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FILE: [Redacted]
EAC-04-038-52797

Office: VERMONT SERVICE CENTER

Date: **MAY 16 2006**

IN RE: Petitioner:
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:

[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, Chief
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 case will be remanded to the director.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook¹. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 7, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 19, 2001. The proffered wage as stated on the Form ETA 750 is \$40,000.00 per year. The Form ETA 750 states that the position requires two years of experience.

¹ The certified Form ETA 750A classified the position as "cook specialty" under occupational title in its certification at the bottom of page 1 and as "second baker" as the "alien's occupation" on the front page. Since the petitioner described the position as a cook, the AAO will also.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Counsel submits a letter from the sole proprietor, the petitioner's 2003 federal tax return, copies of deeds evidencing property ownership by the sole proprietor, and a letter from Commerce Bank evidencing the amount of cash in an account held by the sole proprietor. Including the evidence submitted on appeal, other relevant evidence in the record includes the petitioner's federal tax returns for 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in January 2001 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on October 9, 2001, the beneficiary claimed to work for the petitioner since March 2001.

On appeal, counsel asserts that the sole proprietor's cash, real estate holdings, and the beneficiary's contributions demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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)

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(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 one. The tax returns reflect the following information for the following years:

	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$27,773	\$30,456
Petitioner's gross receipts or sales (Schedule C)	\$159,955	\$153,214
Petitioner's wages paid (Schedule C)	\$0	\$8,580
Petitioner's net profit from business (Schedule C)	\$29,884	\$32,771

In both 2002 and 2003, the sole proprietorship's adjusted gross incomes of \$27,773 and \$30,456, respectively, fail to cover the proffered wage of \$40,000. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record of proceeding is incomplete, however. There is no regulatory-prescribed evidence at all for 2001, which is the priority date year, and the petitioner has the burden to prove it could pay the wage in that year as well. Although it has been represented that the petitioner has employed the beneficiary since March 2001, the record of proceeding does not contain any evidence of wages paid to the beneficiary at any time. The petitioner's Schedule C does not report any wages paid at all either through the wages paid itemized listing or "cost of labor" itemized listing for 2002 and only \$8,580 in 2003 yet the petitioner represented that it employed four employees, presumably including the beneficiary.

Additionally, the petitioner submitted a letter from Commerce Bank pertaining to an account with a balance of \$84,729.18 and a recent deposit of \$31,000. It is unclear whether or not those funds belong to the sole proprietor as part of her personal funds or if those are the petitioner's funds and are included in the represented gross receipts on Schedule C to the sole proprietor's individual income tax returns. Those funds

would have to pertain to the priority date year but the letter is dated August 5, 2004 and does not provide information about the date the account was established. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not established at the priority date with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, there is no evidence in the record of proceeding concerning the sole proprietor's expenses. The sole proprietor may have significant cash holdings but the record of proceeding does not illustrate what type of encumbrances and debts may limit the availability of those funds. Finally, the sole proprietor's real estate holdings are not evidence that weigh in the petitioner's favor since they are not the type of personal assets typically liquefied in order to pay employee wages.

The petitioner also claimed that "[the beneficiary] will cause the [petitioner's] income to increase, and [the beneficiary] will be paid from that increased income." However, the beneficiary has allegedly been employed since two months after the petitioner's business was established. It is therefore unclear how or when the beneficiary improved the petitioner's income. No detail or documentation was provided to explain how the beneficiary's employment would significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The petitioner should be given opportunity to submit additional evidence and responsive argument with regards to the issues raised above.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.