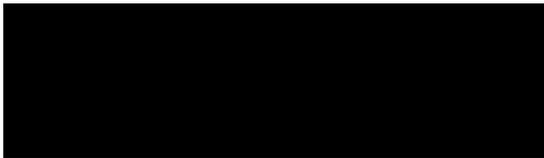


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**U.S. Citizenship
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Services**

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FILE: [REDACTED]
EAC-03-156-51270

Office: VERMONT SERVICE CENTER

Date: JUN 08 2006

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: SELF-REPRESENTED

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 "Michael Valdez".

Robert P. Wiemann, Chief
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 floor and wall tiles firm. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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.

The record shows that the appeal is properly filed, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 4, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The denial was affirmed in the director's November 15, 2004 response to the petitioner's Motion to Reopen.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is \$29.79 per hour, which amounts to \$61,963.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a copy of a bank statement dated December 7, 2004, an affidavit from the petitioner dated December 7, 2004, and copies of checks from the petitioner to the beneficiary from July 31, 2004 to November 29, 2004. Other relevant evidence in the record includes copies of checks from the petitioner to the beneficiary from June 5, 2004 to July 24, 2004, a letter from Midland Chiropractic Center dated June 3, 2004, a listing of the beneficiary's payments for office visits from October 6, 2003 to December 29, 2003, a copy of a bank statement dated September 1, 2004, an affidavit from the petitioner dated September 2, 2004, copies of two checks from the petitioner to the beneficiary dated March 14, 2003 and March 21, 2003, copies of the beneficiary's Form 1099-MISC Miscellaneous Income for 2001, 2002, and 2003, copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2000, 2001, 2002, and 2003, a letter from the petitioner dated June 11, 2004 listing the monthly expenses of the petitioner's owner, a copy of the petitioner's checking account statement for May 2004, a copy of the owner's deed, the owner's life insurance information, a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2003, a copy of the Schedule C of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2001, copies of the Form W-2 Wage and Tax Statements of the beneficiary's wife for 2001 and 2003, and copies of the beneficiary's Form 1099-INT Interest Income for 2001 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner states on appeal that its savings account can be considered in determining its ability to pay the proffered wage. The petitioner also states that the beneficiary was not paid the full proffered wage during the period in question because the beneficiary did not have work authorization at the time of the filing, the beneficiary was unable to work for part of 2003 due to health problems, and the beneficiary's work depends on weather conditions.

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 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 Sonegawa*, 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 beneficiary on November 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in September 2000 and continuing through the date of the ETA 750B.

The record contains copies of the beneficiary's Form 1099-MISC Miscellaneous Income for 2001, 2002, and 2003. The record also contains copies of 18 checks addressed to the beneficiary from the petitioner from June 5,

¹ 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).

2004 to November 29, 2004.² The beneficiary's Form 1099's and calculations based on the checks show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2001	\$28,144.00	\$61,963.20	\$33,819.20
2002	\$30,260.00	\$61,963.20	\$31,703.20
2003	\$27,710.00	\$61,963.20	\$34,253.20
2004	\$19,696.81	\$61,963.20	\$42,266.39

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, 2003, and 2004.

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 for 2000, 2001, 2002, and 2003. The record before the director closed on June 17, 2004 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.³

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

² The record contains copies of two checks addressed to the beneficiary from the petitioner dated March 14, 2003 and March 21, 2003. The AAO will not consider those two checks because the payments indicated on them would have already been reflected on the beneficiary's Form 1099-MISC Miscellaneous Income for 2003.

³ Even though a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2000 appears in the record, it is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is March 22, 2001.

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.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and his spouse. The 2001 return shows one dependent daughter and one dependent son. The 2002 return shows two dependent daughters. Therefore the household size of the petitioner's owner in 2001 and 2002 is four persons. The 2003 return shows one dependent daughter, and thus the household size of the petitioner's owner in 2003 is three persons.

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.⁴ The owner's tax returns show the following amounts for adjusted gross income, and calculations based on a letter from the petitioner dated June 11, 2004 listing the monthly expenses of the petitioner's owner show the following amounts for household expenses.⁵

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$29,186.00	\$20,160.00	\$33,819.20*	-\$24,793.20
2002	\$45,059.00	\$25,068.00	\$31,703.20*	-\$11,712.20
2003	\$43,620.00	\$30,012.00	\$34,253.20*	-\$20,645.20

* Crediting the petitioner with the compensation actually paid to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage and pay its owner's living expenses in 2001, 2002, and 2003.

The petitioner states on appeal that funds from the petitioner's savings account can be used to pay the proffered wage. Evidence in support of this assertion includes a copy of the petitioner's bank statement dated December 7, 2004 and an affidavit from the petitioner dated December 7, 2004 stating that "[t]he funds from this [savings] account will cover the wages of [the beneficiary] in case if the company will not have sufficient funds to pay the [beneficiary's] salary."⁶

⁴ For the Form 1040 U.S. Individual Income Tax Return for 2002, Adjusted Gross Income is the figure shown on line 35. For the Form 1040 U.S. Individual Income Tax Return for 2003, Adjusted Gross Income is the figure shown on line 34.

⁵ According to the letter from the petitioner dated June 11, 2004, monthly expenses for the owner's family average \$1,680.00 for 2001, \$2,089.00 for 2002, and \$2,501.00 for 2003.

⁶ The record also contains a copy of a bank statement for the same savings account dated September 1, 2004 and an affidavit from the petitioner dated September 2, 2004, and both were submitted with the Motion to Reopen. The AAO looks at the end-of-year balance in a savings account, and since the December 7 statement is the most current balance

As a sole proprietorship, the petitioner's owner is personally liable for the financial obligations of the petitioner. For this reason, personal assets held in the name of the petitioner's owner, such as savings accounts, money market funds, or certificates of deposit, 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. According to the bank statement,⁷ the petitioner had a balance of \$83,229.63 on December 7, 2004. Based on this figure, the petitioner has established its ability to pay the proffered wage and the owner's living expenses in 2004. However, the period in question is from the priority date, which is March 22, 2001, to the date the record closed before the director, which is June 17, 2004. Bank statements showing end-of-year assets in the savings account for 2001, 2002, and 2003 do not appear in the record.

The petitioner states that at the time of filing, "[the beneficiary] was not paid the proffered wage . . . due to the lack of the permission to work . . . [and] [the petitioner] did not want to invest in this employee by paying him the above-mentioned wage." The petitioner also states that "[b]ecause of the weather conditions and health problems, [the beneficiary] did not have the number of hours that will reflect the proffered wage. However, with the full schedule the beneficiary was compensated at the proffered wage of [\$]61,963.20 annually." Evidence in support of these assertions includes a letter from the Midland Chiropractic Center dated June 3, 2004 and a listing of the beneficiary's payments for office visits from October 6, 2003 to December 29, 2003.

The AAO, in determining the petitioner's ability to pay the proffered wage, looks at other evidence aside from the compensation the beneficiary received from the petitioner. Thus, the petitioner can still establish its ability to pay the proffered wage even if it did not pay the full proffered wage to the beneficiary.

In addition, the petitioner's statement that the beneficiary would have been compensated at the full proffered wage had the beneficiary worked the full schedule is speculative. Based on the evidence in the record, the beneficiary was not paid the full proffered wage. The petitioner's speculation that the beneficiary would have received the proffered wage had the beneficiary not had health problems and had the weather conditions been different is not supported by evidence, and 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)).

The record contains a copy of the petitioner's checking account statement for May 2004. As stated above, the personal assets held in the name of the petitioner's owner, such as savings accounts, 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. The AAO, however, will not consider the petitioning entity's checking accounts because cash and receipts indicated on the accounts are already reflected on the Schedule C of the owner's tax returns. Even though the owner's 2004 tax return is not part of the record and thus the amount from the checking account has not been considered by the AAO, the amount shows the petitioner's assets in 2004, which is outside the period in question.

available, the AAO will consider the amount listed on that statement instead of the amount listed on the September 1 statement.

⁷ The bank statement is for an account in the name of the petitioning entity. The owner, in the brief, addresses the account as "my savings account." Regardless of whether the savings account is in the petitioner's name or the owner's name, the AAO will look at the end-of-year amount.

The record contains the owner's life insurance information. Nothing in the record indicates whether the insurance is a term life insurance, which has no cash value and cannot be considered as liquid assets, or a whole life insurance, which can have cash value. Moreover, even if it is a whole life insurance, the record does not contain any evidence detailing penalties for withdrawal and the actual amount of cash the petitioner would have.

The record contains a copy of the owner's deed for the property located at the petitioner's address. The property appears to be the owner's residence, and nothing in the record indicates that the petitioner has secured a home equity loan. Even if the petitioner has secured a loan, a loan is not liquid assets and cannot be considered as available cash for the sole proprietor to pay the proffered wage and personal expenses.

The record contains a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2003 and a copy of the Schedule C of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2001. The beneficiary's income as stated on his 2001 and 2003 tax returns will not be considered because those tax returns do not contain information regarding from whom the beneficiary received the income or whether those amounts are a combination of wages paid by different employers. Additionally, if the income as listed on the beneficiary's tax returns did originate from the petitioner, it would have already been reflected on the beneficiary's Form 1099's. Moreover, the beneficiary's tax returns for 2001 and 2003 are joint returns of the beneficiary and his spouse, and the record includes the Form W-2 Wage and Tax Statements for the beneficiary's wife for 2001 and 2003 and the beneficiary's Form 1099-INT Interest Income for 2001 and 2003. Thus, wages earned by the beneficiary's wife and interest income are also included on the beneficiary's 2001 and 2003 tax returns.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the petitioner's assertions on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

The AAO notes that the Form ETA 750 requires three years of experience in the job offered. The record contains a letter from Peter Bauwens Construction indicating that the beneficiary was employed from February 20, 1995 to October 16, 1995 and a letter from Stucco & Buildings Construction indicating that the beneficiary was employed from 1994 to 1995. Those two letters do not meet the experience requirement. According to the Form ETA 750B, the beneficiary was self-employed from April 1982 to October 1997, but no supporting evidence appears in the record. This issue should be addressed in any further proceedings.

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.