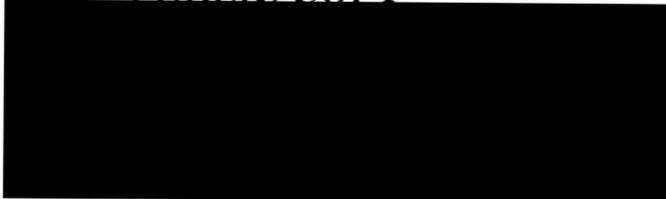




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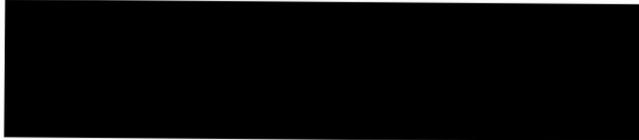
Office: TEXAS SERVICE CENTER

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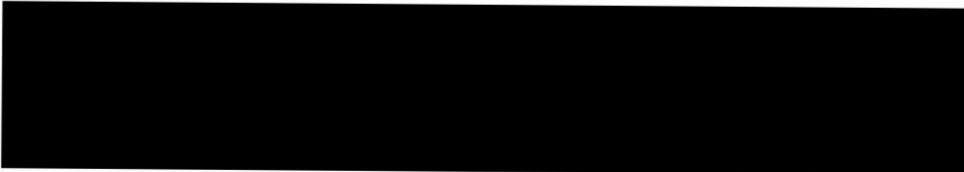
Petitioner:

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas 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 an automobile repair and service shop. It seeks to employ the beneficiary permanently in the United States as a automobile mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

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

As set forth in the director's August 24, 2005 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.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.70 an hour (\$32,656 per year). The Form ETA 750 states that the position requires four years experience in the job offered or four years of work experience as an automobile mechanic.

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 appeal<sup>1</sup>. Counsel submits no new evidence to the record on appeal, but rather in a brief analyzes the evidence already submitted to the record. Other relevant evidence in the record includes the petitioner's Forms 1040, for tax years 2001 to 2004, as well as the beneficiary's W-2 forms for tax years 2001 to 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on June 3, 1986, and to currently employ two workers, in addition to the petitioner. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to work for the sole proprietor since July 2000.

On appeal, counsel asserts that the director failed to consider the assets of the sole proprietor, when considering the sole proprietor's ability to pay the proffered wage. Counsel states that the sole proprietor's income, including the income from the automobile repair service, in combination with the beneficiary's wages has always exceeded the proffered wage.

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, Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 has established that it employed and paid the beneficiary the following wages: \$23,852.71 in 2001; \$24,955.60 in 2002; \$29,436.40 in 2003, and \$31,865.86 in 2004. Thus, while the sole proprietor established that it had employed and paid the beneficiary during these years, it did not establish that it paid the beneficiary the proffered wage of \$32,656 during this period of time. Therefore the petitioner cannot establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present. The sole proprietor has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage during tax years 2001 to 2004.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> As correctly noted by counsel on appeal, the difference between the beneficiary's actual wages and the proffered wage during tax years 2001 to 2004 is \$8,803.29 in 2001, \$7,700.40 in 2002, \$3,219.60 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. In her decision, the director stated that the submission of personal income tax returns as evidence of a petitioner's ability to pay the proffered wage is unacceptable. However, the sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C is precisely the evidence examined in petitions involving sole proprietors with regard to a petitioner's ability to pay a proffered wage. This part of the director's decision is withdrawn.

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 (7<sup>th</sup> 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 two. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 35,517	\$ 41,955
Petitioner's gross receipts or sales (Schedule C)	\$ 223,712	\$ 243,378
Petitioner's wages paid (Schedule C)	\$ 50,390	\$ 60,048
Petitioner's net profit from business (Schedule C)	\$ 32,347	\$ 32,666
	2003	2004
Proprietor's adjusted gross income (Form 1040)	\$ 30,058	\$ 26,313
Petitioner's gross receipts or sales (Schedule C)	\$ 215,206	\$ 224,091
Petitioner's wages paid (Schedule C)	\$ 54,248	\$ 57,948
Petitioner's net profit from business (Schedule C)	\$ 23,133	\$ 16,602

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and \$790.14 in 2004.

In tax years 2001 through 2004, the sole proprietorship's adjusted gross income appears sufficient to cover the difference between the beneficiary's actual wages and the proffered wage of \$32,656. As previously stated, the difference between the beneficiary's wages and the proffered wage during these four years is \$8,803.29 in 2001, \$7,700.40 in 2002, \$3,219.60 in 2003, and \$790.14 in 2004. Although the record of proceedings does not contain evidence of the sole proprietor's personal monthly expenses, it is more likely than not that the sole proprietor's adjusted gross income could cover both the reasonable household expenses for a family of two in Louisiana and the above-described difference between wages paid and the proffered wage during tax year 2001 to 2004. Thus, the sole proprietor has established that it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the 2001 priority date and through tax year 2004, based on the sole proprietor's adjusted gross income. The director's decision will be withdrawn. The petition will be approved.

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 met that burden.

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