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FILE: EAC-03-022-51726 Office: VERMONT SERVICE CENTER Date: OCT 07 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 F. 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 remanded.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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.

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 or seasonal 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 demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 11, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour, which amounts to \$33,280.00 annually.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on October 25, 2002. On the petition, the petitioner claimed to have been established in October 1971, to currently have two employees, to have a gross annual income of \$132,412.00, and to have a net annual income of \$43,729.00. With the petition, the petitioner submitted supporting evidence. However, the petitioner failed to submit a Form ETA 750B with information pertaining to the qualifications of the new beneficiary.

In a request for evidence (RFE) dated November 20, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on February 13, 2004.

In a decision dated May 5, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director found that the petitioner was a sole proprietorship and that the evidence failed to establish sufficient adjusted gross income of the petitioner's owner to pay the proffered wage and also to pay the reasonable household expenses of the petitioner's owner. The director therefore denied the petition.

On appeal, counsel submits a brief, a supplemental brief and additional evidence. Counsel states on appeal that a consideration of the totality of the circumstances, especially the substantial equity of the petitioner's owner and his wife in their home, establishes the petitioner's ability to pay the proffered wage during the relevant period.

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).

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 to pay the first year of 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 CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the previous beneficiary on March 12, 2001, the previous beneficiary claimed to have worked for the petitioner beginning in April 2000 and continuing through the date of the ETA 750B.

The record contains copies of a Form W-2 Wage and Tax Statement of the previous beneficiary for 2001, which shows compensation from the petitioner in the amount of \$9,507.50. The record also contains copies of Form W-2 Wage and Tax Statements of the new beneficiary for 2001, 2002 and 2003. The beneficiary's Form W-2 for 2003 was not submitted for the record prior to the director's decision, but that Form W-2 has been submitted on appeal. The beneficiary's Form W-2's in the record show compensation from the petitioner in the amount of \$900.00 in 2001, \$1,950.00 in 2002 and \$10,400.00 in 2003.

Since the new beneficiary apparently is to be hired for the same position as was held by the previous beneficiary, the compensation received by the previous beneficiary in 2001 may be combined with the compensation received

by the new beneficiary in 2001 when evaluating the petitioner's ability to pay the proffered wage that year, for a total of \$10,407.50 in 2001. The compensation paid by the petitioner in the relevant years is shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$10,407.50	\$33,280.00	\$22,872.50
2002	\$1,950.00	\$33,280.00	\$31,330.00
2003	\$10,400.00	\$33,280.00	\$22,880.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2001, 2002 and 2003. The record before the director closed on February 13, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due and the 2003 return was not submitted for the record prior to the director's decision. However, a copy of that return has been submitted on appeal, along with a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003, which is discussed above.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income

of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The tax returns of the petitioner's owner and his wife state amounts for adjusted gross income as shown in the following table:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$38,970.00	not submitted	\$22,872.50*	\$16,097.50
2002	\$47,438.00	not submitted	\$31,330.00*	\$16,108.00
2003	\$46,617.00	not submitted	\$22,880.00*	\$23,737.00

* Crediting the petitioner with the compensation actually paid to the beneficiary and to the previous beneficiary in those years.

The Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife show three daughters as dependents in 2001 and two daughters as dependents in 2002 and 2003. The amount of \$16,097.50 which would have remained after paying the beneficiary the full proffered wage in 2001 is considered insufficient for the reasonable household expenses of a five-person household. Similarly, the amounts of \$16,108.00 and \$23,737.00 which would have remained available for household expenses in 2002 and 2003 are considered insufficient for the reasonable household expenses of a four-person household in those years.

The figures for adjusted gross income of the petitioner's owner and his wife are therefore insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002 or 2003.

The record also contains copies of bank statements for a checking account in the name of the petitioner for the months January through December 2001. Since the petitioner is a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, assets held in the name of the petitioner's owner are relevant to the issue of the petitioner's ability to pay the proffered wage, as are assets held in the name under which the petitioner does business.

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, evidence such as bank statements may be considered as supplemental evidence to the types of evidence required by the regulation. Where a petitioner is a sole proprietorship, the relevant tax returns are the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner. Unlike the Form 1120 corporate income tax return, which contains a Schedule L balance sheet, a Form 1040 individual tax return includes no balance sheet showing the assets and liabilities of the taxpayer. For this reason, any separate evidence of the assets and liabilities of the petitioner's owner does not duplicate information already found on the Form 1040 tax returns.

On the petitioner's bank statements the ending balances are as follows:

2001:	Ending balances		Ending balances
January	\$2,652.29	July	\$2,879.85
February	\$5,388.35	August	\$3,396.14
March	\$2,694.72	September	\$3,928.05
April	\$5,252.41	October	\$2,744.57
May	\$1,737.75	November	\$2,418.83
June	\$3,115.98	December	\$4,158.98

The bank statements in the record show no negative daily balances and no charges for overdrafts.

Bank statements are evidence of assets held by the petitioner's owner. Although bank statements alone are not acceptable evidence to establish a petitioner's ability to pay the proffered wage, they provide information relevant to the petitioner's available cash resources during the periods covered by the statements. Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The record also includes evidence pertaining to the value of the home of the petitioner's owner and his wife. That evidence was submitted for the first time on appeal. The record contains a letter dated June 8, 2004 from the petitioner's owner and his wife stating that the value of their home is \$345,000.00. Supporting that assertion is a property tax bill from the Town of Chelmsford, Massachusetts dated May 24, 2004 showing a real property consisting of a building and land owned by the petitioner's owner and his wife with total value of \$345,000.00. The record also contains a letter dated June 3, 2004 to the petitioner's owner and his wife from a customer service representative at a mortgage company in Jacksonville, Florida, stating that the principal balance on their mortgage is \$8,132.79.

In the letter of June 8, 2004, the petitioner's owner and his wife also state that they own two businesses, one of which is the petitioning business. Both businesses are pizza restaurants and both are located in Westford, Massachusetts. The owner and his wife state that they owe no monies on either business and that they owe less than \$10,000.00 on their home.

The Form 1040 U.S. Individual Income Tax Return's of the petitioner's owner and his wife in the record include Schedule C's Profit or Loss From Business for each of the two businesses mentioned in the letter of June 8, 2004. Those Schedule C's show the following information.

Schedule C's of the petitioning business, pizza restaurant #1

Year	Gross receipts or sales	Gross Income	Net Profit
2001	\$132,412.00	\$78,846.00	\$14,351.00
2002	\$164,798.00	\$94,056.00	\$32,445.00
2003	\$150,128.00	\$90,698.00	\$27,734.00

Schedule C's of the owner's other business, pizza restaurant #2

Year	Gross receipts or sales	Gross Income	Net Profit
2001	\$184,843.00	\$122,390.00	\$29,378.00
2002	\$203,768.00	\$118,785.00	\$24,532.00
2003	\$186,202.00	\$122,245.00	\$28,629.00

Each of the two businesses shows stable gross receipts or sales, gross income, and net profit during the three years covered by the tax returns in the record. It may also be noted that on the I-140 petition, the petitioner states that the petitioning business was established in October 1971. Therefore, as of the priority date, the petitioner had been in business for nearly thirty years. That period of time is longer than that of the petitioner in *Matter of Sonogawa*, which had been in business for eleven years at the time of the decision in that case. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Also relevant is the fact that the adjusted gross income of the petitioner's owner and his wife was higher than the amount needed to raise the beneficiary's actual compensation to the full proffered wage. The point at issue in the instant petition is whether the amounts remaining for household expenses of the petitioner's owner would have been sufficient if the beneficiary had been paid the full proffered wage beginning in any of the years at issue in the instant petition. Although the figures for the adjusted gross income alone of the petitioner's owner and his wife are not sufficient to establish that sufficient amounts would have remained for their reasonable household expenses, the other evidence in the record along with the figures for adjusted gross income is sufficient to establish that the petitioner's owner and his wife would have had sufficient resources to pay their household expenses after paying the beneficiary the full proffered wage.

As discussed above, based on the adjusted gross income alone of the petitioner's owner and his wife, the amounts remaining for household expenses would have been \$16,097.50 in 2001, \$16,108.00 in 2002, and \$23,707.00 in 2003. Although those amounts are considered insufficient for the reasonable household expenses of a five-person household in 2001 and a four-person household in 2002 and in 2003, relatively minor additional funds from other financial resources would have been needed for reasonable household expenses. The fact that in early 2004 the petitioner's owner and his wife had an equity value in their home of approximately \$335,000.00, along with the stable financial situation of their two business during the previous three years, indicates that during the years at issue the petitioner's owner and his wife could have drawn upon their home equity for their household expenses if that had been needed.

For the foregoing reasons, in considering the record as a whole, the evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date during each of the years at issue, while also allowing sufficient financial resources to pay the household expenses of the petitioner's owner during each of those years.

In his decision, the director correctly stated the adjusted gross income of the petitioner's owner and his wife and correctly credited the petitioner with amounts paid to the beneficiary. The director's decision to deny the petition was correct based on the evidence in the record before the director. However, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal are sufficient to overcome the decision of the director concerning the petitioner's ability to pay the proffered wage.

In his decision, the director made no reference to the fact that the instant petition is for a substituted beneficiary. The director referred to both of the two Form W-2 Wage and Tax Statements for 2001 as those of the beneficiary. But in fact, one of those Form W-2's for 2001 is for the previous beneficiary, as discussed above. The director similarly failed to note that the ETA 750B in the record pertains to the previous beneficiary. As discussed above, the substitution of a new beneficiary requires a petitioner to submit a new Form ETA 750B to the director in support of the I-140 petition. The new Form ETA 750B must contain information pertaining to the new beneficiary and must be signed by the new beneficiary. The record on appeal contains no Form ETA 750B for the new beneficiary. *See* Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

For the foregoing reasons, the decision of the director concerning the petitioner's ability to pay the proffered wage is withdrawn. The petition is remanded to the director for consideration of issues pertaining to the substitution of the new beneficiary and the qualifications of the new beneficiary, including the consideration of any ETA 750B for the new beneficiary which may have been submitted by the petitioner or which may be submitted in the future by the petitioner pursuant to a request by the director.

In summary, the evidence as a whole in the record on appeal is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The decision of the director is withdrawn with regard to that issue. The petition is remanded to the director for consideration of issues related to the substitution of the present beneficiary in the instant petition.

ORDER: The petition is remanded to the director.