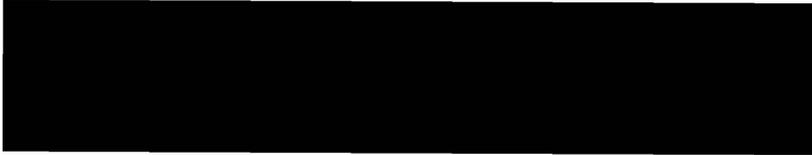




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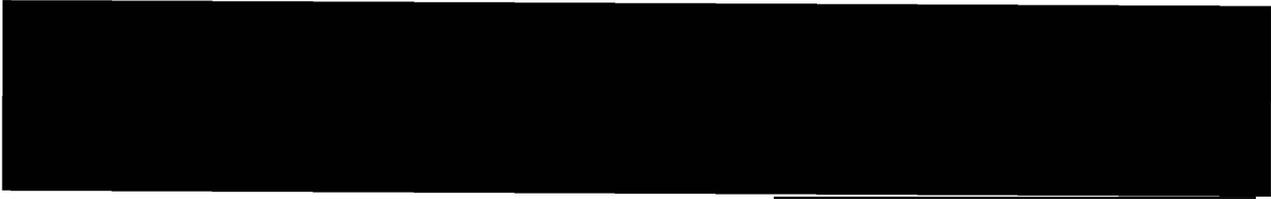
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FILE: WAC 05 045 52200 Office: CALIFORNIA SERVICE CENTER Date: APR 24 2007

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a sole proprietorship that fabricates and installs marble, granite and limestone. It seeks to employ the beneficiary¹ permanently in the United States as a marble fabricator. 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 and 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 September 26, 2005, 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 C.F.R. § 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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$24.39 per hour (\$50,731.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a fabricator.

¹ The beneficiary is also known as [REDACTED]

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.²

Counsel submits copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, various schedules including Schedules C from the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002 and 2003 (the full returns were not submitted).

Other relevant evidence in the record includes copies of the following documents: a motion to reconsider/brief on appeal dated November 15, 2005; W-2 Wage and Tax statements received from the petitioner for 2001, 2002 and 2004 evidencing wage payments to the beneficiary of \$26,670.00, \$19,570.75 and \$8,380.00 respectively; one page of the beneficiary's personal federal U.S. tax return stating wages of \$3,480.00 received in 2003; a statement attached to a copy of Form I-290B; a statement of the petitioner's personal monthly expenses dated July 30, 2005 totaling \$1,410.00 for seven items; three business checking statements for the period April 5, 2005 to July 5, 2005; and, the petitioner's U.S. Internal Revenue Service tax return Form 1040 for 2004.

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 1980 and to currently employ 6 workers.

On appeal, counsel asserts that the evidence submitted such as tax returns and W-2 statements evidence the petitioner's ability to pay the proffered wage. Further, counsel contends that the petitioner's net assets, real estate, and personal property are also evidence of the ability to pay the proffered wage.

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 established that he employed and paid the beneficiary \$26,670.00 (2001), \$19,570.75 (2002), and \$8,380.00 (2004) according to W-2 statements submitted into evidence. Since the

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).

proffered wage is \$50,731.20, the petitioner did not pay the proffered wage in any year in which W-2 statements were submitted.

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, the sole proprietor is single. The proffered wage is \$50,731.20 per year. The tax return reflects the following information for the following years:

2004

Adjusted gross income (Form 1040)	\$101,040.00 ³
Gross receipts or sales (Schedule C)	\$603,615.00 ⁴
Wages paid/cost of labor (Sch. C)	\$102,540.00 ⁵
Net profit from business (Schedule C)	\$107,915.00 ⁶

The petitioner is obligated to demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date. Therefore, for the year 2004 for which a complete tax return was submitted, the petitioner demonstrated that he was able to pay the difference between wages actually paid to the beneficiary and the proffered wage.

³ IRS Form 1040, Line 36

⁴ IRS Form 1040, Schedule C, Part I, Line 1

⁵ IRS Form 1040, Schedule C, Part II, Line 26 or Part III, Line 37.

⁶ IRS Form 1040, Schedule C, (stone fabricator; custom marble), Part II, Line 31.

However, the petitioner submitted Schedules C from the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002 and 2003, but the full returns were not submitted. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The proffered wage is \$50,731.20 per year. The petitioner stated net profits on Line 31 of Schedule C for each of those years of \$34,354.00, \$35,743.00 and \$19,904.00 respectively. The petitioner stated his monthly personal expenses were \$1,410.00, monthly or \$16,920.00 yearly. We do not find this statement credible. This statement must indicate all of the petitioner's household living expenses. Such items, other than stated by the petitioner are generally the following: housing (rent or mortgage),⁷ installment loans, insurance (household, health, life, etc.), utilities (water/sewerage/refuse collection), credit cards, student loans, clothing, school, gardener, house cleaner, and, any other recurring monthly household expenses.

As stated above, the petitioner paid the beneficiary in the years 2001, 2002 and 2004 wage payments of \$26,670.00, \$19,570.00 and \$8,380.00 respectively. Without information concerning the petitioner's adjusted gross income, we cannot determine if the petitioner had the ability to pay the proffered wage for 2001, 2002 and 2003. Based upon the slight information presented without benefit of the full tax return information, the petitioner has not shown that he could pay the proffered wage and meet his personal expenses for years 2001, 2002 and 2003. According to the regulation at 8 C.F.R. § 204.5(g)(2) evidence of the ability to pay, *inter alia*, shall be in the form of copies of federal tax returns. According to the case precedent, sole proprietors must show that they can sustain themselves. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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).

Counsel contends that the petitioner's net assets, real estate, and personal property are also evidence of the ability to pay the proffered wage. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. The petitioner's land and buildings are not necessarily liquefiable assets, as the petitioner states, since he lives there. There is no evidence to show that the petitioner would be willing to encumber the property to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel has submitted three business checking statements for the period April 5, 2005 to July 5, 2005. The information contained in only three months of statements is insufficient to make a determination of the ability to pay the proffered wage from the priority date of April 12, 2001; which is four years before those statements were produced.

On appeal, counsel referenced a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that states that "If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit." Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

⁷ If the petitioner uses the business premises as his residence, he is required to apportion an expense to this item.

On appeal, counsel asserts that since the petitioner has paid the beneficiary wages, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the present case, the petitioner is a sole proprietorship that fabricates and installs marble, granite and limestone that had been in business for 21 years at the time the Form ETA 750 was filed. In 2004, the petitioner had \$603,615.00 in gross receipts and paid out \$102,540.00 in wages and salaries during the year in which the priority date was established. The petitioner stated it employed a total of 6 employees at the time the petitioner was prepared. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage in 2004. We note that the petitioner has never paid the beneficiary the proffered wage from the priority date based upon the evidence submitted, and, by not submitting his full tax returns for the years 2001, 2002 and 2003 the petitioner has precluded our ability to make a determination of the petitioner's ability to pay the proffered wage. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the assets of the petitioner should be considered as evidence of the ability to pay the proffered wage. *Ranchito Coletero* concerns entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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).

Counsel also cites the "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes) for all the issues discussed in those minutes without drawing or relating their applicability to the specific facts of this case. After an examination of the evidence presented, the AILA minutes and counsel's brief, issues such as the addition of depreciation to pay the proffered wage, the taxable income of the petitioner being just as high as the proffered wage for years between the priority date and tax year 2004, negative taxable income being present in the petitioner's return when it is not, the hiring of the beneficiary to boost profits (when the beneficiary has already been on the payroll since 2001) are simply not relevant or at issue in this case. It is important to re-state that by not submitting his full tax returns for the years 2001, 2002 and 2003 the petitioner has precluded our ability to make a determination of the petitioner's ability to pay the proffered wage. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Counsel's reliance on the AILA minutes is misplaced.

Counsel refers to several unpublished AAO decisions. Counsel does not provide a published citation relating to the use of total assets or depreciation that he argues are evidence of the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished 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).

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 for years 2001, 2002 and 2003.

ORDER: The appeal is dismissed.