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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 07 2007

SRC 05 178 51894

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station and food store.[1] It seeks to employ the beneficiary permanently in the United States as a store manager, night shift. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's November 22, 2005 denial, 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.

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 20, 2001. The proffered wage as stated on the Form ETA 750 is $30,000 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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

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[1] The petitioner identified itself in this manner on the Form ETA 750. The I-140 petition simply states "retail".

pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] Counsel submits the petitioner's tax return, Form 1040 for tax year 2001, with Schedule C, as well as a copy of a Board of Alien Labor Certification Appeals (BALCA) decision, *Matter of Ranchito Coletero,* 2002-INA-104 (2004 BALCA). Other relevant evidence in the record includes copies of the petitioner's Forms 1040 for tax years 2002 to 2004, with the accompanying Schedules C submitted in response to the director's request for further evidence.[3] The record also contains copies of two checks paid by the petitioner to the beneficiary dated August and September 2005 and made out for the amount of $2,134.75. Counsel also submitted a copy of an interoffice Citizenship and Immigration Services (CIS) memorandum with regard to establishing the petitioner's ability to pay the proffered wage.[4] 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 1991, and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 14, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that based on the checks submitted to the record, the petitioner is currently paying the beneficiary the proffered wage, and therefore, CIS should make a positive ability to pay determination, based on the guidance provided in the Yates memo with regard to whether a petitioner has paid or is paying the proffered wage to a beneficiary. Counsel also states that since the priority date for the petition is April 27, 2001, the petitioner only has to establish its ability to pay the beneficiary the proffered wage for eight months in tax year 2001. Counsel also notes that the director incorrectly stated the petitioner's adjusted gross income in tax year 2001 was $37,714, however, the petitioner's tax return, even without the Schedule C, clearly indicates the sole proprietor's adjusted gross income in 2001 was $70,271. Counsel also states that based on the findings in *Ranchito Coletero*, the petitioner's overall financial circumstances should be considered when evaluating the petitioner's ability to pay 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.

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[2] 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).

[3] It is noted that the director in his request for further evidence dated July 9, 2005, requested copies of the petitioner's Forms 1040 for tax years 2002 to 2004, and that in a subsequent document entitled "Intent to Deny" dated October 17, 2005, requested the petitioner's complete Form 1040 for 2001. This document while titled "Intent to Deny" did not examine the grounds for a denial of the petition, but rather requested further evidence. Counsel on appeal submits the sole proprietor's 2001 Form 1040 with Schedule C, but states that the director's NOID was never received and that in its response to the director's first request for evidence, the petitioner had submitted copies of its tax returns for 2002 to 2004, as requested.

[4] 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).

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).

On appeal, counsel refers to the Yates memo and states 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 asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the checks paid to the beneficiary in 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 20, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually paid the proffered wage rate, but it must also show its continuing ability to pay the proffered wage as of April 20, 2001, for the priority year 2001, tax years 2002, 2003, and 2004 and the remainder of 2005. 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.

Counsel further states on appeal that the sole proprietor only has to establish its ability to pay the proffered wage from the April 2001 priority date to December 2001. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel cites *Ranchito Coletero*, 2002-INA-104 on appeal, for the premise that personal and other business assets of the sole proprietor petitioner should be considered in evaluating a petitioner's ability to pay the proffered wages. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). However, counsel's assertion with regard to the examination of a sole

proprietor's personal or additional business assets is correct. The AAO will examine this issue more fully further in these proceedings.

Counsel's assertion with regard to the petitioner's gross adjusted income in tax year 2001 is correct. In his decision, the director erroneously used line 17, rather line 33, of the sole proprietor's From 1040 to indicate the sole proprietor's adjusted gross income. The sole proprietor's correct adjusted gross income for tax year 2001 is $70,271.

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 beneficiary did not indicate that he had worked for the petitioner prior to signing the Form ETA 750. While the petitioner submitted copies of two checks in the amount of $2,134.75 paid to the beneficiary in 2005, these checks only establish that for two months in tax year 2005, the petitioner paid a monthly check to the beneficiary at a level close to the proffered wage.[5] The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date onwards. Thus, the sole proprietor has to establish its ability to pay the entire proffered wage as of the 2001 priority year, and through 2002, 2003, 2004, and 2005.[6]

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, as counsel correctly infers, 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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[5] The monthly salary for the beneficiary would be $2,500. This figure is based on the proffered wage of $30,000 divided by 12 for the monthly wage. While the checks submitted to the record may indicate wages minus taxes for two months in 2005, the petitioner has the burden of proof in these proceedings to establish its eligibility.

[6] Since the record closed in October 12, 2005 following the receipt of the sole proprietor's response to the director's first RFE, the petitioner did not submit its 2005 tax return. Therefore, the AAO will not comment any further on the petitioner's ability to pay the proffered wage in tax year 2005.

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 six persons in tax year 2001, five persons in 2002, and five persons in tax years 2003 and 2004. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$ 70,271	$ 90,260
Petitioner's gross receipts or sales (Schedule C)	$ 285,746	$ 304,150
Petitioner's wages paid (Schedule C)	$ 12,000	$ 21,000
Petitioner's net profit from business (Schedule C)	$ 29,337	$ 12,648

	2003	2004
Proprietor's adjusted gross income (Form 1040)	$ 98,147	$ 112,649
Petitioner's gross receipts or sales (Schedule C)	$ 275,218	$ 240,953
Petitioner's wages paid (Schedule C)	$ 24,000	$ 27,999
Petitioner's net profit from business (Schedule C)	$ 9,119	$ -4,489

In 2001, 2002, 2003, and 2004, the sole proprietorship's adjusted gross income of $70,271, $90,260, $98,147, and $112,649 covers the proffered wage of $30,000. However, the sole proprietor needs to establish both its ability to pay the proffered wage and pay its household yearly expenses. The director did not request nor did the petitioner provide an itemized list of monthly expenses, to include such costs as mortgages, insurance, school, transportation, clothing, and food, among others. Therefore the record has insufficient evidence that in the 2001 priority year, the sole proprietor could pay both his yearly household expenses for six persons and also pay the proffered wage of $30,000 on his adjusted gross income of $70,271.[7]

In tax years 2002, 2003, and 2004, with five individuals in the family unit, it is probable that the sole proprietor could both pay his yearly expenses and the proffered wage; however, since the record contains no further information on any such household expenses, the petitioner has not established his ability to both pay the proffered wage and his household expenses as of the 2001 priority year and onward. Thus, the sole proprietor has not established its ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residence. It is also noted that the sole proprietor's adjusted gross income is significantly impacted by his income from S corporations as outlined on Schedule K of the sole proprietor's tax return. While sole proprietors may use the assets of other businesses, or other personal assets to pay the proffered wage, in the instant petition, the diminishing net profits from the business for which the beneficiary would work raises questions as to the financial viability of the business and whether or not the job offer is realistic.

[7] In tax year 2001, the proprietor would have $40,271 remaining of gross adjusted income with which to pay his household expenses.

Beyond the decision of the director, the sole proprietor has not established that the beneficiary is qualified to perform the duties of the proffered position. 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).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 21, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Form ETA 750 submitted to the record requires two years of previous work experience as the night manager of a gas station and food store. On Part B of the ETA 750, the beneficiary indicates that he had worked from December 2000 to April 14, 2001, the date the beneficiary signed the ETA 750, as the sto r of [redacted] Pflugerville, Texas. He further indicated he had worked as a Parts Manager, for Auto Parts, Mumbai, India from Janua 1997 to November 2000 as a parts manager. The petitioner submitted a letter of work verification from Auto Parts, signed by [redacted], Owner. In his letter, [redacted]li stated that the beneficiary worked as a parts manager from January 1997 to August 1999.

Thus, the ETA 750 employment information provided by the beneficiary and the employment letter provided by [redacted] Auto Parts are inconsistent with regard to the length of the beneficiary's employment as a parts manager for an automobile parts company. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The contradictory statements with regard to the beneficiary's previous work experience in India diminish the weight to be given to the letter of work verification submitted to the record.[8] The letter from [redacted] also does not specify the hours of work performed by the beneficiary. Further, the proffered job requires two years of experience as the manager of a gas station and food store. It does not appear that the job duties of a parts manager in an automobile parts facilities fulfill the requisite two years of work experience stipulated on the Form ETA 750. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Finally, it is noted that the sole proprietor and the beneficiary share the same surname. 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."

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[8] The beneficiary's statements on the Form ETA 750 with regard to his employment in India would also call into question his actual arrival date into the United States, which is noted on the I-140 petition as September 16, 1999.

See Matter of Summart 374, 00-INA-93 (BALCA May 15, 2000). In the instant case, the sole proprietor and the beneficiary appear to be related. Therefore, the petitioner cannot establish that that it has made a bona fide job offer to the beneficiary.

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.