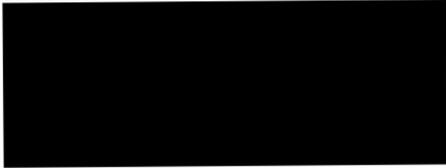


U.S. Citizenship  
and Immigration  
Services



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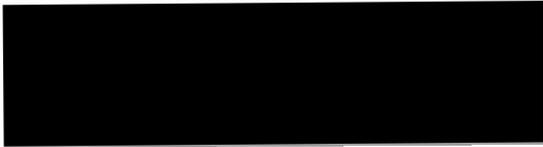
Office: NEBRASKA SERVICE CENTER

Date: OCT 19 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a business related to stonework and seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 25, 2005, denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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 appeal.<sup>1</sup>

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.

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 for processing by the relevant office within the DOL employment

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<sup>1</sup> 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).

system on April 26, 2001. The proffered wage as stated on the Form ETA 750A is \$17.53 per hour, 40 hours per week for an annual salary of \$36,462.40. The labor certification was approved on April 25, 2003.<sup>2</sup> The petitioner filed an I-140 Petition for the beneficiary on March 23, 2004.<sup>3</sup> Counsel listed the following information on the I-140 Petition related the petitioning entity: established: June 9, 1999; gross annual income: \$115,734.00; net annual income: \$44,611; and current number of employees: 2.

The Service Center denied the petition on March 25, 2005, based on the petitioner's failure to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence.

The petitioner appealed and the matter is now before the AAO. We will first examine the petitioner's ability to pay, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Forms 1040, for the years 2001, and 2002, along with a statement of the owner's estimated household expenses and representative bills, a bank letter regarding the petitioning company's bank account, a bank letter regarding the owner's bank account, a copy of one check paid to the beneficiary, and a check ledger showing three additional payments to the beneficiary.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 provides that it did not employ the beneficiary until after he obtained work authorization based his filed I-485 Adjustment of Status application. The petitioner has submitted a copy of one check dated December 23, 2004 demonstrating payment of wages to the beneficiary in the amount of \$2,305. Additionally, the petitioner has provided a ledger showing three additional net payments to the beneficiary in the amounts of \$2,305 on January 31, 2005 (for the month of January); \$2,218 on February 28, 2005 (for the month of February); and \$2,629.77 on March 31, 2005 (for the month of March). The four payments

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<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited the validity of an approved labor certification to the specific alien named on the labor certification application (*See* 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Service based on a Memorandum of Understanding. Procedures for the Service were then set forth in a memorandum from Louis Crocetti, INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

<sup>3</sup> Here, we note that the petitioner failed to file the beneficiary's signed Form ETA 750B with the petition as required by the Louis Crocetti, Assoc. Comm., Adjudications, HQ 204.25-P (Mar. 7, 1996), Memo.

however are insufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

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. 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 proprietor, 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, including himself, and his wife, and two children in Aurora, Colorado. The tax returns reflect the following information for the following years<sup>4</sup>:

<b>Great Marble and Granite</b>	<b>Petitioner's AGI (1040)</b>	<b>Gross Receipts (Schedule C)</b>	<b>Wages Paid (Schedule C)</b>	<b>Net profit from business (Schedule C)</b>
<b>2002</b>	\$31,592 <sup>5</sup>	\$318,300	\$0	\$44,611
<b>2001</b>	\$85,050 <sup>6</sup>	\$440,180	\$0	\$61,638

If we reduced the owner's adjusted gross income (AGI) by \$36,462.40, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of -\$4,870.40 in 2002, \$48,587.60 in 2001, and we have no information to determine this for the years 2003 or 2004. Based

<sup>4</sup> No tax return was submitted for the year 2003, or 2004, which would not have been available at the time that the petitioner submitted the I-140 Petition, but would have been available at the time that the petitioner submitted its appeal.

<sup>5</sup> The owner also reports ownership of a nail salon, which registered a \$9,866 loss in 2002, and is reflected in the owner's reduced AGI.

<sup>6</sup> The owner's AGI reflects a \$28,000 capital gain from the sale of stock.

on the above analysis, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage in 2002 and support himself and his family. The petitioner submitted a statement of owner's estimated expenses, and copies of bills to document the estimated expenses. The owner's listed estimated expenses total \$43,400.16 per year, based on monthly bills in the amount of \$3,616.68, so that the owner would be able to pay the proffered wage in the year 2001 and still support his family.

The petitioner also submitted two letters from Premier Bank:<sup>7</sup> one letter confirmed that the individual owner had a current bank balance of \$61,960.35 as of December 23, 2003; the second letter provided that the petitioning business had a balance of \$123,863.69 as of December 23, 2003, and that the business account had a balance of \$119,723 on April 23, 2001. While the owner's assets are given consideration in the case of a sole proprietor, the year specifically in question is 2002. Counsel did not provide any evidence to show that the petitioner had sources available to support himself and his family in the year 2002. The personal checking only provides his balance at the end of 2003, not the year in question.

Furthermore, we note regarding the letter concerning the business' bank account, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." The petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise does not provide an accurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported in the petitioner's bank statements reflect funds that would be additionally available to the amounts shown by the petitioner's tax return, such as the petitioner's gross receipts, which would already be considered as a factor of the petitioner's AGI. As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns reflect the company's liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

On appeal, counsel contends that: (1) the petitioner had the ability to pay until the time that the beneficiary "ported" to a new employer under the American Competitiveness in the Twenty-First Century Act (AC21); and (2) that the beneficiary would be allowed to port to a new employer since his I-485 Adjustment of Status application<sup>8</sup> had been pending for over 180 days and he moved to a same or similar position to work for [REDACTED]

Regarding the petitioner's first argument that the petitioner had the ability to pay the beneficiary, counsel cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo, and notes correctly that CIS will examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

We have reviewed the petitioner's net income above, under which test the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Counsel then contends that the bank account records demonstrate that the petitioner had the ability to pay since the back accounts represent the petitioner's net current assets. Counsel's statement does not account for the petitioner's liabilities, only the petitioner's assets. With respect to the petitioner's business accounts, the petitioner's tax returns provide the best documentation regarding the company's assets,

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<sup>7</sup> The letters that Premier Bank provided were signed by [REDACTED] Senior Banking Associate. It is unclear whether [REDACTED] is related to the petitioner.

<sup>8</sup> On July 31, 2002, the Service published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. See: Federal Register: July 31, 2002, (Volume 67, Number 147), page 49561.

exhibiting cash, and gross income, minus the business' expenses (or liabilities). For this reason, we find that the petitioner's bank accounts cannot be viewed separately without considering other factor, such as liabilities. Therefore, we cannot conclude based on the bank letters provided alone that the petitioner has met the net current assets test, without factoring in the petitioner's liabilities. The petitioner has not provided an audited financial statement outlining both its assets and its liabilities, so that we are unable to calculate the petitioner's net current assets.

Counsel then contends that the Yates memo allows for approval of the petition where the petitioner can demonstrate that it paid the beneficiary the proffered wage. The petitioner has provided evidence to demonstrate that it paid the beneficiary the proffered wage after he began working in the form of a copy of one check, and a ledger showing three additional payments. This evidence, however, relates to late 2004, and early 2005, and by itself would be insufficient to demonstrate the petitioner's ability to pay in the years 2002, 2003, or 2004.

Next, counsel contends that the beneficiary would be eligible to "port" to a new employer based on AC21 § 106(c), which added a new subsection (j) to section 204 of the INA, which states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

In the case at hand, the beneficiary's I-485 Adjustment of Status application was filed on March 23, 2004 at the same time that the petitioner filed the I-140 on behalf of the beneficiary. Counsel contends that after 180 days, the beneficiary accepted an offer of employment from another company. Counsel references an Exhibit E regarding details of the beneficiary's new employment. We note that the record before us does not contain any Exhibit E, or the letter from the beneficiary's new employer. As we do not have the exact date that the beneficiary started with the new petitioner, it is unclear whether the beneficiary ported from an unapproved petition, or ported later from the denied petition. If the petition was unapproved at the time that the beneficiary ported, we would look to guidance provided by the May 12, 2005, William R. Yates Memorandum, "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21].*"

The Yates Memo, in pertinent part, provides for the following:

**Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under § 106(c) of AC21?**

**Answer:** If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been

approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of a petition, approve the petition on its [sic] merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

- B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

(Emphasis in original).

Based on the foregoing, the instant petition cannot be approved as the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence, and the instant petition cannot be approved.

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. The beneficiary's Adjustment of Status application will be returned to the Director, Nebraska Service Center, so that the director may review the beneficiary's claim for portability under the provisions of AC21 (as the director is the individual with jurisdiction over the beneficiary's I-485).