

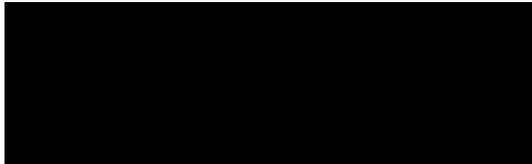


U.S. Citizenship  
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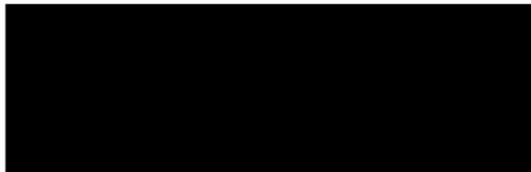
Office: VERMONT SERVICE CENTER

Date: OCT 19 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a pastry and bread baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated July 5, 2005, an 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 at 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).

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<sup>1</sup> The beneficiary last arrived in the United States on July 18, 1996.

Here, the Form ETA 750 was accepted on March 5, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$19.55 per hour (\$35,581.00 per year<sup>3</sup>). 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 appeal.<sup>4</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated March 8, 2004; a cover letter from counsel dated February 8, 2005; a letter from the petitioner's accountant dated February 7, 2005, that stated that [REDACTED] did not have any income "... from Schedule "C" since for 2001 Café Columbia was doing business as a partnership;" the petitioner's U.S. Internal Revenue Service tax returns for 2001 (Forms 1040 and 1065), 2002 (1040), 2003 (1040), and, a copy of a Venezuelan passport stating that [REDACTED] also known as [REDACTED] is a national of the Republic of Venezuela.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship in 2002 and 2003 and as a partnership in 2001. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The date the bakery business was established and the number of employees were not included on the I-140 Form petition.

No IRS federal employer identification (FEIN) tax number was provided for Café Columbia on the petition but one was provided on a 2001 Form 1065 tax return submitted into the record. No further Form 1065 tax returns were submitted after 2001. Form 1040 tax returns were submitted by the petitioner for years 2002 and 2003 (both with a Schedule C, but no FEIN number) with the social security number of [REDACTED] given on those returns as the taxpayer.

On the Form ETA 750B, signed by the beneficiary on February 22, 2001, the beneficiary did claim to have worked for the petitioner from June 1999 to present (i.e. February 22, 2001). The beneficiary has submitted two U.S. federal income Form 1040 tax returns for 2002 and 2003 that were found in the record. No wages were stated in the returns with the beneficiary's income derived from business income as reported on Schedule C of those returns.

The beneficiary stated in each return that his principal business is "bakery" with the business name [REDACTED] at the same address given for the petitioner's business location at [REDACTED] Sunnyside, New York. In 2002 the beneficiary reported gross receipts of \$20,925.00 with net profits of

<sup>2</sup> It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>3</sup> Based upon a 35 hour work week.

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

\$16,335.00, and in 2003 the beneficiary reported gross receipts of \$23,120.00 with net profits of \$16,370.00. In each return the beneficiary's principal expense is "supplies" stated as \$4,590.00 in 2002 and \$6,750.00. There are no Wage and Tax statements (W-2) or 1099-MISC statements in the record. Further, the AAO is unable to correlate the financial data from the beneficiary's tax returns with the petitioner's tax returns since we assume that there is only one bakery facility at the Sunnyside, New York.<sup>5</sup>

On appeal, the petitioner asserts that the petitioner is submitting a "comprehensive report from the company's accountant which details the ability to pay the proffered wage."

Accompanying the appeal, counsel submits additional evidence which is unaudited financial statements as of December 31, 2001, December 31, 2002, and December 31, 2003, for [REDACTED].

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 (BIA 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 not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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<sup>5</sup> 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. If as the beneficiary's tax return indicates he operated his own bakery business at the Sunnyside, New York location in 2002 and 2003, there is a question of the beneficiary's intent to accept employment in the stated job of the labor certification. In pertinent part, in the case *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966), the court stated that in resolving the question of intent to accept employment in the stated job of the labor certification consideration may be given to factors such as whether the alien is presently employed, (and in that case, his/her profession) and, if not, the length of time he/she has not been so employed and the reasons therefore. There is no independent objective evidence such as W-2 or 1099-MISC statements in the record of proceeding that the beneficiary was ever employed as a pastry and bread baker for the petitioner.

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. 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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

According to the Form 1065 submitted for 2001, Café Columbia was a partnership organized to operate a bakery between [REDACTED] and [REDACTED] both noted as partners. A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment.

The record of proceeding does not establish that [REDACTED] is a general partner and it does not contain enough information regarding the general partner's personal expenses. As such, the petitioner has not demonstrated that [REDACTED] assets may be utilized to pay the proffered wage.

*In 2001, the Petitioner Was Organized as a Partnership.*

A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding does establish that [REDACTED] is a general partner<sup>6</sup> but it does not contain enough information regarding the general partner's personal expenses. As such, the petitioner has not demonstrated that [REDACTED] assets may be utilized to pay the proffered wage.

The Form 1065 in the record of proceeding was submitted as signed by [REDACTED] but not dated by her. The AAO notes that the preparer of the Form 1065, identified on the tax return, did not sign the Form but the tax service preparer dated it February 26, 2004, three years after the partnership was formed. There is no substantiated if the return was filed in any year. Based on that Form, the petitioner operated as a partnership in 2001.

The Form 1065 tax return<sup>7</sup> reflects the following information for 2001:

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<sup>6</sup> See Schedule B to the Form 1065 return as well as Schedule K.

<sup>7</sup> Schedule L was blank on the return.



2001

□ Gross sales/receipts (Line 1a):	\$66,874.00
□ Gross profit (Line 3):	\$40,420.00
□ Salaries and wages (Line 9):	\$-0-
□ Ordinary income (loss) from trade or business activities (Line 22):	\$9,220.00

The proffered wage is \$35,581.00 per year. In 2001 the partnership's ordinary income of \$9,220.00 failed to cover the proffered wage.

*In 2002 and 2003, the Petitioner Was Organized as a Sole Proprietorship.*

In 2002 and 2003, the evidence demonstrates that 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.

There is no information in the record of proceeding concerning the petitioner's personal expenses.

As already stated, Form 1040 tax returns were submitted by the petitioner for years 2002 and 2003 (both with a Schedule C, but no FEIN number) with the social security number of [REDACTED] given on those returns as the taxpayer. In the instant case, the sole proprietor is single. The Form 1040 tax returns reflect the following information for the following years:

	<u>2002</u>	<u>2003</u>
Petitioner's adjusted gross income (Form 1040)	\$16,716	\$ 25,671
Petitioner's gross receipts or sales (Schedule C)	\$86,638	\$108,628
Petitioner's wages paid (Schedule C)	\$-0-	\$--0-
Petitioner's net profit from business (Schedule C)	\$20,888	\$ 30,747

The proffered wage is \$35,581.00 per year. In 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$16,716.00 and \$25,671.00 fail to cover the proffered wage even without consideration of the petitioner's

The proffered wage is \$35,581.00 per year. In 2002 and 2003 the sole proprietorship's adjusted gross incomes of \$16,716.00 and \$25,671.00 fail to cover the proffered wage even without consideration of the petitioner's personal expenses. 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 proffered wage.

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.