U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 07 2005
EAC-03-219-52683

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, Director
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 convenient store. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, a Form 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, counsel submits a brief and previously submitted evidence.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $46,446.40 per year.

The petitioner is structured as a sole proprietorship. It filed as "Southland Corp. d/b/a 7 Eleven Food Store" on both the Form ETA 750A and the visa petition. With the petition, the petitioner submitted a one-page unaudited financial summary and "Fairview 7-Eleven's" Schedules C, Profit or Loss from Business statements, which would accompany the sole proprietor's individual income tax returns, for 2002 and 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 22, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested complete copies of the sole proprietor's individual income tax returns along with his monthly expenses for 2001 and 2001, and any evidence of wages actually paid to the beneficiary in 2001 or 2002.

In response, the petitioner submitted unaudited financial statements and the sole proprietor's individual income tax return with "Fairview 7-Eleven's" Schedules C, Profit or Loss from Business statements, for 2000

through 2002. Additionally, counsel's cover letter relied upon the petitioner's gross sales/receipts, and that the petitioner's "low profits should not be considered negatively" because it is a franchisee of Southland Corporation. Counsel states that in order to be rewarded a franchise from Southland Corporation, the petitioner had "to demonstrate financial viability" and is "bound to pay an amount in excess of $230,000.00 on a yearly basis as a franchise fee to Southland Corporation to maintain [its] franchising." The petitioner did not provide evidence of the sole proprietor's monthly expenses as requested by the director. The petitioner submitted a letter from [redacted] ([redacted] an accountant, who stated that they are the petitioner's accountants confirming that Southland Corporation is a "viable firm and has sufficient funds at any time to pay the salaries to their employees." Also, Ms. [redacted] states that the sole proprietor is a franchisee of Southland Corporation and has been regularly paying the franchisee fee in excess of $230,000, monthly expenses, and salaries to their employees.

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

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$9,790	$8,712
Petitioner's gross receipts or sales (Schedule C)	$1,250,110	$1,246,570
Petitioner's wages paid (Schedule C)	$55,603	$67,206
Petitioner's net profit from business (Schedule C)	$10,474	$12,577

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 26, 2004, denied the petition.

On appeal, counsel reasserts the same arguments he made in response to the director's request for evidence and resubmits the same documentary evidence already contained in the record of proceeding.

At the outset, there is no evidence of a relationship between "Fairview 7 Eleven" and Southland Corporation in the record of proceeding. Only "Fairview 7 Eleven" submitted its tax returns not Southland Corporation. There is no document in the record of proceeding illustrating Southland Corporation's financial situation or its relationship to "Fairview 7 Eleven." "Fairview 7 Eleven's" tax returns contain identifying information that match the visa petition such as the petitioner's address and employer identification number so the AAO accepts the tax returns as belonging to the petitioner. Only counsel asserts a relationship between the petitioner and Southland Corporation; however, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Ms. Jan, as an accountant, states that the sole proprietor is a franchisee of Southland Corporation, but does not state her basis for her assertion or submit corroborating evidence. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 has previously employed the beneficiary.

In response to the director's request for evidence, counsel conceded that the beneficiary has not worked for the petitioner. The beneficiary's Form G-325, Biographic Information sheet, submitted with his application to adjust status to lawful permanent resident, indicates that the beneficiary started working for the petitioner in May 2002. The director requested evidence of actual employment and wages paid to the beneficiary after that date, so if the beneficiary's representation on that form was accurate, such evidence should have been available. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

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 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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a 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 sole proprietor supports a family of one. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide complete and legible copies of its 2001 tax return. Additionally, CIS requires evidence of the sole proprietor's personal living expenses, which were not submitted. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In 2001, the sole proprietorship's adjusted gross income of $9,790 is less than the proffered wage. Thus, even despite not having evidence of the sole proprietor's personal living expenses, it is impossible that the sole proprietor could support himself on a deficit for an entire year, which is what would remain after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2002, the sole proprietorship's adjusted gross income of $8,712 is less than the proffered wage. Thus, even despite not having evidence of the sole proprietor's personal living expenses, it is impossible that the sole proprietor could support himself on a deficit for an entire year, which is what would remain after reducing the adjusted gross income by the amount required to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002. Although counsel argues that the petitioner demonstrate the ability to pay the proffered wage because it pays $230,000 in franchise fees, the record of proceeding contains no evidence of that. 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)). Even if there were such evidence, however, as noted above, CIS properly relies upon the petitioner's net income without additional consideration of expenses since those are already figured into the net income. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 532; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1080; *Ubeda v. Palmer*, 539 F. Supp. at 647, *aff'd*, 703 F.2d at 571.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it 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.