U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 20 2007

WAC 05 091 51821

IN RE: Petitioner:
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:

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 dismissed.

The petitioner is an architectural development company.[1] It seeks to employ the beneficiary permanently in the United States as a stone carver. 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 submitted a valid labor certification because the sole proprietor declared that she had relocated her business to Las Vegas, Nevada in a letter dated July 4, 2004. The director also determined that based on tax documents submitted to the record, while the sole proprietor had sufficient adjusted gross income to pay the beneficiary's proffered wage in tax years 2001 and 2002, the sole proprietor did not have the ability to pay the proffered wage in tax year 2003, and provided no evidence of her ability to pay the proffered wage in tax year 2004. Finally the director determined that the sole proprietor had submitted a deficient letter of work verification regarding the beneficiary's previous work experience as a stone carver in India that did not list hours of work and contained illegible signatures. 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.[2] 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 November 9, 2005 denial, three issues were addressed as to why the sole proprietor had not established her eligibility to file the employment-based visa preference petition. The AAO will examine all of these issues in its examination of the appeal. First the AAO will examine the sole proprietor's ability to pay the proffered wage.

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

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[1] The petitioner is identified as an architectural development company on the I-140 petition. In a subsequent cover letter, the sole proprietor describes her business as purchasing homes, upgrading them, and selling them for a profit.

[2] The sole proprietor was represented by counsel in filing the I-140 petition and in responding to the director's first request for further evidence. However, in the first response dated May 26, 2005, counsel withdrew from representation of the petitioner. Nevertheless, in response to a second request for further evidence sent to the petitioner on July 9, 2005, counsel submitted a response. Upon the receipt of the director's denial, the petitioner submitted the appeal which the AAO will examine. Thus, the petitioner is self-represented.

> 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 C.F.R. § 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 December 3, 2001. The proffered wage as stated on the Form ETA 750 is $25.66 an hour, or $53,372.80 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position of stone carver (specialty Indian carving and filigree). The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner does not indicate when it was established, its current number of employees, or its gross or net annual income. On the Form ETA 750B, signed by the beneficiary on July 16, 2001, the beneficiary claimed to have worked for the petitioner since July 2001.[3,4]

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.[5] On appeal, the sole proprietor submits no further evidence to the record with regard to her ability to pay the proffered wage as of the December 31, 2001 priority date and continuing until the beneficiary receives permanent legal residency.

Other relevant evidence in the record includes a one page document entitled "Renovations Completed During Approx. 6 Years By Christl Thomson." This document indicates gross proceeds of $5,286,000 from the sales of properties in California and Nevada during the past six years. A second document submitted by the petitioner with a letterhead address of [redacted], Las Vegas, Nevada, and signed as of August 26, 2004, is entitled "Financial Statement." The record appears to list the assets and liabilities of the sole proprietor as of August 6, 2004, and indicates the sole proprietor's net worth is $2,259,801. The record also contains Schedule D of the sole proprietor's Form 1040 for tax year 2000, and the second page of Schedule C of the sole proprietor's Form 1040 for 2001. In response to one of the director's requests for evidence dated July 9, 2005, the sole proprietor submitted copies of her Forms 1040 for tax years 2001, 2002, 2003, and a

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[3] In a letter submitted to the Department of Labor, dated December 10, 2002, that accompanied the Form ETA 750, the beneficiary also claimed to have worked as a cab driver from June 2001 to September 2001.

[4] As the director correctly noted, the beneficiary's passport submitted to the record with his I-485 Adjustment of Status application, indicates that at the time he obtained a U.S. nonimmigrant visa in June 24, 1997, the beneficiary was the "personal attendant of Thomson family." This evidence suggests earlier employment of the beneficiary by the petitioner but not in the same job classification as stone carver.

[5] 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).

handwritten note that the sole proprietor's 2004 tax return was due in October, and that her gross income was $450,000. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that she has liquid assets in excess of one million dollars that are more than sufficient to pay the proffered wage, and that the sole proprietor can submit bank statements or letters from the bank to corroborate her assets. The sole proprietor does not submit any such statements or letters on appeal.

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).

The sole proprietor submitted an unaudited financial statement and incomplete tax records with the initial petition. With regard to the unaudited financial statement, the sole proprietor's reliance 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 the sole proprietor. The unsupported representations of the sole proprietor are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Thus the sole proprietor's financial statement is given no weight in these proceedings. It is noted that the sole proprietor did submit more complete tax returns in response to the director's second request for further evidence dated July 9, 2005, and the director examined these returns in his decision. The AAO will also examine these returns 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. Although the beneficiary indicates he was employed by the sole proprietor on the Form ETA 750 and his U.S. nonimmigrant visa suggests the same, the sole proprietor submits no further evidence to any employment as of the 2001 priority date and continuing to the present time. Thus, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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 supported a family of two in tax years 2001 and 2002, and supported herself in tax year 2003.[6] In his decision, the director noted that based on the sole proprietor's adjusted gross income of $180,532 in tax year 2001, and $227,412 in tax year 2002, the sole proprietor had sufficient adjusted gross income to pay the proffered wage of $53,372.80. However, the sole proprietor did not submit her complete tax returns to the record. The record reflects that the sole proprietor did not submit the respective Schedules C for any relevant tax year with her Forms 1040, although the director clearly requested such documentation twice prior to denying the instant petition.[7] Without such information, the record cannot establish that the sole proprietor is running a viable business enterprise, as items such as the sole proprietor's net profits or wages with the business are not available.

Further, despite the director's request in both RFEs, the sole proprietor did not submit any evidentiary documentation as to her monthly household expenses for any tax year. Thus, the record does not reflect whether the sole proprietor could both pay her own yearly household expenses as well as those of her one dependent, and also pay the entire proffered wage during tax year 2001 and 2002. Without such further evidence the sole proprietor has not established her ability to pay the entire proffered wage in the 2001 priority year or in tax year 2002. Thus, the AAO will withdraw the director's decision with regard to the sole proprietor's ability to pay the proffered wage during tax years 2001 and 2002.

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[6] The AAO notes that the sole proprietor submitted her Form 1040 for tax year 2000. However, this information is not probative of the sole proprietor's ability to pay the proffered wage, as the priority year in this case is 2001. Therefore the AAO will not examine the sole proprietor's financial assets and liabilities for tax year 2000 further in these proceedings.

[7] The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

With regard to tax year 2003, the sole proprietor did not submit Schedule C for her 2003 tax return, or any evidence as to her yearly household expenses. Furthermore the Form 1040 submitted to the record only reflects adjusted gross income of $38,575, which is insufficient to pay the entire proffered wage of $53,372.80, as well as the sole proprietor's yearly household expenses. Thus the director's determination that the sole proprietor had not established her ability to pay the proffered wage in tax year 2003 is correct. As the director correctly noted, the sole proprietor did not provide her 2004 tax return, even though the record did not close until the sole proprietor's response to the director's second request for further evidence dated September 28, 2005.

On appeal, the sole proprietor provides no further evidentiary documentation as to her financial assets, nor does she provide complete Form 1040 tax returns. Therefore the sole proprietor has not established her ability to pay the proffered wage as of the 2001 priority date year and through 2004.

Next, the AAO will examine whether the petitioner submitted a valid labor certification with the initial petition. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(C)(2). The labor certification indicates the employer's address is in San Francisco, California. The fact that the sole proprietor submitted correspondence with a Las Vegas, Nevada letterhead raised questions as to whether the proffered position would be performed in San Francisco, California, or in Las Vegas, Nevada, and which prevailing wage rate would be applicable to the proffered position. Furthermore the sole proprietor in her letter dated July 4, 2004, stated that she "relocated [her] business to Las Vegas in March 2002, and that she had spent 2002 and 2003 in Las Vegas on a new project which is about to be marketed." It is also noted that when submitting the Form ETA 750 for certification to the Department of Labor, the sole proprietor did not state or indicate that the beneficiary would work in multiple work sites in Nevada and California. Based on the change of business venue declared by the sole proprietor after the submission of the labor certification application, it appears that the petitioner as of July 2004 intended to employ the beneficiary as a stone carver in Las Vegas, Nevada, outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).[8]

On appeal, the sole proprietor submits a statement, described as a sworn affidavit, that states that the sole proprietor's business is located in San Francisco, California, that the intended area of employment remains San Francisco, California, and that the certified labor certification should not be invalidated. However, the declaration that has been provided on appeal is not an affidavit, as it is not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Thus, the sole proprietor's statement that her business location is actually San Francisco, California is given no weight.

Thus the petitioner has not definitively established in the record that her business is actually located in San Francisco, California. The record is inconsistent as to the actual location of the proffered position. *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

[8] The beneficiary's G-325 form, Biographic Information, found in the record with his I-485 Petition for Adjustment of Status indicates that he began working for the sole proprietor in July 2001, identifying the sole proprietor's address as San Francisco, California and Las Vegas, Nevada. This form also indicated that the beneficiary lived in Las Vegas, Nevada, at the same address noted by the sole proprietor on her letterhead from December 2002 to March 2004, which suggests that the sole proprietor's business and domicile location was Las Vegas, Nevada, in 2003 and to some time in 2004.

inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, AAO thus upholds the director's decision with regard to the labor certification.

The AAO will next examine whether the petitioner submitted a deficient letter of work verification in response to the director's request for further evidence.. In his denial, the director also stated that the letter of previous work verification from Good Living, New Delhi, India, submitted by the sole proprietor in response to the director's request for further evidence, dated July 9, 2005, was deficient. The director noted that the letter did not indicate that the beneficiary had worked fulltime, that the letter had an illegible signature and the name and title of the person who signed the letter couldn't be read, and that the letter indicated the beneficiary was an apprentice of some unstated portion of his time with Good Living (India). The director also noted a discrepancy between the beneficiary's description of his work with Good Living as contained on the Form ETA 750, and the letter of work verification submitted in response to the director's request for further evidence. On the Form ETA 750, the beneficiary indicated he worked for Good Living (India), New Delhi, India, from March 1995 to January 1998, working 50 hours a week. The letter from the Good Living (India) company states that the beneficiary worked there from January 1, 1994 to December 31, 1998. On appeal, the sole proprietor notes that she has not been given an opportunity to explain these discrepancies; however, she provides no further explanation for the discrepancy or documentation to refute the discrepancy. 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)). Again, *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." Finally, *Matter of Ho* also states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." It is also noted, as stated previously, that in the beneficiary's passport, his U.S. nonimmigrant visa obtained on June 24, 1997 states the beneficiary was the "personal attendant of Thomson family." This passport annotation points out further inconsistencies regarding the beneficiary's employment at Good Living (India) as a stone carver from June 1997 and up to January 15, 1998 when the beneficiary entered the United States.

It is further noted that the record contains a Form I-130, Petition for Alien Relative, originally submitted to CIS on March 27, 2001, on the beneficiary's behalf. This petition was based on the beneficiary's marriage entered into on March 13, 2001 in Yonkers, New York with a U.S. citizen. The marriage certificate submitted to the record indicated the residence of the beneficiary at the time of the marriage as [redacted] Queens, New York.[9] The information on this form points out further inconsistencies with regard to employment of the beneficiary by the sole proprietor as of June or September 2001.

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 not met that burden with regard to her ability to pay the proffered wage to the beneficiary, with regard to the actual work location of the proffered position, and with regard to the previous work experience of the beneficiary as a stone carver.

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[9] Based on the beneficiary's I-485 petition submitted to the record with the initial petition, the beneficiary at this period of time was residing in San Francisco, California. The I-130 petition was eventually denied when the beneficiary and his spouse failed to show up on February 23, 2004 for an Alien Relative Petition interview.

ORDER: The appeal is dismissed.