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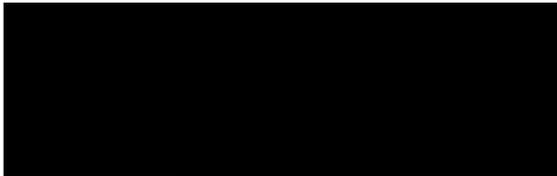
U.S. Department of Homeland Security  
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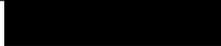
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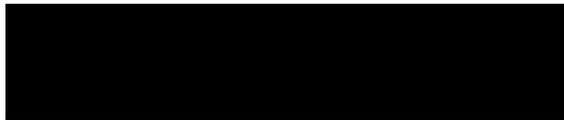
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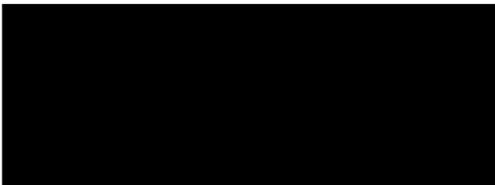
Petitioner:



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, 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 is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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, structured as a sole proprietor, did not have the ability to pay the proffered wage as of the 2001 priority date and until the beneficiary obtains legal permanent residence. 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 January 9, 2006 decision, the single issue in the instant case is whether the sole proprietor has established its ability to pay the proffered wage.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,000 a month, or \$24,000 per year. The Form ETA 750 states that the position requires three years of work experience in the proffered job or three years of work experience in the related occupation of Thai cook.

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>.

On appeal, counsel submits copies of Bank of America personal checking statements starting with April 22, 2004 and ending in October 2005. This account is jointly held by [REDACTED] and [REDACTED] (the sole proprietor). Counsel also submits a copy of the sole proprietor's October 31, 2005 statement of the business checking for the sole proprietor's account with Wells Fargo Bank, Portland, Oregon. In response to the director's request for further evidence dated August 23, 2005, counsel submitted complete copies of the sole proprietor's IRS Forms 1040, U.S. Individual Income Tax Return, for tax years 2001, 2002, 2003, and 2004, with accompanying Schedules C. Counsel noted that the petitioner was a sole proprietor until April 2005.

Counsel also submitted a letter from Bank of America dated July 29, 2003, confirming that the sole proprietor had an account with the bank since October 1997, and that the sole proprietor's current balance was \$23,802.48 with a three month average balance of \$14,589.87. Counsel also submitted a letter from Wells Fargo Bank, Portland, Oregon, dated August 5, 2003 confirming that the sole proprietor had a deposit relation with the bank since July 2001. This letter indicated a balance of \$10,205 in the Wells Fargo account and a six-month average balance of \$4,000.

Finally counsel submitted copies of the beneficiary's 2004 W-2 Wage and Tax statement and stated that the beneficiary started working for the sole proprietor after he obtained work authorization on July 9, 2004. The W-3 was issued by [REDACTED] EIN [REDACTED]. Counsel also submitted copies of some of the beneficiary's pay stubs from October 2004 to October 2005 that indicated hourly wages of \$7.05 to \$9.00 over the one-year period of time. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1999, to currently employ eight workers, to have a gross annual income of \$230,000 and a net annual income of \$24,602. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed that he had worked for the petitioner since June 2000.

On appeal, counsel states that the petitioner is not required to pay the proffered wage until the I-140 is approved and the beneficiary begins work or is admitted to take up the certified employment. Counsel states that based on the sole proprietor's net income from 2001 to 2004, the sole proprietor had the ability to pay the beneficiary the proffered wage of \$24,000, and that the \$8,243 shortfall in tax year 2003 is easily made up by the retained earnings of the two prior years that amounts to \$34,970 above the amount required to meet the \$24,000 proffered wage in the prior years.

Counsel further states that while the sole proprietor's net income may be a good indicator of the ability to pay in the case of a corporation, it is not a complete measure by which to judge the ability of a sole proprietorship to pay

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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).

because the proprietor's income and expenses are meshed with those of the sole proprietorship. Counsel states that the sole proprietor's overall assets and financial picture should be considered in determining whether the petitioner has the ability to pay the proffered wage. Counsel cites *Matter of Ranchito Coletero*, 2002 INA 105 (BALCA January 8, 2004) for the proposition that the proprietor's full financial circumstances should be considered in matters involving a sole proprietorship. Counsel states that based on the sole proprietor's individual tax returns, bank statements, and other evidence previously submitted to the record, the sole proprietor's financial situation demonstrates that the sole proprietor has the ability to pay the proffered wage. Counsel also notes that the director's decision does not adjust for amounts that were paid as wages to the beneficiary during prior years and which were already deducted from sole proprietor's net income.

As stated above, counsel submits additional personal and business bank statements from the first quarter of 2004 to the last quarter of 2005. Included in these documents are Bank of America bank statements for the personal checking account of [REDACTED] for the months April 2004 to October 2004, from December 2004 to February 2005, and then from July, September, and October of 2005. The April 2004 statement has a balance of \$11,599.26, while the September 2005 statement has a balance of \$50,753.59. As also stated previously, on appeal the petitioner submits an October 31, 2005 statement for the sole proprietor's business checking account with Wells Fargo Bank, Portland, Oregon. This statement indicated the sole proprietor had an ending balance of \$3,585.97 in this business banking account as of October 31, 2005.

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 beneficiary claimed on the Form ETA 750, Part B, that he had worked for the petitioner since June 2000, while counsel stated that the beneficiary started working for the petitioner in July 2004. The AAO notes that the assertions of counsel do not constitute evidence. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner did not submit any evidentiary documentation to establish the earlier employment beginning in tax year 2000; however, the petitioner did submit the beneficiary's Form W-2 for tax year 2004 that indicates the petitioner paid the beneficiary \$1,128. The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001, 2002, and 2003, and its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 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 (7<sup>th</sup> 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 supported a family of four in tax year 2001 and 2002. In tax year 2003, the petitioner supported a family of five. The sole proprietor's tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 38,375	\$ 10,165	\$ 30,705
Petitioner's gross receipts or sales (Schedule C)	\$ 230,416	\$ 230,757	\$ 212,525
Petitioner's wages paid (Schedule C)	\$ 0	\$ 28,616	\$ 30,385
Petitioner's net profit from business (Schedule C)	\$ 58,368	\$ 24,602	\$ 15,757 <sup>2</sup>
	2004		
Proprietor's adjusted gross income (Form 1040)	\$ 27,774 <sup>3</sup>		
Petitioner's gross receipts or sales (Schedule C)	\$ 321,853		
Petitioner's wages paid (Schedule C)	\$ 44,339		
Petitioner's net profit from business (Schedule C)	\$ 28,965		

<sup>2</sup> The petitioner has three Schedules C in its 2003 tax return. The AAO uses the net profit identified on the Schedule C for the sole proprietor's restaurant located at [REDACTED], the address listed on the Form I-140 petition.

<sup>3</sup> The petitioner's Form 1040 for tax year 2004 is missing the first page and Schedule A. For the sole proprietor's adjusted gross income, the AAO uses the figure for federal tax adjusted gross income identified on line 8 of the sole proprietor's state of Oregon tax return. The sole proprietor also has four

In tax year 2002, the sole proprietorship's adjusted gross income of \$10,165 fails to cover the proffered wage of \$24,000. It is improbable that the sole proprietor could support himself and four family members on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. With regard to tax years 2001, 2003, and 2004, the petitioner has sufficient adjusted gross income to pay the entire proffered wage in tax years 2001, and 2002, and sufficient adjusted income to pay the difference between the beneficiary's wages and the proffered wage in 2004. However, as stated previously, the sole proprietor has to establish its ability to pay the proffered wage and its yearly household expenses based on its adjusted gross income. In the instant petition, the sole proprietor would have remaining adjusted gross income of \$14,375 in 2001, \$6,705 in 2003, and \$3,774 in 2004 to pay its yearly household expenses. These remaining sums do not appear probable to support a family of four to five members. Thus, the petitioner has not established that it has the ability to both pay the proffered wage and its household expenses based on its adjusted gross income for any of the years in question.

The AAO notes that the director did not request nor did the petitioner provide an itemized list of monthly household expenses. The only yearly expenses noted on the sole proprietor's Schedules A are items such as medical expenses, personal property taxes, and home mortgage interest reported to the IRS. In tax years 2001, 2002 and 2003, the sole proprietor's expenses with regard to home mortgage interest payments alone were \$7,337, \$15,404, and \$17,165. The sole proprietor's 2004 Form 1040 submitted to the record did not contain an accompanying Schedule A; however, the sole proprietor's state of Oregon income tax return for tax year 2004 indicates itemized deductions from Schedule A of \$23,591.<sup>4</sup> Even a partial listing of the petitioner's household expenses suggests that the petitioner cannot both pay the proffered wage and his household expenses based on his adjusted gross income.

With regard to additional funds available to pay either the entire proffered wage, or the difference between the beneficiary's actual wages and the proffered wage, the record of proceeding contains letters from Wells Fargo as of August 5, 2003 and from Bank of America as of July 2003, that indicate the sole proprietor's available funds in these accounts. On appeal counsel also submits more recent monthly bank statements from 2004 and 2005 for the sole proprietor's joint bank account with Bank of America and one bank statement dated October 2005 for the sole proprietor's business checking account with Wells Fargo. However, the sole proprietor's reliance on these bank statements is misplaced.

The sole proprietor's 2003 bank correspondence is not dispositive of any additional funds available to the sole proprietor to pay the proffered wage in 2001 or 2002, or to pay the difference between the beneficiary's wages and the proffered wage in 2004. Furthermore, the record does not reflect whether these accounts are business checking accounts or the sole proprietor's savings, checking, money market or brokerage accounts. With regard to the 2004 and 2005 bank statements, the Bank of America statements indicate this account is a joint checking account for the sole proprietor and his spouse, while the Wells Fargo bank account is a business checking account. These statements are also not viewed as dispositive of whether the sole proprietor had sufficient additional funds available to pay the proffered wage in the 2001 priority year and during 2002 and 2003, or the difference between the beneficiary's wages in 2004 and the proffered wage.

First, the sole proprietor submits incomplete monthly balance statements for its Bank of America joint checking account, so the AAO cannot determine whether average bank balances for the period in question are

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<sup>4</sup> This figure could include other deductions besides home mortgage interest and points: however, the sole proprietor's other Schedule A figures for tax years 2001, 2002, and 2003 as documented by the sole proprietor's tax returns suggest that the majority of the itemized deductions indicated on the state of 2004 Oregon tax return reflects primarily the sole proprietor's home mortgage interest deduction.

sufficient to cover the full or remaining proffered wage, and that the ending balances in the period of time in question are sufficient enough to cover the full or remaining wage and always sufficient to cover the full wages paid on a monthly basis. More importantly, while the record reflects the sole proprietor's current cash assets, it does not reflect the sole proprietor's current liabilities, as would be indicated by the sole proprietor's monthly or yearly household expenses. The AAO will not consider the sole proprietor's current assets without also considering the sole proprietor's current liabilities in its examination of the sole proprietor's ability to pay the proffered wage.

Finally, with regard to the Wells Fargo business checking account statement for October 2005 submitted on appeal, this document reflects an ending balance of \$3,585.97 which is insufficient to establish the petitioner's ability to pay the proffered wage, or any difference between the beneficiary's wages and the proffered wage in tax year 2005. In sum, the sole proprietor cannot utilize either the earlier bank correspondence or the monthly bank statements for tax years 2004 and 2005 submitted on appeal to establish that it has sufficient additional funds with which to pay both the proffered wage and yearly household expenses as of the 2001 priority date and onward.

Beyond the decision of the director, the AAO raises an additional issue with regard to whether the sole petitioner has a realistic job offer for the beneficiary. As stated previously, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

As stated previously, 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 AAO notes that based on CIS records, the sole proprietor's wife appears to be the beneficiary's sister. Under 20 C.F.R §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Furthermore the AAO notes that although the certified Form ETA 750 states no college is necessary and that three years of experience in the proffered position or as a Thai cook are the minimum education training or experience, the beneficiary in fact indicates that he studied construction engineering at Rajchapatch of Surin University, Thailand, from 1980 to 1984 and received a bachelor's degree. If the sole proprietor pursues this matter further, he should provide further evidence as to the *bona fide* nature of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

