

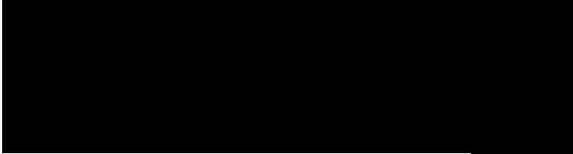
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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC 03 087 53083

Office: VERMONT SERVICE CENTER

Date: **MAY 21 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, on July 22, 2004. The petitioner submitted an initial motion to reopen and reconsider which the director granted. The director subsequently denied the petition on November 16, 2004. The petitioner subsequently submitted another motion to reopen/reconsider on December 20, 2004, which the director granted. However, on March 15, 2005, the director also denied the second motion and reaffirmed his earlier denial of the petition. Counsel submitted a further motion dated April 18, 2005, which the director also granted and then subsequently denied on June 23, 2005. On July 26, 2005, counsel submitted an I-290B appeal to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a hair braiding salon. It seeks to employ the beneficiary permanently in the United States as a hair braider. 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 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, as well as pay her monthly personal expenses. 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 July 22, 2004 denial, the single issue in this case is whether or not the sole proprietor 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, or \$20,800 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 appeal¹. On appeal, counsel submits materials previously submitted with previous motions to reconsider/reopen, or in response to the director's request for further evidence. Counsel does not identify any new evidence submitted on appeal. Relevant evidence in the record includes the sole proprietor's tax returns on Forms 1040, for tax years 2001, 2002, and 2003. Counsel also submits copies of a joint money market account held by the sole proprietor and his wife with PNC Bank for the months December 2000 to September 2001, and copies of statements from a joint checking account with Philadelphia Federal Credit Union for the months January 2001 to December 2001. Counsel also submits copies of the sole proprietor's wife's statements from her checking account with United Bank of Philadelphia. Counsel also submitted copies of the beneficiary's Individual U.S. Tax Return, Form 1040, for tax years 2001 to 2004. These documents indicate the beneficiary also filed her tax returns as a sole proprietor.

The record also contains a description of the sole proprietor's monthly expenses for each month during tax year 2001.² Although counsel noted in a previous motion/appeal dated April 14, 2005 that the beneficiary's Form 1099 was submitted and had been submitted previously, this documentation is not located in the record. The record also contains documentation with regard to the sole proprietor's property holdings, and automobile titles, which the director previously noted correctly are not considered additional funds readily available to pay the beneficiary's proffered wage. 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 on November 13, 1992, and to currently employ one worker, and to have a gross annual income of \$17,500. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since 1996.

On appeal, counsel asserts that based on its adjusted gross income and the amounts that the sole proprietor had in its money market account, and in its checking accounts as of the April 30, 2001 priority date, the petitioner had enough money 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

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 on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² It is noted that the director in his denial of the petition used a yearly household expenses figure of \$14,256, which is based on the sole proprietor's monthly expenses for January 2001. Even though the sole proprietor's monthly expenses fluctuated somewhat during the 2001 tax year, based on the sole proprietor's wages as a parking attendant and other slight variations, the AAO will use the same monthly expenses figure as the director utilized in these proceedings.

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, although counsel asserts in a previous motion and on appeal, that the petitioner submitted a Form 1099 for the beneficiary, this document or documents are not found in the record. It is noted that even if such a document were in the record, the petitioner would not have established its ability to pay the entire proffered wage of \$20,800, but rather only the beneficiary's actual wages for tax year 2001.³ The record reflects no further evidentiary documentation of any subsequent wages paid to the beneficiary by the petitioner in tax years 2002 or 2003. Therefore the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 and onwards. Thus, it has to establish its ability to pay the entire proffered wage as of the April 30, 2001 priority date and to when the beneficiary receives legal residency.

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).

³ The AAO further notes that the beneficiary's Form 1040 for tax year 2001 identifies her place of employment as [REDACTED] Philadelphia, Pennsylvania, which appears to be her home address during that year. Thus the record is not clear as to whether the petitioner actually paid wages to the beneficiary, or whether she earned them in her own home as a sole proprietor.

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, in tax year 2001, the sole proprietor supports a family consisting of himself, his spouse and two daughters. In tax years 2002 and 2003, the sole proprietor supports a family consisting of himself, his spouse, two daughters, and an additional two sons and one daughter. Thus, for tax year 2001, the sole proprietor supports four individuals, while in tax years 2002 and 2003, the sole proprietor supports seven individuals. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 23,973	\$ 38,895
Petitioner's gross receipts or sales (Schedule C)	\$ 17,500	\$ 29,989
Petitioner's wages paid (Schedule C)	\$ 0	\$ 0
Petitioner's net profit from business (Schedule C)	\$ 5,506	\$ 5,105
	2003	
Proprietor's adjusted gross income (Form 1040)	\$ 42,420	
Petitioner's gross receipts or sales (Schedule C)	\$ 29,713	
Petitioner's wages paid (Schedule C)	\$ 0	
Petitioner's net profit from business (Schedule C)	\$ 7,384	

The sole proprietor's adjusted gross incomes of \$23,973 in 2001, \$38,895 in 2002, and \$42,420 in 2003 cover the proffered wage of \$20,800. However, the sole proprietor has to establish it can both cover its household expenses and pay the proffered wage before it has demonstrated its ability to pay the proffered wage. Utilizing an annual expenses figure of \$14,256 based on the sole proprietor's claimed expenses for January 2001, and deducting this from the sole proprietor's adjusted gross income for tax years 2001, the sole proprietor would have the following sum to pay the proffered wage after his annual expenses were considered: \$9,717. Clearly this sum is insufficient to pay the proffered wage of \$20,800 in tax year 2001, and the sole proprietor would need \$11,083 in additional available funds with which to pay the proffered wage. With regard to tax years 2002 and 2003, the sole proprietor added three additional dependents in these two tax years, and thus, his yearly expenses would have increased.⁴

The record does not have any further information on the sole proprietor's annual expenses in these two years. It is noted that the proffered wage is almost over 50 percent of the sole proprietor's adjusted gross income in 2002, and is only slightly under 50 percent of the petitioner's adjusted gross income in 2003. Even if the figure for annual expenses in 2001, namely \$14,256, were utilized for calculating the petitioner's ability to pay the proffered wage of \$20,800 in tax years 2002 and 2003 and his monthly expenses, the sole proprietor would have only \$24,639 in 2002, and \$21,164 in 2003 with which to pay the annual expenses for seven

⁴ The sole proprietor in his itemized monthly expenses indicated a constant monthly expense of \$150 for food throughout tax year 2001 for a household of five persons. This sum would increase with three additional dependents.

individuals. The record does not contain sufficient evidence with regard to the sole proprietor's household expenses in 2002 and 2003 to establish that such sums are sufficient to both pay the proffered wage and pay the sole proprietor's monthly expenses for seven individuals.

On appeal, counsel states that the sole proprietor's joint money market accounts and checking accounts could be used as sources of additional funds with which to pay the proffered wage. Counsel is correct that the sole proprietor's personal assets and liabilities can be considered when considering the sole proprietor's ability to pay the proffered wage. In the instant case, since the record does not contain any evidentiary documentation, such as a W-2 form or a Form 1099-MISC, the sole proprietor has to establish its ability to pay the entire proffered wage.

The record of proceeding contains bank statements from the petitioner's joint money market account that only covers mid-month December 2000 to mid-month October 2001, with no documentation provided for November and December 2001. Thus, an average monthly balance for the entire year is not available. Utilizing the ending balances for the money market accounts submitted to the record, the sole proprietor has an average monthly balance of \$6,679.15. 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.

The average monthly balance for the sole proprietor's joint checking account with his wife is not calculated as this account could have been utilized in the sole proprietor's business and thus the cash could have been included in expenses and costs listed on the sole proprietor's Schedule C for tax year 2001. With regard to the sole proprietor's wife's bank account, during tax year 2001, the ending monthly balance average for this account was \$2,102.82. This average balance, and the combination of both monthly balance averages are 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. Additionally, even if the sole proprietor had had substantial additional funds available in his money market or savings accounts, or in his wife's bank account, the sole proprietor submitted no further documentation of money market accounts, savings, or checking accounts for the relevant tax years after the 2001 priority year. 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)).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.