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

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: WAC-05-061-52184 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007

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 appeal will be dismissed. The director's decision will be withdrawn in part and affirmed in part.

The petitioner operates a business related to diamond wholesale and the retail of colored stones. It seeks to employ the beneficiary permanently in the United States as a jeweler, precious stone ("Gem Cutter"). 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 August 17, 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. Further, the director questioned the experience letter submitted on behalf of the beneficiary, and, since the letter was in question, found that the petitioner failed to establish that the beneficiary met the requirements of the certified ETA 750.

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

[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).

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 for processing by the relevant office within the DOL employment system on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $10.88 per hour, 40 hours per week, which is equivalent to $22,630.40 per year. The labor certification was approved on September 28, 2004. The petitioner filed an I-140 Petition for the beneficiary on December 29, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: January 1, 1998; gross annual income: $307,455.00; net annual income: not listed; and current number of employees: 0.

The director issued a Request for Evidence ("RFE") on May 18, 2005 requesting that the petitioner provide the petitioner's federal tax returns, along with all schedules and tables, and to additionally submit Form DE-6 Quarterly Wage Reports listing all employees and wages paid. The RFE also requested that the petitioner submit evidence of the beneficiary's qualifications, as the director found that the initial letter submitted to document the beneficiary's qualifications was vague. The petitioner submitted a response, however, following review, the director determined that the petitioner failed to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. Further, the director found that the petitioner failed to demonstrate that the beneficiary met the requirements of the labor certification, and denied the petition. 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 April 23, 2001, the beneficiary did not list that he was employed with the petitioner, but rather listed that he has been unemployed from June 2000 to the present (April 23, 2001).[2] The petitioner did not submit any W-2 Forms for the beneficiary. Therefore, the petitioner is unable to establish its ability to pay the beneficiary based on prior wage payment.

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

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[2] Form I-140 lists that the beneficiary is present in the U.S. The record is unclear as to how the beneficiary is supporting himself.

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 himself, and resides in Tarzana, California. The tax returns reflect the following information for the following years:[3]

[redacted]	**Sole Proprietor's AGI (1040)**	**Gross Receipts (Schedule C)**	**Wages Paid (Schedule C)**	**Net profit from business (Schedule C)**
2004	$54,756	$478,099	$0	$58,919
2003	$24,676	$307,455	$0	$26,552
2002	$22,594	$320,953	$0	$24,312
2001	$10,944	$221,692	$0	$11,776

If we reduced the owner's adjusted gross income (AGI) by $22,630.40, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of $32,125.60 in 2004, $2,045.60 in 2003, -$36.40 in 2002, and -$11,684.40 in 2001. Based on the above analysis, it is unlikely that the beneficiary could support himself in any year other than 2004, and pay the beneficiary as well.

On appeal, the petitioner claims that he had the following amounts in inventory listed on the federal tax returns, which the director failed to take into consideration: 2001: $93,684; 2002: $80,788; 2003: $124,219; and 2004: $122,195. CIS will generally consider the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current assets are examined against the petitioner's current liabilities. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due. While the petitioner has offered evidence of inventory, which would be considered as an asset,[5] we have no information regarding the petitioner's current liabilities in order to

[3] No tax return was submitted for the year 2005, which may not have been available at the time that the petitioner responded to the RFE, but would have been available at the time of appeal.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] Further, from the record, it is not clear that the inventory would represent a "current" asset. The petitioner's tax returns reflect the company's inventory at the beginning of the year, and not the remaining inventory at

determine whether the petitioner would have positive or negative net current assets. We cannot consider inventory in the absence of information regarding the petitioner's current liabilities, and thus, the amounts listed as inventory would not demonstrate the petitioner's ability to pay.

The petitioner additionally submitted business bank statements for the time periods September 30, 2004 to August 31, 2005 (submitted on appeal), and for the time period June 30, 2001 to December 31, 2002. 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." Additionally, in the case of a sole proprietor, cash assets of the business would be reflected on the petitioner's Form 1040 Schedule C, and accordingly already considered above. As a sole proprietorship, the owner's personal assets, or personal bank statements would be taken into consideration as additional funds to pay the proffered wage. However, the petitioner only submitted bank statements related to the petitioning company, which have been considered. Further, we note that the bank statements reflect significant varying amounts from a low of $789 (as of January 31, 2002) to a high balance of one month at $174,091 (as of June 30, 2005, based on a deposit of $157,509.17 on June 29). As a comparison, the petitioner had a bank balance of $24,944 at the end of May 2005, a balance of $13,454 at the end of April 2005, and $6,124 in the month before. Since the petitioner has not established that the bank balances represent funds in addition to that listed on Schedule C, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner also has property, purchased on January 1, 2004, which should be considered as an asset in terms of the petitioner's ability to pay, and that the assessed value of the property is $528,500. Further, counsel contends that "the house next door to the petitioner's" was on sale for $978,000. In support, he attached a real estate advertisement for the house "next door" at [redacted] exhibiting a listing of $978,000. The petitioner additionally submitted a tax bill for the owner exhibiting an address of his property as 17332 Crest Heights Drive.

As the petitioner purchased the house on January 1, 2004, the value would not establish that the petitioner could pay the beneficiary the proffered wage in the year of the priority date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, we note that based on the neighbor property's house number, and the house number listed on the tax assessment, the petitioner's home would likely not be right "next door" to the home selling for $978,000, but would appear to be further down the street by several houses or blocks. Additionally, while the assessment shows a land at $210,000, and improvements at $318,500, equivalent to $528,500, a hand written note lists the property's "fair market value at $978,000." Evidence of a neighbor's house selling at that amount does not demonstrate that the petitioner's owner's house would sell for a similar amount. Counsel concludes that based on the neighbor's property's valuation, and the tax assessment, that the petitioner would have "equity accumulated for this property" in the amount of $449,500. We see no basis for this conclusion. The petitioner did not submit any documentation to exhibit what he owed on the property, such as a mortgage statement, or that the petitioner has significant equity in the home. Further, a home is not an immediately liquefiable asset from which to pay the proffered wage.

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the end of the year. Part or some of the listed inventory may have been sold during the year, and would not be available as a current asset to pay the proffered wage, but would be reflected in the petitioner's gross receipts already listed and considered above.

The petitioner additionally submitted a list of estimated monthly expenses (including mortgage, gas, television, electricity, groceries, car expenses, and credit card), which totaled $4,213 equivalent to $50,556 per year. We note that the petitioner did not submit any bills such as a mortgage, electricity bill or car payment to document these expenses. Based on the petitioner's foregoing estimate, the petitioner would not be able to support himself and pay the beneficiary from the adjusted gross income above. Further, although the petitioner has provided a tax assessment bill, the petitioner has not demonstrated the amount the petitioner owes on the house, and whether any equity would be available to support himself, or otherwise pay the beneficiary.

We also note that the petitioner has no other employees, and submitted no quarterly wage forms DE-6, as the owner is the sole employee. As the petitioner has run the business himself for many years, it might be questionable that he actually needs an employee as a gem cutter to work for his business on a full time basis.

Another questionable aspect of the petition is that the beneficiary appears to be residing with the petitioner, or at the location of the petitioner's business, although the beneficiary does not claim to be working for the petitioner. We note that 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 also Paris Bakery Corporation,* 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." It is unclear whether there is a relationship between the two parties, but if there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the bona fides of the job offer may be in question.

The petitioner's individual Form 1040 tax return lists his address as: [redacted] Tarzana, California. Schedule C lists the business address as [redacted]. The petitioner's bank statements similarly list this as the business address. However, the Form ETA 750 and Form I-140 list [redacted], California, as the petitioner's business address. The reason for this discrepancy is unclear. The beneficiary lists his address on Form I-140, as well as on Form ETA [redacted] as: [redacted] We find this raises an issue of the petitioner's credibility. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) 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."

In consideration of the foregoing, the petitioner has not demonstrated that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

The director also denied the petition based on the petitioner's failure to document that the beneficiary met the requirements of the certified ETA 750. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a gem cutter, with duties including: "the cutting, shaping & polishing of colored precious/synthetic gems. Cuts & slits stone with revolve saw or slitter. Application of abrasive compound. Shape stone further by holding stone against revolving shaping wheel and lapidiary disk and grinds facets. Examination of stone by magnification. The polishing of the stone with polishing wheel & compounds." The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on April 23, 2001, the beneficiary listed his prior work experience as: (1) Unemployed, from June 2000 to present; ([redacted], September 1998 to June 2000, Owner, retail; and (3) [redacted] from June 1995 to August 1998.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted a letter from [redacted] Jayawickrama, Colombo, [redacted], which provided that "this is to certify that [the beneficiary] has worked in our Gem cutting division as a Gem cutter for colourd [sic] stones from June 1995 to August 1998. It is sad for us that he left our company."

The director raised the issue that the initial letter was vague and did not include the beneficiary's job duties. The petitioner obtained and provided a second letter from the same individual, which provided a list of job duties, including, "careful study of the rough gem material using the necessary equipment; sawing or splitting them into proper sizes; performing the sawed or splited pieces into different shapes; calibrating the preformed gem stones to the required millimeter sizes; cutting and polishing the calibrated stones using the appropriate laps; and sorting the stones that he has cut and polished into different grades."

The director stated in the denial that the letters did not provide the job title, position, and the letter author's dates of employment with the company, which would be used to determine whether the author of the letter could properly attest to the skills and experience of the beneficiary. The director also questioned "how the beneficiary's work records were retrieved from ten years ago."
On appeal, the petitioner provided an additional letter, which states: "I, [redacted]a, am the owner of [redacted] that was established on March 1993. To my recollection [the beneficiary] worked for me from June 1995 to August 1998."

The letters accurately document the beneficiary's work experience, conform to the applicable regulatory requirements, and the beneficiary's prior job duties are sufficiently similar to the position offered to serve as qualifying experience to meet the two years of experience listed on the certified ETA 750. Thus, the portion of the director's decision determining that the beneficiary is not qualified for the proffered position is withdrawn. However, as the petitioner has failed to establish its ability to pay the beneficiary the proffered wage, the petition will remain denied.

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.