjusted gross income or the net profit of the petitioner in 2001, or the difference between the proffered wage and the wages actually paid in 2001. The AAO then noted that the record also contained no evidence regarding the sole proprietor's personal expenses that would need to be paid from the petitioner's adjusted gross income.

On motion, counsel states that CIS erred in its evaluation of the petitioner's financial resources because it did not adjust the petitioner's net income for depreciation. Counsel states that if the petitioner's depreciation expenses for 2001 of \$8,441 were added to the petitioner's existing net income identified on its 2001 tax return, the new net income figure would be \$44,985. Counsel asserts that this net income figure is higher than the difference between the beneficiary's actual wages and the proffered wage. Counsel also asserts that the petitioner's net assets, as documented by the petitioner's balance sheet for April 30, 2001, were approximately \$83,000. Counsel states that adding the petitioner's net assets to the petitioner's net income for 2001 results in a figure greater than the difference between the wages paid to the beneficiary and the proffered wage. Counsel also notes that the petitioner's net assets of March 31, 2003 were \$66,777 and the petitioner's net income was \$12,961. Counsel states that the total sum of \$79,738 is greater than the proffered wage, as well as the difference between the paid and proffered wages. Counsel resubmits the petitioner's Schedule C for tax year 2001, as well as a document identified as the petitioner's balance sheet as of April 30, 2001. This document indicates that the petitioner had total current assets of -\$83,048.02 as of April 30, 2001. A letter from the petitioner dated June 23, 2004 accompanies this document. In the letter, the petitioner states that the balance sheet dated April 30, 2001 is incorrect due to receipts being posted as payments resulting in a negative balance. The petitioner further states that the matter is in the process of being audited by an accountant and the end result will be a positive balance of approximately \$83,000.

On motion, the petitioner also submits a statement with regard to errors on its balance sheet dated April 30, 2001, and an ongoing audit of the contents. Upon review of the record, this document was not submitted into the record previously, and counsel does not clarify why this document is presently submitted on motion. The AAO will not consider this document in the present proceedings for two reasons. First, the purpose of the request for evidence 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) and (12). The director's instructions in the RFE mentioned the submission of profit/loss statements, and audited financial statements. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has

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been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal, and by extension, on motion.. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the new document submitted on appeal. Second, no coversheet from the beneficiary's accountant accompanies the balance sheet, thus it is not known whether the document was compiled, reviewed, or audited by an accountant. As such, it is given no evidentiary weight in these proceedings. Third, such a revision of the petitioner's assets in 2001 would be given much more probative weight, if the petitioner had submitted an amended Form 1040 that reflected such a change.

On motion, counsel also refers to the use of depreciation expenses in augmenting the petitioner's adjusted net income; however, In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Counsel also suggests that if the petitioner's revised net income of \$83,000 were added to the petitioner's net assets, the resulting sum would equal a total greater than the difference between the actual wages paid to the beneficiary and the proffered wage. However, the petitioner, as stated previously, has not submitted sufficient documentation to establish a revised net income of \$83,000 for 2001. In addition, net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

It is noted that the director in the denial of the petition made no reference to the fact that the petitioner is a sole proprietor. The AAO in its denial of the appeal, did point out this fact and stated that the record contained no evidence regarding the sole proprietor's personal expenses that would need to be paid from the petitioner's adjusted gross income prior to paying the proffered wage, or the difference between the actual wage and the proffered wage. The AAO's comment reflects the manner of analysis for sole proprietors outlined below. Nevertheless, upon review of the record, the petitioner submitted payroll statements and check registers that indicate the sole proprietor has no dependents and received a salary during 2001 and 2002 at the hourly rate of \$20 an hour. In the final quarter of 2001, based on the petitioner's payroll records, the sole proprietor received wages of \$8,800 for the last quarter of 2001. Although the petitioner could clarify the exact salary earned by the sole proprietor as of the priority date and through 2002, it appears probable that the sole proprietor's personal expenses were covered by his salary.

Furthermore, in response to the director's request for further evidence, counsel submitted copies of its account registers for two bank accounts which both appear to be checking accounts. Without further explanation, the petitioner's check registers for the entire year of 2002 for its Wells Fargo bank account and for its Continental Bank bank account do not add any further relevant documentation to the record. Counsel's reliance on the registers is misplaced. First, neither check registers or bank statements are among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, registers simply list checks issued and deposits made by the petitioner, and the balances left in the account on a given date after such transactions, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank registers somehow reflect additional available funds that were not reflected on its tax return. For example, the Wells Fargo check register indicates that on January 1, 2002, the checking account had a balance of -\$3,369.43, and at the end of December 2002 had a balance of \$2,569.76. The petitioner does not establish what either figure has to do with the petitioner's ability to pay the proffered wage in 2002. In addition, if such documents had been determined to be relevant to the petition, the check register most relevant to the instant petition, would be the check register for the year 2001, the year in which the priority date was established.

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. The petitioner submitted payroll statements and documents that appear to be copies of the beneficiary's W-2 forms for 2001 and 2002, with end of year earnings. Based on these documents as well as the Wells Fargo check register, the beneficiary received an hourly wage of \$13 for a basic 40-hour workweek, and his yearly earnings in 2001 appear to be \$32,051.<sup>6</sup> In 2001, the petitioner's documentation indicates an hourly salary of \$14 an hour, and indicates that the beneficiary earned \$30,543. Nevertheless, the petitioner did not pay the beneficiary the proffered wage of \$75,857 prior to or following the priority date.<sup>7</sup>

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<sup>6</sup> Although the director previously calculated the beneficiary's actual wage as \$27,040, or a salary of \$13 dollars an hour for a 40-hour week, the documentation in the record at times reflects more than a 40 hours a week work schedule. Therefore, the higher wages reflected in the petitioner's documentation are accepted as the actual wages.

<sup>7</sup> The documentation provided by the petitioner as to the beneficiary's actual wages suggest that the petitioner has to establish it can pay the difference between the beneficiary's actual wages and the proffered wage in

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, as stated previously, the sole proprietor supports himself. Although not mentioned by the director in the denial or in the subsequent AAO dismissal of the appeal, the petitioner submitted its tax return for 2000. Since the priority date for the instant petition is April 30, 2001, the petitioner's adjusted gross income for 2000 is not dispositive. In addition, the petitioner has not submitted its 2002 Form 1040 or any other 2002 federal income tax return for further consideration of the petitioner's ability to pay the proffered wage. Therefore the AAO will only examine the petitioner's adjusted gross income for 2001, which is -\$7,793. In addition, as previously stated, the sole proprietor has to establish that it can cover its business expenses, pay its household expenses, and also pay the proffered wage, out of its adjusted gross income or other financial assets. For this purpose, the director will request an itemized list of household expenses on a monthly basis, that covers such items as mortgages, food, clothing, and insurance, among other items. In the instant petition, as stated previously, the sole proprietor has no dependents and has given himself a salary based on a \$20 hourly wage. It is noted that Form 1040 for the 2001 tax year does not indicate any wages, or tips paid to the petitioner, so it is not possible accurately establish his actual annual salary in 2001.

Nevertheless, the petitioner does not have sufficient adjusted gross income in 2001 to pay the difference between the beneficiary's actual wages and the proffered wage. As stated previously, this difference is \$43,806 in 2001 and \$45,314 in 2002. Thus, based on his negative adjusted gross income in 2001, the petitioner lacks \$51,599 in 2001 to pay the proffered wage. Without more persuasive evidence to demonstrate additional available funds, such as savings accounts, or liquid assets that the sole proprietor can

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both 2001 or 2002, namely, \$43,0806 in 2001 and \$45,314 in 2002.

access to pay the remaining sums of wages, the petitioner has not established that it can pay the difference between the actual wages and the proffered wage as of April 2001 and continuing.

In addition, the petitioner still has not addressed the issue of the payment of wages to multiple beneficiaries. Although the petitioner's quarterly reports and payroll statements indicate that three other beneficiaries presently work for the petitioner at similar or higher wage levels than the beneficiary in the instant petition, the petitioner has submitted no evidence that it has the financial resources to pay the difference between the current employees' actual wages and the proffered wage. Or in the instance of beneficiaries who are not employed by the petitioner, the petitioner has not established that it has the ability to pay the entire proffered wage. Although the director suggested that the sum of \$ \$461,385.60. would be needed to pay the proffered wages of all six beneficiaries, this sum does not appear to be an accurate assessment in view of the current employment of four beneficiaries. However, the petitioner has neither refuted this sum or provided sufficient evidence to establish the actual amount of funds needed to pay both current employees or new employees their proffered wages.

Finally, on appeal, the petitioner submitted letters of confirmation or proposals for work to be performed in 2003. While such documentation does establish the prospects of the petitioner's future business operations, they do not conclusively establish that the revenues generated by the documents will be sufficient to pay the beneficiary's proffered salary, or those of the remaining beneficiaries. Nor do they establish the petitioner's ability to pay the proffered wage as of the 2001 priority date. Without more persuasive evidence as to the sole proprietor's financial assets, 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 or to the beneficiary's qualifications to perform the duties of the position.

**ORDER:** The appeal is dismissed.