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U.S. Citizenship
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Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 16 2008
SRC 06 280 52648

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 employment based 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 petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction electrician. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and contends that it has demonstrated its financial ability to pay the proffered salary.

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).

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the ETA 750 is \$31.05 per hour, which amounts to \$64,584 per year. On Part B of the ETA 750, signed by the

beneficiary on April 16, 2001, the beneficiary claims to have worked for the petitioner from April 1998 to April 2001.

On Part 5 of the I-140, the petitioner states that it was established on October 12, 1970, currently employs ten workers, and reports an annual gross income of approximately \$700,000 and a net annual income of \$120,000.

The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$64,584 per year as of the priority date and in response to the director's request for additional evidence and two notices of intent to deny, the petitioner provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001, 2002, 2003, 2004 and 2005, and copies of the sole proprietor's U.S. Individual Income Tax Return for 2001, 2002, 2003, 2004, 2005 and 2006. The tax returns reflect that the sole proprietor filed jointly with his spouse and claimed no dependents. The returns also contain the following information:

	2001	2002	2003	2004	2005
Wages	\$ n/a				
Taxable interest	\$ 76	\$ 52	\$ 847	\$ 1,719	\$ 299
Business Income	\$ 93,256	\$108,753	\$149,955	\$ 98,717	\$ 90,564
Adjusted Gross Income ¹	\$110,366	\$128,353	\$284,004	\$109,273	\$118,807
	2006				
Wages	\$ n/a				
Taxable Interest	\$ 1,960				
Business Income	\$ 29,961				
Adjusted Gross Income	\$ 70,073				

In addition, the W-2s provided by the petitioner indicate that the petitioner paid the beneficiary the following wages:

Year	Wages	Difference of Actual Wages and Proffered Wage
2001	\$24,872	-\$39,712
2002	\$27,296	-\$37,288
2003	\$20,000	-\$44,584
2004	\$24,000	-\$40,584
2005	\$28,800	-\$35,784

¹ Adjusted gross income is shown on line 33 of the Form 1040 in 2001; line 35 in 2002; line 34 in 2003; line 36 in 2004; line 37 in 2005 and 2006.

The petitioner additionally provided copies of five statements of wages from July 2006 to November 2006, reflecting that the beneficiary was paid \$600 each time, however the hours worked or respective length of the pay period is not indicated.

The director denied the petition on May 7, 2007. She reviewed the wages paid to the beneficiary as well as the sole proprietor's adjusted gross income and concluded that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. The director noted that the petitioner had not provided a summary of the sole proprietor's personal monthly expenses that would enable CIS to review the petitioner's ability to pay the certified salary. She also observed that the petitioner had not submitted any other evidence to demonstrate its ability to pay the proffered wage.

On appeal, the petitioner (sole proprietor) states that his failure to submit additional documentation of other sources of income was an oversight and that such documents are herewith provided that would demonstrate his ability to pay the proffered wage.

The petitioner's assertions are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the beneficiary's W-2s and comparative shortfalls to the proffered wage are set forth above.

CIS will also 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As noted by the director, when a petitioner is a sole proprietorship, additional factors will be considered. 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, personal assets and personal liabilities may also be considered as part of the petitioner's ability to pay.² 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, Profit or Loss from Business and are carried forward to the first page of the tax return (line 12) and included within the calculation of the adjusted gross income. Sole proprietors must show that they can cover their existing business expenses as well as show that they can sustain themselves and their dependents and pay the proffered wage out of their adjusted gross income or other available funds. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In order to review a sole proprietor's ability to sustain himself and his dependents as well as pay existing business expenses, as in this case, CIS requests that a petitioner provide a summary of the sole proprietor's household expenses for the relevant period under consideration.

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 this case, the director issued a second notice of intent to deny on April 3, 2007. She specifically requested a statement of the sole proprietor's individual household expenses such as housing, food, automobile payments, insurance, utilities, etc. She also specifically advised the petitioner that if personal assets, such as bank statements, stock accounts, etc., have been available to pay the proffered wage, then evidence must be provided to verify such assets.

The AAO finds the petitioner's failure to submit evidence of personal assets and individual household expenses as specifically requested by the director cannot be excused. The petitioner's documentation related to the sole proprietor's individual assets will not be considered for the first time on appeal. The petitioner failed to submit any evidence of household expenses during the relevant time period under consideration. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the

² Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. This is usually based on a review of Schedule L of a corporate tax return, but may be taken from an audited financial statement submitted by a corporate petitioner or a sole proprietor.

document(s) in response to the director's notice of intent to deny on April 3, 2007. Under the circumstances, the AAO need not and does not consider the sufficiency of this evidence.

In this case, it is noted that the sole proprietor's adjusted gross income reached a high of approximately \$284,000 in 2003 and a low of approximately \$70,000 in 2006. Although these amounts exceeded the proffered wage, without the evidence of pertinent monthly/annual household expenses, as well as documentation demonstrating that there was readily available cash or cash equivalent assets to cover the comparative shortfalls in each of the pertinent years, the AAO finds that as a sole proprietor, the petitioner did not demonstrate its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

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.