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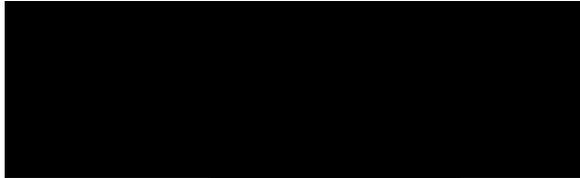
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 07 005 51509

Office: NEBRASKA SERVICE CENTER

Date: OCT 03 2008

IN RE: 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based 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 sewing contractor. It seeks to employ the beneficiary permanently in the United States as a sample stitcher. 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, through counsel, submits additional evidence and contends that the petitioner 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 its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of The Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

Here, the ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the ETA 750 is \$10.50 per hour, which amounts to \$21,840 per year. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, she does not list the petitioner as an employer, although by a letter dated October 7, 2003, addressed to the Employment Development Department (DOL), she states that she had worked for the petitioner since October 21, 1991.

On Part 5 of the Form I-140, the petitioner states that it was established on February 28, 1988, currently employs thirty (30) workers, and reports an annual gross income of \$1,150,000 and a net annual income of \$52,100.

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 \$21,840 per year as of the priority date and in response to the director's request for additional evidence, the petitioner provided copies of the sole proprietor's U.S. Individual Income Tax Return for 2000, 2001, 2002, 2003, 2004, and 2005. The tax returns reflect that the sole proprietor filed jointly with his spouse and claimed three dependents in 2001 and 2002, and claimed one dependent in 2003, 2004 and 2005. As the tax returns covering the priority date in 2001 and forward are more relevant to the determination of the petitioner's continuing ability to pay the proffered wage, the information set forth below indicates the following:

	2001	2002	2003	2004	2005
Wages	\$26,400	\$ n/a	\$ 17,953	\$23,358	\$22,951
Taxable interest	\$ 69	\$ 102	\$ 204	\$ 21	\$ 24
Business Income	\$43,660	\$42,702	\$ 36,959	\$52,092	\$37,851
Adjusted Gross Income ¹	\$61,728	\$44,696	\$ 49,290	\$76,101	\$55,349

The petitioner also provided copies of Wage and Tax Statements (W-2s) issued to the petitioner to the beneficiary² for the following years:

Year	Wages	Difference from Proffered Wage
2001	\$6,127.50	\$15,712.50
2002	\$5,940	\$15,900
2003	\$6,820	\$15,020
2004	\$7,202.50	\$14,637.50
2005	\$7,770	\$14,070

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 and on line 37 in 2005.

² They were issued to the beneficiary under her maiden name of [REDACTED]

Copies of payroll records from the periods ending December 10, 2006 and January 21, 2007 also were supplied. For the period ending December 10, 2006, the year to date total earnings indicates that the petitioner had paid the beneficiary \$14,115 that year or approximately \$7,725 less than the proffered wage. As of January 21, 2007, the beneficiary had earned \$1,680.

The petitioner additionally provided copies of its bank statements for the last three months of 2006 but failed to supply a summary of the sole proprietor's monthly recurring household expenses as requested by the director on December 5, 2006.

On May 10, 2007, the director denied the petition. Following a review of the petitioner's adjusted gross income and the wages paid to the beneficiary and noting that the petitioner had failed to provide a summary of the sole proprietor's monthly recurring household expenses, he concluded that the petitioner had not established its ability to pay the proffered wage beginning at the priority date.

On appeal, the petitioner, through counsel, provides additional copies of the beneficiary's individual payroll records as well as others employed by the petitioner. They indicate that the petitioner had paid the beneficiary \$14,535 as of the period ending December 17, 2006 or \$7,305 less than the proffered wage and that the petitioner had paid her \$9,660 as of the period ending June 3, 2007. A letter from the sole proprietor, dated June 9, 2007, confirms that the beneficiary has been employed since October 21, 1991. He adds that she works 40 hours per week at \$10.50 per hour.

The petitioner further provided a summary of two real estate holdings owned by the sole proprietor as well as copies of two mortgage interest statements indicating amounts of interest paid by the sole proprietor. The properties are not specifically identified. The petitioner also submits a summary of the equipment used at the petitioner's place of business, as well as, for the first time, a list of the sole proprietor's monthly household expenses amounting to \$2331.50 per month or \$27,978 per year. It is noted that the list contains such items as mortgage, utilities and car payment, but fails to indicate any expenses for food or clothing.

It is also noted that the director requested this specific evidence of monthly recurring household expenses on December 5, 2006 when he issued a request for additional evidence. 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 documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the list of household expenses submitted for the first time on appeal.

Relevant to the petitioner's bank statements contained in the record, it is noted that in the ordinary course of business, such cash flow which would be already be incorporated on Schedule C of a corresponding tax return and would be offset by the reported expenses and deduction and carried forward to line 12 (business income) of a Form

1040. For that reason, without more, the bank balances during a three month period reported in 2006, will not be considered as part of the sources available to pay the proffered wage in 2006. Although they may be considered as additional evidence pursuant to the provisions of 8 C.F.R. § 204.5(g)(2), standing alone, they do not reflect other encumbrances or liabilities that affect a petitioner's profile and are not probative of a petitioner's ability to pay a proffered wage in lieu of the submission of audited financial statements or tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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)).

It is noted that the financial information provided to the record relating to the real estate held by the sole proprietor as well as equipment used in the petitioner's business will not be considered. Although CIS will consider a sole proprietor's overall personal assets and liabilities, they must represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid. Real estate is considered a long-term asset and is not readily convertible to be available to pay the proffered wage. Similarly, equipment used in the petitioner's business is considered part of a petitioner's total depreciable assets used in such business, and would not be converted to cash during the ordinary course of business. It will not, therefore, become funds available to pay the proffered wage.

Counsel asserts that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004) supports a finding of an ability to pay the proffered wage if the petitioner is currently paying the proffered wage. Counsel states that by examining the beneficiary's payroll record from June 11, 2006 to June 3, 2007, it indicates that she is being paid the requisite hourly rate of \$10.50 per hour on a full-time (40 hours per week) basis.

With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.³ The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 25, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year or a given period may suffice to

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).



show the petitioner's ability to pay for a specified duration, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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, there is evidence of the beneficiary's employment from 2001 to 2007 as set forth above.

Year	Difference from Proffered Wage
2001	\$15,712.50
2002	\$15,900
2003	\$15,020
2004	\$14,637.50
2005	\$14,070
2006	\$7,305 (based on \$14,535 paid as of 12/17/06)

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.

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, assets and personal liabilities are also considered as part of the petitioner's ability to pay.⁴ Sole proprietors report income

⁴ 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.

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 *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, even though the sole proprietor's family is smaller than the household described in *Ubeda*, it is noted that the additional amounts necessary to cover the individual difference(s) between the actual wages paid to the beneficiary and the proffered wage in each of the relevant years represented approximately 25% of the sole proprietor's adjusted gross income in 2001 (\$15,712.50 = 25% of \$61,728); approximately 36% (\$15,900=36% of \$44,696) of the adjusted gross income in 2002; approximately 30% (\$15,020 = 30% of 49,290 in 2003; approximately 19% (\$14,637.50 = 19% of \$76,101) of the sole proprietor's adjusted gross income in 2004; and approximately 26% (\$14,070 = 26% of \$55,349) in 2005. A percentage of adjusted gross income could not be calculated for 2006 because the record does not contain evidence of the sole proprietor's adjusted gross income.

Without persuasive evidence of the sole proprietor's monthly recurring household expenses during the relevant period from 2001 through 2006, as well as further documentation of the sole proprietor's financial status in 2006 consisting of either an audited financial statement or federal tax return, the petitioner has not demonstrated the petitioner's ability to pay the proffered wage beginning at the priority date. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning as of the priority date. (Emphasis added.)

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date of April 25, 2001.

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.