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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 1 2 2008
SRC 06 273 51785

IN RE: Petitioner:
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:

[redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is architecture. It seeks to employ the beneficiary permanently in the United States as an architectural drafter. 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 (DOL). 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 December 13, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 either 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, accepted for processing by any office within the employment system of DOL. *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 DOL 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 May 29, 2003.[1] The proffered wage as stated on the Form ETA 750 is $23.03 per hour ($47,902.40 per year[2]).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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 1997 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 15, 2003, the beneficiary did claim to have worked for the petitioner since February 2001.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the beneficiary's Citizenship and Immigration Services (CIS) Form I-94 Departure Record, U.S. entry visa and a biographic page from his Republic of the Philippines passport; a letter from the beneficiary dated January 2, 2003; the sole proprietor's U.S. Internal Revenue Service Form 1040 tax return for 2003, 2004 and 2005; the Wage and Tax Statements (W-2) issued by the petitioner to the beneficiary for 2003, 2004 and 2005 in the amounts of $30,900.00, $35,832.00 and $45,192.00 respectively; the petitioner's Form W-3 and Form 1096 for 2005; and the petitioner's Form 1099-MISC statements for various other employees of the petitioner (not including the beneficiary); and W-2 Statements for 2005 for the petitioner's employees.

The director issued a request for evidence to the petitioner on September 27, 2006, requesting, *inter alia,* evidence of wages paid to the beneficiary in 2006. The director requested evidence that the sole proprietor is in possession of sufficient personal assets to pay the proffered wage and gave examples such as bank statements, checking account statements, and stock account statements, (if the sole proprietor would use those personal assets to pay the proffered wage).

Further the director requested a statement of monthly expenses for the petitioner's family:

> This statement must indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. All items may be subject to verification."

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[1] It has been approximately five years since the Application for Alien Employment Certification 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."

[2] According to the labor certification the prevailing wage is based upon a 40 hour work week.

In response prior counsel submitted the following relevant evidence: an explanatory statement dated November 8, 2006;[3] the petitioner's biographic page from his U.S. passport; a Wage and Tax Statement (W-2) issued by the petitioner to the beneficiary for 2003 in the amount of $30,900.00; the beneficiary's U.S. Internal Revenue Service Form 1040EZ tax return in 2003; the petitioner's U.S. Internal Revenue Service Schedules C for 2003, 2004, and 2005; partial copies of the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2003, 2004, and 2005; and the beneficiary's pay statements from the petitioner for the period June 19, 2006 to October 8, 2006.[4]

On appeal, prior counsel asserts the following:

- That in 2003 the beneficiary was paid $30,900.00 and therefore the issue is whether or not the petitioner had the ability to pay an additional $17,000 in salary in 2003 and still be able to support himself and his dependents. Counsel is correct.
- Counsel asserts that the director's reliance on the case precedent of *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) is "misplaced."
- Counsel contends that the director was wrong when she relied upon adjusted gross income rather than "total income" in her determination of the petitioner's ability to pay the proffered wage.
- Counsel asserts that the director erred when she did not consider the petitioner's "extensive assets and other available funds" in her determination of the petitioner's ability to pay the proffered wage.
- Counsel contends that it is "arbitrary, capricious and an abuse of discretion to demand a listing of personal monthly expenses for the petitioner's family."
- Counsel contends that deductions from the petitioner's adjusted gross income represent "discretionary spending choices" rather than fixed expenses.
- Counsel asserts that the director's determination that an alimony payment made by the petitioner to his former spouse in the amount of $44,200.00 "somehow took away [the petitioner's] ability to pay the proffered wage."
- Counsel also asserts: "There is also an issue concerning the fundamental fairness of adding a theoretical expense to actual expenses paid. [The petitioner] wants to show high expenses because then he can pay less alimony to his ex-wife, so there is an incentive to spend as much as he earns."

Accompanying the appeal, prior counsel submits the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2003, 2004, and 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, CIS requires the petitioner to demonstrate financial resources sufficient

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[3] In prior counsel's explanatory statement, she points out that the beneficiary's wages are included each year in his tax returns. Counsel is correct. As can be seen in this discussion, wages paid to the beneficiary by the petitioner are credited to the sole proprietor and used in the determination of his ability to pay the proffered wage.

[4] A statement of monthly expenses for the petitioner's family was not submitted by prior counsel.

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 Sonegawa*, 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.

Prior counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for 2003, 2004 and 2005 in the amounts of $30,900.00, $35,832.00 and $45,192.00 respectively. Since the proffered wage is $47,902.40 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which are $17,002.40, $12,070.40 and $2,710.40 respectively.

Prior counsel submitted evidence[5] that the beneficiary earned compensation in the amount of $48,720.00 in 2006. The beneficiary's pay statements submitted were for the period June 19, 2006 to October 8, 2006. This evidence indicates that the beneficiary in 2006 was paid at the approximate rate of $58,464.00 per year.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above for the years 2003, 2004 and 2005 but he has demonstrated the petitioner's ability to pay the proffered wage in 2006.

Prior counsel contends that the director is wrong when she relied upon adjusted gross income rather than "total income" in her determination of the petitioner's ability to pay the proffered wage. 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 Form 1040 tax returns state that the sole proprietor supports a family of two.

As already stated, the director issued a request for evidence to the petitioner on September 27, 2006, and requested, among other evidence, a statement of the monthly expenses for the petitioner's family. The petitioner did not submit a statement of the monthly expenses. Counsel contends that it is "arbitrary,

[5] The beneficiary's pay statements from the petitioner for the period June 19, 2006 to October 8, 2006.

capricious and an abuse of discretion to demand a listing of personal monthly expenses for the petitioner's family" and therefore by implication the listing could be withheld from evidence or that it was not relevant to the issue of the petitioner's ability to pay the proffered wage. Further, prior counsel asserts that the director reliance on the case precedent of *Ubeda v. Palmer*, 539 F. Supp. at 647, is "misplaced." Prior counsel distinguishes on appeal the factual situation of *Ubeda v. Palmer* and the present case since the subject petitioner's gross annual income in 2003 was 23 times the employer's income in the *Ubeda* case. Also, prior counsel states that the petitioner in *Ubeda* supported a family of seven, whereas the subject petitioner supports a family of two. It is not explained why these factual differences remove the petitioner's case from the case precedent or why the petitioner is excused from submitting a statement of the monthly expenses for the petitioner's family. The *Ubeda* case is persuasive in this matter concerning the issue of the need to determine what are the petitioner's actual personal family expense for 2003, 2004 and 2005 (not as prior counsel asserts whether the sole proprietor earned more than the sole proprietor in *Ubeda,* or whether the sole proprietor had fewer dependents.)

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

As already stated, the I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, all of the family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally includes the following: food, car payments (whether leased or owned), installment loans, insurance (auto, household, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the Schedule A statements to the returns.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence. Even if the petitioner had submitted the requested evidence on appeal, the AAO would not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The sole proprietor's income tax returns state the following:

	2003	2004
Proprietor's adjusted gross income (Form 1040)	$ 47,074	$ 97,386
Petitioner's gross receipts or sales (Schedule C)	$506,473	$572,597
Petitioner's wages paid (Schedule C)	$154,027	$156,442
Petitioner's net profit from business (Schedule C)	$ 90,710	$133,632

	2005
Proprietor's adjusted gross income (Form 1040)	$138,219

Petitioner's gross receipts or sales (Schedule C)	$537,731
Petitioner's wages paid (Schedule C)	$101,210
Petitioner's net profit from business (Schedule C)	$173,617

The difference between wages actually paid and the proffered wage is $17,002.40, $12,070.40 and **$2,710.40.00 for the years 2003, 2004 and 2005 respectively.** In 2003, 2004 and 2005, the sole proprietorship's adjusted gross incomes of $47,074.00, $97,386.00 and $138,219.00 respectively cover the proffered wage of $47,902.40 per year or difference between wages actually paid and the proffered wage. In 2006 the petitioner paid the proffered wage. However, since the petitioner has declined to submit his family's household living expenses, the AAO is unable to determine whether or not the petitioner has the ability to pay the proffered wage from the priority date for years 2003, 2004 and 2005.[6]

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

On appeal, prior counsel asserts that the director erred when she did not consider the petitioner's "extensive assets and other available funds" in her determination of the petitioner's ability to pay the proffered wage. On September 27, 2006, the director requested evidence that the sole proprietor is in possession of sufficient personal assets to pay the proffered wage and gave examples such as bank statements, checking account statements, and stock account statements, if the sole proprietor will use those personal assets to pay the proffered wage. Without submitting independent, objective evidence of either bank or checking statements or stock accounts, counsel extrapolates from the interest and dividend income stated on the petitioner's tax returns that the sums "represent" a sum certain in a savings account and a certificate of deposit as well as "$11.000.00" in stock. No bank or stock account statements were provided. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further there is no statement by the sole proprietor in the record that those funds are pledged or available to pay the beneficiary's wages.

Prior counsel also asserts without substantiation that a "net short-term gain" from Schedule K-1 excluded from the petitioner's total income is available to pay the proffered wage in 2002. There is no statement by the sole proprietor in the record that those funds are pledged or available to pay the beneficiary's wages. Prior counsel has provided no case precedent or regulation that "net short-term gain" from Schedule K-1 should be considered an asset available to pay the proffered wage.

Prior counsel asserts that the director determined that an alimony payment made by the petitioner to his former spouse in the amount of $44,200.00 "somehow took away [the petitioner's] ability to pay the proffered wage." There is no statement in the director's decision concerning the $44,200.00 but any legitimate expense

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[6] Schedule A as submitted with the petitioner's Form 1040 tax returns for 2003, 2004 and 2005 listed personal deductible expenses for home mortgage interest and charitable contributions as follows: 2003, $4,960.00; 2004, $7,066.00 and in 2005, $49,436.00. Since these are but a portion of the petitioner's personal family expenses, reasonably under *Ubeda,* 539 F. Supp. at 647, this evidence is necessary to determine the petitioner's ability to pay the proffered wage from the priority date.

that reduces the sole proprietor's adjusted gross income must be disclosed.[7] It is not clear why an expense should not be taken into account when considering whether funds are available to pay the proffered wage.

According to prior counsel, the petitioner owns the building from which he practices his profession and by implication this realty is available to pay the proffered wage. There is no statement by the sole proprietor in the record that this real estate is pledged or available to pay the beneficiary's wages. While the operators of a sole proprietorship may utilize liquid assets to make up deficiencies to pay the proffered wage, it is not reasonable to conclude that the owner of petitioner has or will convert his real estate assets to cash and have sufficient cash reserves to pay the proffered wage. Since this additional cash infusion does not appear on the tax returns for 2003, 2004 and 2005, it is apparent that the funds were not available from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further there is no independent, objective evidence in the record such as a deed or mortgage that the sole proprietor owns the realty in question.

Counsel contends that deductions from the petitioner's adjusted gross income represent "discretionary spending choices" rather than fixed expenses. As examples of discretionary spending choices counsel considers $7,000.00 that the sole proprietor paid into his Individual Retirement Account, and $20,705.00 for self-employment health insurance in 2003 and provides similar examples in other tax years. Counsel contends that had the petitioner has made or not made the expenditures, or made them in differing amounts, that the sole proprietor's adjusted gross income would have been higher or lower. As already stated, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. at 49. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for years 2003, 2004 and 2005.

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.

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[7] Prior counsel also makes an additional assertion concerning the petitioner's alimony payments which is "There is also an issue concerning the fundamental fairness of adding a theoretical expense to actual expenses paid. [The petitioner] wants to show high expenses because then he can pay less alimony to his ex-wife, so there is an incentive to spend as much as he earns." It is unclear why counsel characterizes any deduction as "theoretical" as according to counsel's statement the alimony payment did occurred. Further an expense is not an asset available to pay the proffered wage. Counsel provides no case precedent or regulation to support her contention.