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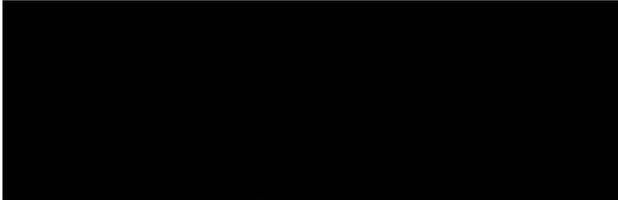
U.S. Department of Homeland Security
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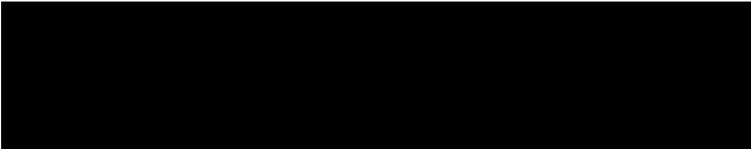
Petitioner:

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 landscaping and gardening service. It seeks to employ the beneficiary permanently in the United States as a gardener.¹ 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 did not have sufficient adjusted gross income to pay both the beneficiary's proffered wage and the petitioner's household 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 January 9, 2008 decision, the single issue in this case is whether or not the petitioner, as a sole proprietorship, has the 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 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, 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 October 14, 1997. The proffered wage as stated on the Form ETA 750 is \$10.42 an hour, or \$21,673.60 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

¹ The petitioner has filed a previous I-140 petition for the beneficiary (WAC 04 075 50749). When the petitioner failed to respond to the director's request for further evidence, the petition was denied on March 14, 2005, based on abandonment.

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.² On appeal, counsel submits a brief with the following documents:

A copy of a Bank of America business checking statement dated October 31, 2007 for account number 09892-09197 that indicates an ending balance of \$416.88. A printed note on the statement states that the petitioner had been a customer since 1991:

Copies of the first page of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for tax years 2002, 2003, and 2006. Counsel states that the interest income listed on these tax forms establish that the sole proprietor had ample funds available for 2002, 2003, and 2006, three years in which the sole proprietor declared interest income; and

Copies of the beneficiary's Forms 1040 for tax years 1997 to 2007 with accompanying Schedules C that all indicate the beneficiary worked for the petitioner during these years.

The petitioner also resubmits a copy of the first page of a statement for the sole proprietor's Bank of America combined Prima Interest Checking and Certificates of Deposit accounts (Account Numbers [REDACTED] and [REDACTED] dated September 5, 2007. The statement has a printed notice on it that the sole proprietor has been a Bank of America customer since 1976. This statement indicates the sole proprietor has \$124,061.48 in an eleven month Risk Free Certificate of Deposit, and \$6,056 in another eleven month Risk Free Certificate of Deposit. Other relevant evidence in the record includes the sole proprietor's IRS Forms 1040 for tax years 1997 to 2006, with accompanying Schedules C for tax years 1997, 2000, 2001, 2004, 2006, and 2007; and a breakout of the sole proprietor's household expenses that indicate monthly household expenses of \$3,543, or annual household expenses of \$42,516. This document listed items such as mortgage payments, food, cars, automobile insurance, health insurance, life insurance, and water and utilities monthly bills. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the sole proprietor did not submit a Schedule C for tax years 1998, 1999, 2002, 2003, and 2005, because the sole proprietorship did not earn any money in those years, although the sole proprietor continued to own and operate his nursery. Counsel notes that during those years, the sole proprietor earned and reported his wages. Counsel refers to the director's comment in his denial of the instant petition that although the sole proprietor had provided evidence of funds of \$135,170.91 in its Bank of America certificate of deposit statement, there was no evidence that the certificate of deposit account existed previously. Counsel states that if the director needed more than a current statement to establish the sole

² 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).

⁴ The beneficiary's gross receipts are identified on Part I Income, line 1, Schedule C, of the respective Schedules C. The Schedules C also identify the beneficiary as working as a gardener for Bennett Nursery.

proprietor's assets in the certificate of deposit, he should have requested such evidence. Counsel then notes that the sole proprietor's September 2007 Bank of America certificate of deposit statement states that evidence does exist that the sole proprietor had the certificate of deposit earlier and refers to the November 2007 Bank of America statement that indicated the sole proprietor had been the bank's customer since 1976. Counsel also points out that the sole proprietor's inclusion of interest income for the sole proprietor's tax returns in 2002, 2003, and 2006 totaled \$2,171, \$2,111, and \$2,354, respectively. Counsel states that in order to earn in excess of \$2,000 per year in interest income, an individual needs to have at least \$80,000 to \$100,000 in their bank account. Based on the sole proprietor's interest income figures, counsel states that the sole proprietor had sufficient income to pay the proffered wage to the beneficiary.

Counsel notes that because the beneficiary did not have a social security number, the sole proprietor did not issue the beneficiary IRS Form W-2 Wage and Tax Statements or IRS Forms 1099-MISC. Counsel also notes, that as a sole proprietor, the petitioner did not submit Forms DE-6. Counsel states that the beneficiary's Forms 1040, U.S. Individual Income Tax Return, establish that the sole proprietor employed the beneficiary on a fulltime basis during the years 1997 to 2007, as documented by the beneficiary's gross receipts⁴ reported on the beneficiary's Schedule C. Counsel calls attention to amendments made to the ETA Form 750 in 1998 and in 2001 as evidence that the beneficiary worked for the sole proprietor.⁵ Counsel then examines the beneficiary's tax returns to establish the beneficiary's wages and the difference between the beneficiary's claimed wages and the proffered wage of \$21,673.60.

With regard to the list of monthly household expenses submitted by the sole proprietor in response to the director's RFE, counsel notes that the list was an itemization of monthly expenses for 2007, and that the sole proprietor never stated that these expenses were for every month of the years 1997 to the present. Counsel notes that with regard to the sole proprietor's certificate of deposit statement, the adjudicating officer dismissed the document because it only represented one month, while the adjudicating officer utilized the sole proprietor's claimed expenses for 2007 when examining the sole proprietor's ability to pay the proffered wage from 1997 to the present. Counsel asserts that the evidence in the record should not be selectively chosen to fit the adjudicating officer's conclusions.

Counsel then states that based on an average rate of inflation of two to three percent a year, the sole proprietor's costs in 1997 would have been 30 percent of the household costs he listed in 2007, or \$12,755. Counsel states that if these costs were subtracted from the petitioner's stated adjusted gross income for 1997, \$46,492 would be left, a figure that is more than adequate to pay the proffered wage of \$21,673.60. Counsel also notes the sole proprietor's depreciation deduction, listed on the petitioner's Schedule C, Line 13, in the sole proprietor's Schedules C for tax years 1997, 2000, and 2004. Counsel states that the depreciation deduction is only a paper loss and not an actual loss, and thus, the sole proprietor's depreciation deductions should be added back to the petitioner's adjusted gross income. Counsel states that the sole proprietor's revised adjusted gross income in tax year 1997, 2000, and 2004 would then be \$68,508, \$30,778, and \$32,694.

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 1990 and to currently employ one worker. On

⁵ The ETA 750 only shows corrections made on September 14, 2001 with regard to the basic hourly wage, the petitioner's telephone number, and the place of employment. However, the record contains correspondence between the petitioner and the state of California Employment development Department dated April 26, 1998 that primarily provides an Employment Development (EDD) number, and contact information for the petitioner.

the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed that he had worked for the petitioner from June 1996 through August 1997. He signed the Form ETA 750 on October 7, 1997.

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 petitioner has not provided W-2 forms or IRS Forms 1099-MISC to establish that it employed and paid the beneficiary the full proffered wage from the 1997 priority date onwards.

The AAO notes that the beneficiary's Schedules C in his Forms 1040 submitted to the file on appeal indicate the beneficiary, himself a sole proprietor, had gross receipts based on his work as a gardener during the years 1997 to 2007. However these documents have minimal evidentiary value because, as will be discussed below, they do not correlate with the wages paid by the petitioner as listed on the sole proprietor's Schedules C. Therefore the sole proprietor has to establish its ability to pay the entire proffered wage of \$21,673.60 from the 1997 priority year to the present.

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, contrary to counsel's assertions, 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).

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 supports a family of varying size during the time period in question. In tax year 1997, the sole proprietor supported a family of three individuals. For tax year 1998 to 2001 and in 2004 and 2005, the sole proprietor supported a family of two individuals. In tax year 2002 and 2003, the sole proprietor supported a family of four and five individuals respectively. In tax year 2005, the sole proprietor supported a family of three individuals.

The tax returns reflect the following information for the following years:

	1997	1998	1999
Proprietor's adjusted gross income (Form 1040)	\$ 59,247	\$ 63,512	\$ 86,740
Petitioner's gross receipts or sales (Schedule C)	\$ 113,319	\$ UNK	\$ UNK
Petitioner's wages paid (Schedule C)	\$ 22,769	\$ UNK	\$ UNK
Beneficiary's wages received (Beneficiary's Schedule C)	\$ 20,140		
Petitioner's net profit from business (Schedule C)	\$ -4,223	\$ UNK	\$ UNK
	2000	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 29,311	\$ 25,728	\$ 89,428
Petitioner's gross receipts or sales (Schedule C)	\$ 62,998 ⁷	\$ 1,989 ⁸	\$ UNK ⁹
Petitioner's wages paid (Schedule C)	\$ 6,250	\$ 0	\$ UNK
Beneficiary's wages received (Beneficiary's Schedule C)	\$ 21,420	\$ 20,630	
Petitioner's net profit from business (Schedule C)	\$ 32,848	\$ 1,989	\$ UNK

⁷ The sole proprietor filed two Schedules C in tax year 2000. One for a landscape nursery and the other for gardening services.

⁸ The AAO only encountered one Schedule C in the record for gardening services for tax year 2001 although the sole proprietor's indicates business income of \$30,460 for tax year 2001 on page one, Form 1040.

⁹ The sole proprietor's Form 1040, page one, for tax year 2002 indicates wages, salaries and tips of \$80,673, and no business income in tax year 2002. Counsel in the petitioner's response to the director's RFE dated September 27, 2007 stated that the petitioner was not self-employed in the years 1998, 1999, 2002, 2003, and 2005, and that there are no Schedules C for these years. a

	2003	2004	2005
Proprietor's adjusted gross income (Form 1040)	\$ 80,451	\$ 15,894	\$ 58,807
Petitioner's gross receipts or sales (Schedule C)	\$ UNK ¹⁰	\$ 65,172	\$ UNK ¹¹
Petitioner's wages paid (Schedule C)	\$ UNK	\$ 0	\$ UNK
Beneficiary's wages received (Beneficiary's Schedule C)		\$ 21,210	
Petitioner's net profit from business (Schedule C)	\$ UNK	\$ 2,568	\$ UNK

	2006
Proprietor's adjusted gross income (Form 1040)	\$ 149,542
Petitioner's gross receipts or sales (Schedule C)	\$ 74,296
Petitioner's wages paid (Schedule C)	\$ 136
Beneficiary's wages received (Beneficiary's Schedule C)	\$ 21,770
Petitioner's net profit from business (Schedule C)	\$ 25,221

The record contains no explanation for the large discrepancies between the wages listed as paid by the petitioner in the years the sole proprietor filed a Schedule C and the wages listed as received by the beneficiary on his own Schedule C.

In the priority year 1997, and during tax years 1998 through 2003, and then during tax years 2005 and 2006, the sole proprietorship's adjusted gross income was sufficient to cover the proffered wage of \$21,673.60. In tax year 2004, the sole proprietor's adjusted gross income was not sufficient to pay the beneficiary's proffered wage. However, the sole proprietor also has to establish that he can both pay the proffered wage and pay his yearly household expenses.

In response to the director's request for further evidence, the petitioner submitted an itemized list of its monthly household expenses that covered mortgage payments food, utility bills, and property taxes, among other items. In his decision, the director noted that the petitioner's monthly household expenses totaled \$3,543, or as stated previously, an annual household expense of \$42,516. On appeal, counsel states that the itemized list of household expenses was based on tax year 2007, and did not reflect accurately the sole proprietor's household expenses for the earlier relevant tax years. Counsel asserts that based on average inflation rates, the sole proprietor's expenses may have been 30 percent of the sole proprietor's expenses in 2007. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The sole proprietor's mortgage costs, however, decreased to zero from 1998 through 2005 before increasing again in 2006 according to his Schedule A. Thus, even assuming some of the sole proprietor's expenses were higher in 2007 than in 1997, his mortgage costs were actually decreasing from 1998 through 2005. More probative would have been an itemized list of monthly expenses for the years in question that would more accurately identify the petitioner's monthly

¹⁰ The sole proprietor's Form 1040, page one, for tax year 2003 indicates wages, salaries and tips of \$73,189, and no business income in tax year 2003.

¹¹ The sole proprietor's Form 1040, page one, for tax year 2003 indicates wages, salaries and tips of \$58,807, and no business income in tax year 2005.

expenses for years prior to 2007. Without such evidence, the AAO will use the annual amount of household expenses identified in the sole proprietor's document dated October 17, 2007.

The beneficiary's proffered wage of \$21,673.60 and the sole proprietor's annual household expenses of \$42,516 total \$64,189.60. For the period of time in question, namely tax years 1997 to 2006, the sole proprietor had sufficient adjusted gross income to pay both the beneficiary's wages and his own expenses in tax years 1999, 2002, and 2006. Therefore the sole proprietor did not have the ability to pay both the beneficiary's wages and his household expenses continuously from the 1997 priority date to the present.

Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income.

On appeal, counsel states that the sole proprietor has additional funds with which to pay the proffered wage, and resubmits the sole proprietor's September 2007 Bank of America bank statement that identifies balances of two certificates of deposit. The sole proprietor's substantial cash assets as reflected in its certificates of deposit are probative evidence; however, the record of proceeding contains one bank statement from the petitioner's checking and certificate of deposits account. The record contains no evidence of whether the sole proprietor's certificates of deposit were sufficient to pay the proffered wage as of the 1997 priority date and to the present. On appeal, counsel asserts that the sole proprietor's interest income can also be used to estimate the sole proprietor's available additional financial resources. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Of more probative weight would be evidence as to the sole proprietor's certificates of deposit existence in the period of time in question, and the actual funds in them during tax years 1997 to 2006. 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)). We note that the petitioner needs to demonstrate an ability to pay the proffered wage over several years, and, even assuming a significant portion of those funds existed in 1997, any money available to pay the proffered wage in one year would not be available in subsequent years. Thus, a limited number of bank statements in 2007 cannot establish a continuous ability to pay the proffered wage as of the priority date in 1997.

Beyond the decision of the director, the AAO would also question the bona fide nature of the proffered position, given that counsel asserts the sole proprietor's business generated no income in tax years 1998, 1999, 2002, 2003 and 2005, and the sole proprietor's Schedules C where submitted indicate very small salaries paid through the sole proprietor's gardening or landscape nursery business. However, the beneficiary in Form ETA 750 stated that he had worked for the petitioner since June of 1996, and his income tax returns are submitted to the record to support the sole proprietor's claim that he employed the beneficiary as of that date through 2007. The beneficiary's Schedule C income, however, is far greater than the listed wages paid by the petitioner for the years the sole proprietor filed a Schedule C. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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.