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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 29 2007

WAC 04 137 51133

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:

[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, 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 case will be dismissed.

The petitioner is a residential facility for developmentally disabled adults. It seeks to employ the beneficiary permanently in the United States as a live-in residential manager. 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 July 22, 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 4, 2001. The proffered wage as stated on the Form ETA 750 is $12 an hour, or $24,960 per year.

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[1]. Counsel submits a copy of the Yates memo,[2] copies of the petitioner's Schedules C for tax years 2001 to 2004, copies of Forms DE-6, Quarterly Wage and Withholding Report for the petitioner's last two quarters of 2004 and the first two quarters of tax year 2005; and the petitioner's balance sheet as of December 31, 2004, and a copy of an article written by [redacted] that analyzes comments made by Mr. Yates at an American Immigration Lawyers Association (AILA) meeting with regard to the ability to pay memo. Other relevant evidence in the record includes the petitioner's Forms 1040, Individual U.S. Income Tax Return, for tax years 2001 to 2004; the petitioner's Forms DE-6 for the four quarters of tax year 2003 and 2004; and the beneficiary's W-2 form for tax year 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 in 1989 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in not considering the petitioner's profit and loss statements as provided on the sole proprietor's Schedules C. Counsel also asserts that the director erred in not factoring the additional revenues that would have been generated by the petitioner, had the beneficiary begun his employment in 2001. Counsel then asserts that the director erred because he only utilized one of the three methods of establishing a petitioner's ability to pay as outlined in the Yates memo. Counsel states that the director based the denial of the instant petition on the first criterion examined in the Yates memo, namely whether the petitioner has sufficient net income to pay the proffered wage. Counsel states that if the director, utilizing the third factor outlined in the Yates memo, had examined the beneficiary's wages as documented in the petitioner's DE-6 Quarterly Employment reports, he would have determined that the petitioner was paying the beneficiary the proffered hourly wage rate, namely, $12.00 an hour for the last two quarters of 2004 and the first two quarters of 2005. Counsel also asserts that if the director had examined the second criterion outlined in the Yates memo, the net current assets test, the petitioner could have established its ability to pay the proffered wage. Counsel states that according to the petitioner's balance sheet for 2004 the petitioner had net current assets of $99,581, an amount sufficient to pay the proffered wage of $24, 960.

Finally counsel states that during the AILA annual conference, Mr. Yates clarified the Yates memo by stating that the statutory requirement to establish the ability to pay is to establish that the petitioner is a bona fide company. Counsel states that the sole proprietor has been established since 1989 and has the ability to pay the proffered wage based on its balance sheet and income statements. Counsel notes that the petitioner's fixed assets, namely, the land and building where the business is located, is worth $491,283. Counsel states the petitioner's total capital is $99,283, and that the business has always had a positive cash flow. Based on these factors, counsel states that the petitioner is a legitimate and bona fide business, and that there should be no question about its ability to pay the proffered wage.

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[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).

[2] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since the beginning of the third quarter of 2004, and that according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel urges CIS to consider the wages paid in the last two quarters of 2004 and the first two quarters of 2005 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 4, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in tax year 2004, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in tax years 2001 to 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.[3]

On appeal, counsel also states that the director failed to examine the petitioner's net current assets to establish the petitioner's ability to pay the proffered wage, as outlined in the Yates memo. Counsel uses the figure contained on the petitioner's unaudited balance sheet as of December 2004 to establish the petitioner's net current assets for tax year 2004. Counsel's assertions are not persuasive. First, as with the beneficiary's wages, the petitioner has to establish its ability to pay the proffered wage as of the April 4, 2001 priority date and to the present. An examination of the petitioner's claimed net current assets for tax year 2004 does not establish the petitioner's ability to pay the proffered wage as of tax year 2001. In addition, counsel's reliance

[3] It is also noted that the DE-6 forms submitted to the record simply record the aggregate wages paid to the beneficiary and do not establish either the hours worked or the hourly wage paid.

on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. More importantly, the petitioner is a sole proprietor, and with this business structure, the petitioner's net current assets are not examined to establish the petitioner's ability to pay the proffered wage, but rather the sole proprietor's gross adjusted income. The criterion outlined in the Yates memo with regard to net current assets would not be applicable to the instant petition. The AAO will analyze the petitioner's ability as a sole proprietor to pay the proffered wage, more fully further in these proceedings.

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 did not establish that it employed or paid the beneficiary the proffered wage as of the April 2001 priority date or during tax year 2002 or 2003. It did establish that it employed and paid the beneficiary wages in the last two quarters of tax year 2004 and the first two quarters of 2005. In tax year 2004, as documented by the beneficiary's W-2 form, the petitioner paid the beneficiary $11,970, a sum less than the proffered wage of $24,960. Although counsel asserts that these wages establish that the petitioner was paying the beneficiary the proffered salary wage, neither the DE-6 forms nor the beneficiary's W-2 form establish this fact. With regard to tax year 2005, the petitioner's DE-6 forms establish that the beneficiary was paid $12,480, again, a sum less than the proffered wage of $24,960. Thus, the petitioner has not established that either the proffered hourly wage was paid or that the petitioner had paid the proffered wage of $24,960 to the beneficiary as of the 2001 priority date and to the present.

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).

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

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$ 4,367	$ 9,669
Petitioner's gross receipts or sales (Schedule C)	$ 122,278	$ 147,731
Petitioner's wages paid (Schedule C)	$ 29,902	$ 27,240
Petitioner's net profit from business (Schedule C)	$ 4,591	$ 10,342

	2003	2004
Proprietor's adjusted gross income (Form 1040)	$ 19,754	$ 23,539
Petitioner's gross receipts or sales (Schedule C)	$ 140,216	$ 145,147
Petitioner's wages paid (Schedule C)	$ 35,360	$ 45,011
Petitioner's net profit from business (Schedule C)	$ 21,003	$ 25,010

In tax years 2001 to 2003, the sole proprietorship's adjusted gross incomes of $4,591, $10,342, and $21,003 fail to cover the proffered wage of $24,960. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. With regard to tax year 2004, after paying the proffered wage of $24,960, the sole proprietor would have $50 left with which to support herself. In addition, it is noted that the total wages paid are only slightly more than the proffered wage in the relevant tax years, and thus the petitioner's total wages can not be used to establish the petitioner's ability to pay the proffered wage. Thus the sole proprietor cannot establish its ability to pay the proffered wage based on its adjusted gross income from the April 4, 2001 date and to the present.

On appeal, counsel states that additional funds would have been available to pay the proffered wage, if the petitioner had employed the beneficiary since the 2001 priority date. No detail or documentation has been provided to explain how the beneficiary's employment as a live in residential manager would have significantly increased profits for a residential facility for developmentally disabled adults. This hypothesis cannot be concluded to outweigh the evidence presented in the sole proprietor's tax returns. Furthermore, 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). Furthermore, 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)). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the decision of the director, the AAO will examine another issue raised by the evidence in the record. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Upon a review of the record, the record is not clear that the petitioner has established that the beneficiary is qualified to perform the duties of the position based on his previous work experience. The Form ETA 750's work experience stipulated on Form ETA 750 is two years in the proffered job as a residential live in manager or two years as a manager. The Form ETA identifies the occupational code for the proffered job as 39-9041, Residential Advisors. A summary description of Residential Advisor duties are described in the Department of Labor Occupational Information Network, or *O'Net* Online as follows: "Coordinate activities for residents of boarding schools, college fraternities or sororities, college dormitories, or similar establishments. Order supplies and determine need for maintenance, repairs, and furnishings. May maintain household records and assign rooms. May refer residents to counseling resources if needed." As found at http://online.onetcenter.org/link/summary/39-9041.00 as of January 17, 2007.

The duties of the proffered position, as described on the Form ETA 750, Part A, are as follows:

> Supervision of Staff and residents of board and care for developmentally disabled adults. Plan and Coordinate with State Health Agencies pertaining to resident's social activities, medical, dental and psychiatric programs, individual service and program plans, behavior modifications, restrictions and regulations. Responsible in assigning rooms, solve problems relating to residents and facility, order supplies and call paramedics or ambulance if needed.

While there is some similarity between the *O'Net* job duties discussed under the SOC category and the job duties outlined in the Form ETA 750 with regard to reference of the supervision of residents for counseling services and coordinating activities, there is no similarity between the proffered job description and the beneficiary's previous work duties. In a letter dated February 4, 2005, Mr. [redacted] President of [redacted] Corporation, Quezon City, the Philippines, described the beneficiary's previous job as "Operations Manager" with the Mardee Refrigeration and Electrical Services, later known as [redacted] Aircon. Electrical and General Services, Inc, now known as [redacted] Corporation. Mr. [redacted] then described the beneficiary's employment with the company as follows:

> His duties included directing, coordinating and supervising the repair and maintenance personnel and to evaluate work performance of the staff. He was also tasked to formulate time schedules, location of work site and corresponding work force for different projects of the company. His position also required him to devise administrative plans and operational policies and procedures. He was also tasked to make sure that the requirements of the clients were met and were provided efficiently and effectively.

On Form ETA 750, Part B, the beneficiary described his previous work experience. He stated that his title with the [redacted] Corporation, identified as the [redacted] of Aircon. [redacted] Inc., was

"Operations Manager" in the area of "installation, maintenance, repairs" and that his duties includes the following: "Direct and coordinate activities of operations department of the company; confers and recommends with management in formulating administrative and operational policies and procedures". The beneficiary's prior work experience as more specifically identified in Mr. [redacted]s letter does not appear to be in the field of work described in the Form ETA 750, or by the *O'Net* title provided to the position by the Department of Labor (DOL). These issues raise questions as to whether the petitioner has established that the beneficiary is qualified to perform the duties of the position

It is also noted that the record contains a grant deed document in which the two individuals with the last name as the beneficiary, Mr. and Mrs. [redacted] deeded over property to the sole proprietor upon which the sole proprietor's business is located, namely [redacted] This document raises question as to the relationship between the former owners of the property upon which the petitioner is located and the beneficiary, and questions with regard to a possible familial or financial basis for the proffered position based on the financial relationship between the former owners of the property and the sole proprietor. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

While the appeal is being dismissed based on the petitioner's not demonstrating its ability to pay the proffered wage as of the 2001 priority date and to the present, if the petitioner pursues this matter any further, these additional issues of ineligibility should be discussed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.