U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-04-131-53569 Office: CALIFORNIA SERVICE CENTER Date: MAY 15 2006

IN RE: Petitioner: [redacted]
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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a sheep ranch. It seeks to employ the beneficiary permanently in the United States as a sheepherder. A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor does not accompany the petition. A completed Form ETA 750 was submitted and includes a note, author unknown, that it qualifies for blanket waiver without any additional information. 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 submits a brief statement and additional evidence. The AAO notes that the petitioner submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative signed by its representative, [redacted] and [redacted], who explained that she is a bonded immigration consultant on that form. A review of accredited representatives does not contain her name. *See* http://www.usdoj.gov/eoir/statspub/AC30404.pdf (accessed April 18, 2006). Under 8 C.F.R. §§ 292.1 and 292.2, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Because [redacted] is not an individual authorized to represent petitioners or beneficiaries before DHS, the petitioner is considered self-represented for these proceedings.

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 director's decision only included the discussion of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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 (DOL). *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 has a date stamp, but that date stamp does not indicate whether DOL or Citizenship & Immigration Services (CIS) accepted it for processing. That date stamp reflects October 13, 2004. The visa petition was filed on April 7, 2004. The priority date year is thus 2004 regardless of whether or not this is some permutation of a labor certification waiver case. The proffered wage as stated on the Form ETA 750 is $270 per week, which amounts to $14,040 annually. On the Form ETA

750B, signed by the beneficiary on March 26, 2004, the beneficiary claimed to have worked for the petitioner as of October 1994.

On the petition, the petitioner claimed to have been established in 1973, to have a gross annual income of $47,011, and to currently employ 13 workers. In support of the petition, the petitioner submitted a letter from [redacted] stating that the beneficiary has been working with The Western Range Association; copies of the beneficiary's H-2A temporary non-immigrant status approvals from May 2000 through October 2004, with accompanying temporary labor certifications from DOL; a letter from [redacted] describing the proffered position and the beneficiary's qualifications; and a copy of [redacted] individual income tax return with Schedule F, Profit or Loss from Farming statement for 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 2, 2004, 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 for 2001 and 2003 and evidence of wages paid to the beneficiary.

In response, the petitioner submitted the same letter from [redacted], the sole proprietor; copies of W-2 forms issued by the petitioner to the beneficiary from 1998 through 2003; and the sole proprietor's individual income tax returns for 2001 through 2003 with accompanying Schedules F, Profit or Loss from Farming statements.

Evidence pertaining to 2004 would be dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since 2004 is the priority date year. However, since the petitioner did not submit evidence pertaining to 2004, although the record of proceeding closed before the director on April 2, 2004 with the petitioner's response to his request for evidence and the sole proprietor's individual income tax return for 2004 would not yet have been available. No other regulatory-prescribed evidence was submitted for 2004 such as the petitioner's annual report or audited financial statements. The AAO will thus analyze 2003 since it is the most recent year relevant to the petitioner's financial situation in 2004 for which the record of proceeding contains regulatory-prescribed evidence.

The petitioner's 2003 tax return reflects the following information:

	2003
Proprietor's adjusted gross income (Form 1040)	-$74,324
Petitioner's gross income (Schedule F)	$1,386,806
Petitioner's Labor hired (Schedule F)	$231,800
Petitioner's net farm profit or loss (Schedule F)	$54,873

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 November 5, 2004, denied the petition through an analysis of the sole proprietor's adjusted gross income and the wages actually paid to the beneficiary from 1998 through 2003.

On appeal, the sole proprietor states the following: "[The beneficiary] is a contracted H2 sheepherder. As required by California state law, he is currently paid $12,000.00 per month. Additionally, he is furnished food,

housing and transportation at an estimated value of $700.00 per month." prior letter is also submitted on appeal with a "p.s." addendum stating that the beneficiary sleeps with the sheep and is on call 24/7[1]. On the Form I-290B, [redacted] states that a profit and loss statement is submitted with the appeal but the record of proceeding does not contain it. The petitioner did not seek any additional time to submit additional evidence.

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 established that it employed and paid the beneficiary $11,600 in 2003. Since the proffered wage is $14,040, the petitioner must illustrate that it can pay the remainder of the proffered wage, which is $2,440 in 2003.

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 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).

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[1] The AAO will not consider living expenses on the beneficiary's behalf as additional income because such expenses were not included on the Form ETA 750A Items 18 and 20[1]. Additionally, including such items now would impermissibly represent a material change to the terms of the proffered position. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Finally, even if the AAO could accept the argument that the beneficiary receives additional income through benefits received such as housing and transportation, the record of proceeding does not contain corroborating evidence of those benefits. 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 *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 record of proceeding does not contain evidence of the sole proprietor's monthly living expenses. In 2003, the sole proprietorship's adjusted gross income is negative however it includes a deduction for the petitioner's prior year's net operating loss deduction in the amount of -$160,811, which may be added back to the sole proprietor's adjusted gross income as an equitable consideration of the totality of circumstances in this case. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). Thus, the sole proprietor has sufficient income to cover the difference between the wages actually paid to the beneficiary and the proffered wage. It is reasonable to conclude that there are sufficient funds remaining to cover personal expenses. Therefore, the petitioner has demonstrated that it has the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.