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U.S. Citizenship
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FILE:

EAC 03 211 51644

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:

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:

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, Vermont Service Center, and then on August 10, 2005, was subsequently denied by the Administrative Appeals Office (AAO) on appeal. The petitioner submits a motion to reopen and reconsider the matter. The motion is granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The sole proprietor is the owner of three liquor stores. It seeks to employ the beneficiary permanently in the United States as a store manager of one of its liquor stores. 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, as a sole proprietor 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 support herself and her dependents. The director denied the petition accordingly.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. The petitioner has submitted new documentation with regard to the petitioner's personal financial worth, including the petitioner's Form 1040 for tax year 2005, with Schedules C. Counsel also submits the sole proprietor's joint personal financial statements for the years 2001, 2002, 2003 and 2004, that outline the sole proprietor's assets as well as monthly expenses for each year. Finally, counsel also submits additional bank statements with regard to the sole proprietor's financial resources in tax years 2001, 2003, and 2004. This evidence is viewed as sufficient to reopen the proceedings.

The record shows that the motion is properly filed and timely. 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 January 27, 2004 denial, the single issue in this case is whether or not the petitioner, as a sole proprietor, has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. With regard to the AAO's dismissal of the appeal, the AAO further noted that while the sole proprietor's Schedule B on its 2001 tax return suggested additional financial resources, the petitioner had submitted no additional evidentiary documentation to establish the petitioner's additional financial resources as of the 2001 priority year or any other year. The AAO affirmed the director's decision on appeal.

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 21, 2001. The proffered wage as stated on the Form ETA 750 is \$21.33 an hour, or \$44,366.40 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 motion.¹

Counsel submits the following new documentation:

The petitioner's Forms 1040 tax return, with accompanying Schedules C for tax year 2005;

Copies of a Form 1099-INT Interest Income statement from NewAlliance Bank, from WebsterBank, Waterbury, Connecticut, and Fidelity Brokerage Services, L.L.C. Boston, Massachusetts. These documents indicated the [REDACTED] account² earned \$22.38 in interest income in 2005, the [REDACTED] account earned \$1.47 in interest income in 2005, and the [REDACTED] account earned \$38.58 in interest income in 2005;³

Copies of documents identified as "Personal Financial Statement." These documents list the assets of the petitioner and her husband as of December 31, 2001, 2002, 2003, and 2004 in the following areas: checking and savings accounts, household goods/furnishings, jewelry, vehicles, real estate and properties, the sole proprietor's personal residence, and life insurance policies. These documents also list the sole proprietor's and her husband's liabilities, including aggregate sums for home mortgage and vehicle loans, as well as monthly expenses. These documents identify the sole proprietor's monthly expenses as \$4,141.33 in 2001, \$6,101.56 in 2002, \$4,952 in 2003, and \$5,097.56 in 2004.

¹ 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. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). By granting the motion to reopen, the AAO also accepts the evidence submitted by the petitioner to the record on motion.

² This bank statement only contains the payee's account number, and does not state that the sole proprietor is the holder of this account.

³ This document also indicates gross proceeds in 2005 of \$41,721.35.

Copies of the beneficiary's W-2 forms for tax years 2005 and 2006 that indicate he earned \$45,336.40 in 2005 and \$44,366.40 in 2006; and

The sole proprietor's federal tax return for 2005 with all schedules and attachments.⁴

The record also contains the sole proprietor's Forms 1040 for tax years 2001 and 2002, as well as a letter from Citizens Bank, dated November 3, 2003 that states the sole proprietor and her husband had an "average complete balance for tax year 2001 of \$11,100, and of \$51,000 for tax year 2002."⁵ In response to the director's request for further evidence, previous counsel submitted a one page breakout of the sole proprietor's average monthly expenses for tax year 2001 and 2002. This document indicates monthly expenses of \$3,810 in 2001 and \$3,630 in tax year 2002. Based on these monthly figures, the sole proprietor's yearly expenses amount to \$45,720 in tax year 2001 and \$43,560 in tax year 2002.

The petitioner also submitted the following documents on appeal:

A Combined Tax Statement for Year 2001, Form 1099-INT, from Citizens Bank, New London, Connecticut, that states the sole proprietor's and her husband's two checking accounts earned \$44.05 and \$17.91 respectively in interest and that a third account, the sole proprietor's savings account, earned \$2,402.43 in interest income in tax year 2001;

A combined tax statement for year 2001 Statement 1099-INT from Citizen's Bank for two accounts identified as [REDACTED] and [REDACTED] and [REDACTED] New Haven, Connecticut that indicates these two businesses earned interest income of \$37.54 and \$128.21 respectively in tax year 2001;

The sole proprietor's Forms 1040 for tax years 2002, 2003 and 2004;

The sole proprietor's personal financial statement prepared on September 29, 2005;

A copy of a statement from Citizens Bank for the period July 15, 2005 to August 11, 2005 that indicates a checking account balance of \$17,654.63;

A bank statement dated July 6, 2005 for the sole proprietor's and her husband's account with [REDACTED] New Haven, Connecticut that indicates an ending balance on an interest bearing account of \$6,444.45;⁶

A statement from [REDACTED] dated August 2005 that indicates an ending portfolio balance in the sole proprietor's husband's account of \$33,288.36.

A copy of the sole proprietor's account with [REDACTED] that indicates an ending value for investments in June 2005 of \$12,355.87.

⁴ The petitioner also submitted further documentation on its expenses, including a Form 1098 for mortgage interest payments, and information on the petitioner's children's educational expenses. These items appear to be included in the petitioner's monthly expense items and will not be examined further in these proceedings.

⁵ This letter does not identify whether the Citizens Bank account is a checking or savings account, or both.

⁶ The AAO notes that this document does not indicate whether the account is a checking or savings account .

A copy of an ING Landmark Annuitant statement dated June 30, 2005 for what appears to be a qualified ROTH IRA account.

A copy of [REDACTED] policies for both the sole proprietor and her husband; and

Copies of two promissory notes dated July 5, 2005 that stated loans of \$7,895 and \$45,000 would be repaid to the sole proprietor in monthly payments.

In his initial statement on motion, current counsel states that the AAO noted in its decision that the sole proprietor had an account with an "average complete balance" of \$51,000 in 2002 and that it appeared the sole proprietor and her husband maintained such a balance for the year based on the Schedule B figure for earned interest income on its 2001 tax return. Counsel further notes that while such a sum of readily available cash could establish the sole proprietor's ability to cover the deficit in her adjusted gross income for 2002, the AAO determined on appeal that the petitioner had not met her evidentiary burden because previous counsel⁷ had failed to supply documentary proof of the sole proprietor's 2001 savings. Counsel states that he submits copies of 1099 statements and that the sole proprietor will submit old bank statements for tax year 2001 to determine the exact amount of cash available to her during 2001. Counsel also notes that the sole proprietor and her husband jointly claimed \$34,995 in wages as their own income that was more than sufficient to cover their expenses for a family of two according to poverty guidelines for the year 2001.

Counsel then states that the combination of the sole proprietor's net profit of \$21,170 with the sole proprietor's closing inventory of \$43,029 would have provided \$64,199, which is \$19,833 more than the beneficiary's wage of \$44,266 for tax year 2001. Counsel also reiterates an assertion made by the initial counsel that the sale of another business in 2001 reduced the sole proprietor's income by \$53,044, and that without that loss, the sole proprietor's joint income would have been at least \$74,507, or \$30,141 above the proffered wage of \$44,366.

Counsel also asserts that since the priority date in the instant petition is April 24, 2001, the sole proprietor only has to establish its ability to pay the proffered wage for tax year 2001 from April 26, 2001 to December 31, 2001, which counsel claims amounts to \$30,715.20. Counsel states that since the beneficiary was paid \$27,996 in tax year 2001, there was a shortage of just \$2,719, which was covered by the Schedule C net profit alone, or by the net income indicated on the sole proprietor's Form 1040.

With regard to the taxable interest income of \$2,642 for tax year 2001, which counsel states shows that the sole proprietor had substantial liquid assets/cash, counsel states that he submits copies of the sole proprietor's tax return for tax year 2001, establishing that the interest earned in 2001 was from checking and savings bank accounts. Counsel notes that the sole proprietor is in the process of obtaining old bank statements for the year 2001, and makes similar assertions with regard to the sole proprietor's taxable interest income of \$2,805 shown on the sole proprietor's Form 1040 for tax year 2002.⁸

⁷ The petitioner had been represented by [REDACTED] New Milford, Connecticut who submitted the initial petition, and appeal.

⁸ Counsel also states that the petitioner was looking for old bank statements and investment statements for other tax years. As previously stated, counsel subsequently submits some bank checking account records in April 2007 for tax year 2001, 2003, and for March 2004, in addition to documents initially submitted on

With regard to tax year 2003, counsel notes the sole proprietor had taxable interest income of \$457, and dividends of \$718, and that based on these sums, the sole proprietor had substantial liquid assets with which to pay the difference between the beneficiary's actual wages and the proffered wage, as well as the sole proprietor's monthly expenses. Counsel also adds the sole proprietor's net profits for tax year 2004 with its liquid inventory of \$43,460 and states that the resulting sum of \$61,447 is \$17,081 is more than the proffered annual wage of \$44,366.

With regard to tax year 2004, counsel states that the petitioner only had to establish that she could pay \$16,370.40, the difference between the beneficiary's actual wages of \$27,996 and the proffered wage, in addition to her monthly expenses. Counsel states that this difference was covered by the Schedule C net profit of \$17,987, not taking into consideration the sole proprietor's net income indicated on the Form 1040 of \$88,274, or the cash that the sole proprietor had in her checking and saving bank accounts with her husband, which earned interest in 2004 of \$134 and dividends of \$458.

Counsel states that the sole proprietor had not paid the beneficiary the wages of the store manager position because he was not performing the store manager duties, which the sole proprietor was performing. Counsel then states that the sole proprietor did start to pay the beneficiary the proffered wage as of August 1, 2005. The AAO notes that the beneficiary's Form G-325, submitted with his I-485 application to adjust status, states that the beneficiary was employed as store manager by the petitioner from November 1995 to the date he signed the G-325 on February 15, 2003. On Form ETA 750B, the beneficiary also stated that he was employed by the petitioner as a store manager from January 1996 to the date he signed the Form ETA 750, Part B on March 11, 2001.

The AAO notes that in a subsequent submission to the record, dated April 9, 2007, counsel submits further copies of the sole proprietor's bank statements and also copies of five IRS Forms 1099-INT for tax year 2001. The Forms 1099-INT for tax year 2001 indicate that the sole proprietor, his spouse, and two businesses had interest income of \$2,630.14 in tax year 2001. The bank statements submitted on the record on motion are for disparate periods of time at two banks as follows: Citizens Bank, December 2000 to February 2001; October 13, 2001 to November 2001, December 3, 2002 to January 14, 2003 and November 2004 to December 2004; and New Haven Savings Bank, January 2003 to April 2003, and March 2004. Counsel also submits bank statements for New Haven Savings Bank for January through April 2003, October 2003 and March 2004, as well as two bank statements from NewAlliance Bank from June and October 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 October 1993 and to have one employee, and a gross annual income of \$355,032. As stated previously, the beneficiary stated on the Form ETA 750 that he had worked for the sole proprietor from January 1996 to the date he signed the ETA 750, namely, March 11, 2001.

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

motion for various accounts during either June or August 2005.

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).

On motion, counsel asserts that the petitioner will submit its Forms 1099 for tax years 2001, 2002, 2003, and 2004 to further substantiate the sole proprietor's additional financial resources. However, the record only reflects that the sole proprietor submits such documentation for accounts held by the sole proprietor for tax years 2001 and 2005. The AAO will examine these documents as they impact on the sole proprietor's ability to pay the proffered wage further in these proceedings.

Further, counsel on motion appears to calculate the sole proprietor's ability to pay the difference between the beneficiary's actual wages and the proffered wage by combining the sole proprietor's net profit for one business, as established on one of the Schedules C submitted with the 2001 tax return, with the difference between the sole proprietor's opening and closing inventories, as established in Part III, Cost of Goods Sold and contained on the first page of the sole proprietor's Schedule C, Part 1, Income, line 4. First, it is noted that the sole proprietor's net profit in any tax year is the total of all the net profits for all three businesses identified on the sole proprietor's Schedules C, and carried forward to line 12, Business Income or Loss. In tax year 2001, this sum is \$39,870. Further, the AAO does not examine the sole proprietor's net profit but rather its adjusted gross income in the examination of the sole proprietor's ability to pay both the beneficiary's wages and its household expenses. Finally, counsel's references to the sole proprietor's beginning and closing inventories as an indicator of the petitioner's ability to pay the proffered wage are not persuasive. These figures are part of the calculations as to the sole proprietor's cost of goods sold, and by extension, the sole proprietor's income. These figures are already calculated into the consideration of the sole proprietor's gross income, as established on line 7, Schedule C. The AAO will examine the sole proprietor's ability to pay the proffered wage more fully further in these proceedings.

On motion, counsel asserts that the petitioner only has to establish its ability to pay the proffered wage from the April 21, 2001 priority date to December 31, 2001. Counsel is also mistaken with this assertion. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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 it employed and paid the beneficiary \$27,996 in tax year 2001 and \$27,997 in tax year 2002. In tax years 2005 and 2006, based on W-2 Forms submitted on motion, the petitioner established that it paid the beneficiary the entire proffered wage, \$44,366.40 in tax year 2005 and 2006. The record does not reflect any wages paid by the sole proprietor to the beneficiary in tax years 2003 and 2004. Therefore the petitioner has not established that it pay the full proffered wage from the priority date in 2001 onwards. Therefore the petitioner has to establish its ability to pay the difference between the

beneficiary's actual wages and the proffered wage in tax years 2001 and 2002, and the entire proffered wage in tax years 2003 and 2004.

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 supports a family of two persons in tax year 2001, a family of three persons in tax year 2002, and a family of four persons in tax years 2003 and 2004. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 18,646	\$ 10,401
Petitioner's gross receipts or sales (Schedule C) ⁹	\$ 355,032	\$ 383,290
Petitioner's wages paid (Schedule C) ¹⁰	\$ 25,663	\$ 27,996

⁹ The sole proprietor's adjusted gross income is the combination of all three businesses' net profits. The petitioner's wages, gross receipts, and net profits are taken from the individual Schedules C for the respective tax year.

¹⁰ There is a discrepancy of \$2,333 in the record between the wages declared on the petitioner's Schedule C and the wages paid to the beneficiary for tax year 2001. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, the sole proprietor needs to explain the

Petitioner's net profit from businesses (Schedule C)	\$ 21,170	\$ 4,670
	2003	2004
Proprietor's adjusted gross income (Form 1040)	\$ 78,551	\$ 78,568
Petitioner's gross receipts or sales (Schedule C)	\$ 447,015	\$ 465,991
Petitioner's wages paid (Schedule C)	\$ 27,996	\$ 27,996
Petitioner's net profit from businesses (Schedule C)	\$ 13,449	\$ 17,987

As illustrated above, the sole proprietor in none of the tax years examined had sufficient adjusted gross income to pay either the difference between the beneficiary's actual wages and the proffered wage, or the beneficiary's entire wage, and also pay its monthly expenses. As stated previously, the sole proprietor submitted monthly expenses statements for tax year 2001 and 2002 with the initial petition. In these two years, the petitioner had yearly expenses of \$45,720 in 2001 and \$43,560 in 2002. On motion, the sole proprietor provided additional monthly expenses statements for the years 2003 and 2004 that indicate monthly expenses of \$4,952, or annual expenses of \$59,424. The statements also establish monthly expenses of \$5,097.56 in 2004, or annual expenses of \$61,170.72.

In the 2001 priority year and in tax year 2002, the sole proprietor could not have paid her yearly expenses and the difference between the beneficiary's wages and the proffered wage. 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 difference between the beneficiary's actual wages and the proffered wage. In the priority year, the difference would have been \$16,370.40, or \$18,703.40.¹¹ With regard to tax year 2002, the difference between the beneficiary's actual wages and the proffered wage would have been \$16,370.40. It is noted that the sole proprietor's adjusted gross income of \$10,401 in tax year 2002 is less than the difference between the beneficiary's actual wages and the proffered wage. In both these years, the sole proprietor would have been left with a deficit to pay the monthly expenses of either two individuals in tax year 2001 or three individuals in tax year 2002.

With regard to tax years 2003 and 2004, as previously noted, the record does not contain any W-2 forms for the beneficiary, therefore the sole proprietor has to establish that it has the ability to pay the entire proffered wage of \$44,366.40 in tax year 2003 and 2004, as well as pay the sole proprietor's monthly household expenses. As noted above, the sole proprietor's adjusted gross income in 2003 was \$78,551 and in 2004 was \$78,568. While these sums are higher than the sole proprietor's adjusted gross income for the previous two years, the sole proprietor's yearly expenses for tax year 2003 and 2004 were \$59,424, and \$61,170.72, respectively. Thus, after paying these expenses, the sole proprietor would have had only \$19,127 in 2003 and \$17,397.28 in 2004 to pay the entire proffered wage of \$44,366.40.

With regard to counsel's assertion that the sole proprietor's and her husband's wages would have been available to pay the monthly expenses, the AAO notes that there is no evidence on the record as to sole proprietor's and her husband's actual wages in tax year 2001, such as W-2 forms, or any subsequent years.

difference in the wages contained on the Rosette Liquor Store Schedule C, and the wages stated on the W-2 form prepared by the sole proprietor.

¹¹ See previous comments on the discrepancy in wages claimed on the sole proprietor's Schedule C for tax year 2001 and the beneficiary's W-2 form for tax year 2001.

Furthermore the wages identified on the first page of the sole proprietor's Form 1040 are already considered in the calculation of the sole proprietor's adjusted gross income.

In his initial decision, the director had determined that the sole proprietor did not have sufficient financial resources in tax years 2001 and 2002 to pay the difference between the beneficiary's actual wages and the proffered wage, as well as pay its monthly expenses. The AAO in its review of the director's decision affirmed the director's decision, although it commented that the sole proprietorship's interest income for tax year 2001, noted on Schedule B as \$2,402, could denote additional financial resources with which the sole proprietor could pay the difference between the beneficiary's actual wages and the proffered wage. As noted by the AAO in the appeal dismissal, the petitioner had not submitted any additional evidentiary documentation to establish its ability to pay the proffered wage in response on appeal, and thus the AAO affirmed the director's decision.

With regard to this issue, counsel on motion submits Forms 1099-INT from Citizens Bank for tax year 2001 and from Fidelity Brokerage for tax year 2005. As previously stated, counsel also submits additional monthly bank statements from Citizens Bank for December 14, 2000 to January 12, 2001; January 13, to February 13, 2001; September 15, 2001 to October 12, 2001; October 13, 2001 to November 14, 2002; and for November 2001 to December 13, 2001. The AAO notes that counsel did not submit all the sole proprietor's bank statements for the entire tax year 2001, and also notes that the Citizens Bank account appears to be for a checking account that may already be represented in the Schedule C expenses and profits. Of more probative weight would be money market brokerage accounts or savings accounts.¹² However, the AAO will examine these bank statements to further clarify the possible use of bank statements such as those submitted by counsel. The AAO notes that the average balance for these 2001 statements is \$5,479.84. This average balance is not sufficient to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year.

Furthermore, while the 1099 Form submitted for the priority year 2001 indicates interest income of \$2,402 from a Citizens Bank savings account, this fact by itself does not establish that the petitioner had sufficient funds in the savings account throughout 2001 to pay the proffered wage. Of more probative weight would have been more extensive documentation of the sole proprietor's Citizen's Bank savings accounts throughout the 2001 priority year. It is also noted that if the sole proprietor had used the funds in this savings account in 2001 to pay the difference between the beneficiary's actual wages and the proffered wage, the interest income would have decreased, as well as the savings. Furthermore, the sole proprietor's 2001 interest income, which decreases in the subsequent tax returns found in the record, could have been based on a single large deposit into the Citizens Bank account that earned interest while it was in the account for a part of the year, and then withdrawn.

It is noted that the petitioner did submit further documentation with regard to the sole proprietor's financial assets in tax year 2005, as well as some bank statements for tax years 2003 and 2004. As stated previously, the sole proprietor has to establish its ability to pay the proffered wage as of the 2001 priority year, through tax years 2002, 2003, 2004, and until the beneficiary obtains lawful permanent residence. Furthermore, based on the petitioner's documentation for tax year 2005 submitted to the record, the sole proprietor appears to

¹² It is noted that counsel submits two 2004 monthly statements for NewAlliance Bank and five 2003 statements for New Haven Savings Bank. However, the record does not reflect clearly that these are savings or checking accounts. It is also noted that counsel does not provide sufficient evidence for either 2003 or 2004, based on these statements to establish that the sole proprietor had sufficient additional funds with which to pay the entire proffered wage.

have paid the beneficiary the entire proffered wage. Thus, the petitioner established at least for that year that it has the ability to pay the entire wage.

The AAO further notes that to establish the available funds to pay the proffered wage, the petitioner would have to establish the actual funds available during the year, and not just the interest earned on these funds by the end of the year. The record is not clear that substantial funds were actually available to the petitioner throughout the entire year in the savings account identified in the record, as opposed to the petitioner having a large sum of money in its savings account that for a short period of time earned substantial amounts of interest. As such, the petitioner's submission of its Form 1099-INT for tax year 2001 does not establish that the sole proprietor had sufficient savings available to pay the difference between the beneficiary's actual wages and the proffered wage as of the 2001 priority year and through 2002, 2003, and 2004.

On motion, counsel states that the petitioner had additional financial resources with which to pay the difference between the beneficiary's actual wages in tax years 2001 through 2004, and the proffered wage. Counsel also refers to the statement found in the record submitted by Claudia Christian, Citizens Bank and dated November 3, 2003. However, the petitioner provides no explanation as to why Mrs. Christian's statement with regard to the sole proprietor's "average complete balance" would be viewed as probative evidence in establishing the sole proprietor's ability to pay the proffered wage in tax year 2001 or 2002. Neither counsel nor the sole proprietor provided any further evidentiary documentation to establish the definition of "average complete balance." The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record is also devoid of any evidence that the bank accounts to which Mrs. Christian refers were business checking or savings accounts.

With regard to the use of the sole proprietor's 2001 interest income noted on the petitioner's Schedule B, the petitioner's funds on which this interest was earned is not sufficiently documented in the record to establish the sole proprietor's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Furthermore, the evidence placed on the record on motion, namely the sole proprietor's personal financial statements from 2001 to 2004 are merely statements that are not supported by evidentiary documentation of readily available funds, such as money in investment or savings accounts. 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)). Furthermore, the incomplete evidence submitted on motion as to further financial assets in tax year 2001, 2003, and 2004 are not viewed as sufficient to establish the petitioner's ability to pay the difference between the actual wage and the proffered wage in 2001, and the entire proffered wage in 2003 or 2004.

It is noted that counsel on appeal submitted individual monthly statements for several accounts and that on motion submits an individual monthly statement for several 2005 bank accounts, as well as bank statements for several bank accounts for the years 2001, 2003, and 2004. It is further noted that counsel on appeal and on motion submits documentation of the sole proprietor's financial assets, such as promissory notes, life insurance assets, retirement savings, and real estate and other financial assets. However, these assets are not generally viewed as available to the sole proprietor to pay the proffered wage. In other words, the sole proprietor would have to cash in retirement monies, sell its properties, and/or call in the loans represented by the promissory notes to utilize the money held in these assets to pay the proffered wage. While the AAO would consider the IRA and pension assets of the sole proprietor and the current value of any whole life

insurance policies owned by the sole proprietor if she would wish to cash them in to pay the proffered wage, the documentation provided by the petitioner for these assets is not sufficient to establish the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

As noted previously, counsel's assertions with regard to the examination of opening and closing inventories are without merit. With regard to the examination of the petitioner's Form 1099 for tax year 2001 to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage, the AAO finds the record incomplete as to the actual monies in the sole proprietor's savings account and as to whether these monies were available throughout the priority year. Therefore the AAO does not find the documentation submitted on motion to be sufficient to establish the sole proprietor's ability to either pay the difference between the beneficiary's actual wages and the proffered wage, or the entire proffered wage.

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 motion is granted and the decision of the AAO dated August 10, 2005 is affirmed. The petition is denied.