

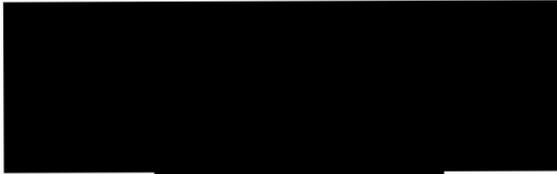


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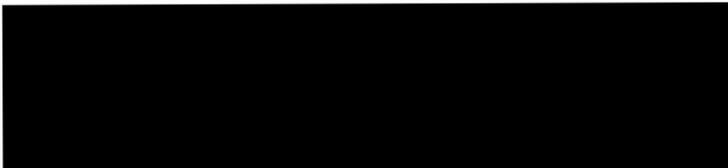
FILE: [REDACTED]
SRC-05-207-52138

Office: TEXAS SERVICE CENTER Date: JUL 18 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (“director”), and is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a retail store, which sells groceries, gas, and other products. The petitioner seeks to employ the beneficiary permanently in the United States as a manager, retail store (“Evening Manager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s November 9, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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

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 the decision. Further elaboration of the procedural history will be made only as necessary.

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).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$38,730 per year, 40 hours per week. The labor certification was approved on March 8, 2005. The petitioner filed an I-140 Petition for the beneficiary on July 18, 2005. The petitioner failed to list any of the following information on the I-140 Petition related to the petitioning entity: date established; gross annual income; net annual income; and current number of employees.

The director issued a Request for Evidence (“RFE”) on August 12, 2005 requesting that the petitioner provide evidence of the petitioner’s ability to pay, including copies of quarterly IRS Forms 941 exhibiting taxes paid, and the names of employees; Forms I-9 for the company’s employees;² and Form W-2 evidence of wages paid to all employees. The director also requested information related to the business: a photocopy phonebook listing for the business; a copy of the business’ lease; information related to the business’ incorporation; and any advertisements for the business. The petitioner responded.

On November 9, 2005, the director determined that the evidence submitted was insufficient to demonstrate the petitioner’s ability to pay the proffered wage, and denied the petition. In her decision, the director raised the following points: (1) that the petitioner’s net income would not support the proffered wage; (2) that the petitioner submitted Form W-2 statements for other employees, and no other employee received a salary similar to that offered to the beneficiary; and (3) that the checks issued to the beneficiary on different dates were sequential (which would not account for payment of any other employees), and it was unclear that the checks submitted had been cashed. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel’s arguments on appeal. First, in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on July 22, 2003, the beneficiary did not list that he was employed with the petitioner. On appeal, the petitioner indicated that the beneficiary has been employed since June 1, 2005,³ and provided copies of checks written to the beneficiary for the following dates: July 1, July 7, August 1, August 14, September 2, September 11, September 18, and October 2, 2005 all in the amount of \$1,400. Additionally, the petitioner provided one check dated September 30, 2005 in the amount of \$1,000.⁴ Based on documentation in the record, the petitioner has paid the beneficiary the following amounts:

² The petitioner did not provide its Forms I-9, but indicated in its RFE response that the I-9 Forms “were not located but please see W-2s to indicate employees employed at the business.”

³ The sole proprietor provided a statement that the beneficiary borrowed \$3,000 in living expenses from the owner in June 2005, and that the owner is escrowing the beneficiary’s checks for 30 days to ensure that the beneficiary repays him.

⁴ We additionally note that based on the quarterly state tax reports submitted, that the petitioner appears to have employed the beneficiary previously. A report for the quarter ending December 31, 2001 shows that the petitioner paid the beneficiary \$3,000; the beneficiary is also listed on a quarterly report for the time period ending June 30, 2002 with earnings of \$1,500. There is no other evidence of the petitioner’s employment, or payment of wages to the beneficiary until 2005. We note that the petitioner did not indicate that it employed the beneficiary prior to June 2005.

<u>Year</u>	<u>Wages Paid</u>	<u>Remaining Wage petitioner would need to pay</u>
2005	\$12,768	\$25,962
2004	no documentation of any wages paid	full proffered wage of \$38,730
2003	no documentation of any wages paid	full proffered wage of \$38,730
2002	\$1,500	\$37,320
2001	\$3,000	\$35,730

Based on the foregoing, the petitioner cannot establish its ability to pay the proffered wage on wages paid to the beneficiary alone. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and the proffered wage.

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. 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 proprietor, 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 ("AGI") 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 himself, and his spouse and three dependent children and resides in Houston, Texas. The tax returns reflect the following information for the following years:

Year	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2004	\$27,626	\$271,679	\$18,423	\$11,559
2003	\$39,727	\$308,271	\$23,650	\$13,382

2002 ⁵	\$36,024	\$345,000	\$30,420	\$26,098
2001	\$43,998	\$347,226	\$12,000	\$19,843

If we reduced the sole proprietor's adjusted gross income (AGI) by the wages remaining needed to show that it can pay the proffered wage to the beneficiary, the owner would be left with an adjusted gross income of: -\$11,104 in 2004; \$997 in 2003; 2002: -\$1,206; and 2001: \$8,268.

Based on the foregoing, the sole proprietor would be left with negative income in two years to support himself and his family, and very low income in another two years. Therefore, it would be unlikely that the sole proprietor could pay the beneficiary the proffered wage in any year, and support himself and his family.⁶

As additional evidence, the sole proprietor submitted unaudited "personal financial statements" for each year from 2001 to 2005, which lists the sole proprietor's following estimated net worth: 2001 - \$366,000; 2002 - \$488,000; 2003 - \$512,000; 2004 - \$662,000; 2005: \$690,000. In support, he provided a recorded Satisfaction or Release of Mortgage to document that he owned his residence, and a 2005 tax appraisal showing that the property is worth an estimated value of \$193,870. We note, however, that his home residence would not be a readily liquefiable asset available to pay the proffered wage.

Counsel additionally submitted a statement related to the sole proprietor's auto insurance showing that he owned four vehicles without liens; however, the value of vehicles was not stated. The sole proprietor did not provide any further documentation to document the value of any items included in his estimated net worth. 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)).

Further, we note that the personal financial statements submitted were unaudited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited personal financial statements submitted with the petition are not persuasive evidence. The statements are in a compilation format rather than audited. Statements produced pursuant to a compilation are the representations of management, or the sole proprietor. The unsupported representations of management, or in this case, the sole proprietor, are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel additionally submitted documentation of an E-Trade investment account in the name of the sole proprietor, which was dated September 30, 2005 and showed a balance of \$25,965. While the sole proprietor's personal assets will be considered, only one statement was provided, which would exhibit what the sole proprietor had in his account as of September 30, 2005, and would not demonstrate the petitioner's continuous ability to pay the proffered wage, or to support the sole proprietor's family as of the priority date in 2001. Any funds expended in one year would not be available in subsequent years to pay the proffered wage or support the beneficiary.

⁵ The petitioner submitted two separate tax returns for the year 2002. The director questioned this in her decision. On appeal, counsel indicates that one copy was a draft copy inadvertently submitted.

⁶ We note that the sole proprietor did not provide an estimate of monthly expenses for himself and his family in order to establish his monthly expenses and whether he would be able to support himself and his family and pay the proffered wage.

Additionally, counsel submitted business bank statements representing month end balances for four months: December 31, 2002, December 31, 2003, December 31, 2004, and October 31, 2005. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." We note that the bank statements reflect significant varying amounts from a high balance of \$43,841.90, and a low balance of \$28,995 in 2005. However, as only four statements were provided, it is unclear what funds the business had in its account throughout the year. As such, they would not be reliable evidence to show that the petitioner could pay the proffered wage continuously.

On appeal, counsel contends that CIS erred in failing to consider the petitioner's entire circumstances, including personal assets as the petitioner is formed as a sole proprietorship and cites to *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA) in support.

As noted above, 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.⁷

Counsel claims that the unaudited personal financial statements submitted show that the sole proprietor has sufficient net current assets to pay the proffered wage. Further, counsel notes that as a small business it would be very costly to obtain audited financial statements, and that the petitioner submitted bank statements, and a property appraisal in support of the unaudited statements.

As addressed above, the bank statements for the business represent only four months, and would not show the petitioner's continuous ability to pay the proffered wage, the E-Trade account only documents one month, and the sole proprietor's home is not a readily liquefiable asset, which might be used to pay the proffered wage. The director's decision specifically noted that the statements were deficient as they were unaudited. However, the petitioner did not provide any further documentation on appeal to evidence that the items listed in the unaudited personal financial statements were fairly valued or appraised. See *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190), (Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

Further, counsel contends that CIS erred in considering the petitioner's net income and not the sole proprietor's AGI. We agree, and have addressed that issue above. Based on the sole proprietor's AGI, the petitioner cannot demonstrate that it can pay the proffered wage, and allow enough remaining income for the sole proprietor to support himself, and his family.

Counsel cites to the May 4, 2004 Memorandum from William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2) (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary. Counsel contends that the petitioner is now employing the beneficiary and,

⁷ It is unclear from the decision whether the director took into consideration the sole proprietor's personal assets. The decision cites general language that "personal savings or holdings are not considered for the ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders." The present case is different, however, as the petitioner is formed as a sole proprietorship, and therefore, personal assets would be considered.

therefore, can demonstrate its ability to pay. Although the petitioner may now be employing and paying the beneficiary the proffered wage, the May 4 Yates Memo does not negate the petitioner's statutory requirement to show that it can pay the beneficiary the proffered wage from the priority date of April 2001 to the time that the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has provided checks from only a few months in 2005, not since April 2001.

Counsel additionally contends that it is unreasonable for the petitioner, as a small business, to have to show the ability to pay the proffered wage since 2001, particularly when the petitioner has not had the benefit of the beneficiary's employment.

Based on the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate its ability to pay the proffered wage from the priority date onward. The requirement cannot be negated based on the length of time that DOL took to make determination on the petitioner's Form ETA 750. Regarding the petitioner's ability to show that it can pay the wages without the benefit of the beneficiary's employment, it would be speculative to suggest that had the beneficiary worked for the petitioner, the petitioner would be able to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing, the petitioner has not demonstrated that the sole proprietor can support himself and his family, and has the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

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.