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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 30 2007

EAC 04 217 51130

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting firm. It seeks to employ the beneficiary[1] permanently in the United States as an audit clerk. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated December 16, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 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 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).

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[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Here, the Form ETA 750 was accepted on August 8, 1988.[2] The proffered wage as stated on the Form ETA 750 is $16,250 per year.[3] The Form ETA 750 states that the position requires one year of experience in the proffered position or one year of experience in the related occupation of bookkeeper.

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.[4]

Relevant evidence in the record includes copies of the following documents: a cover letter from counsel dated July 9, 2004; a letter from the petitioner dated June 30, 2004; the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with ETA 750 Part B signed by the substitute beneficiary on June 30, 2004; a U.S. Internal Revenue Service Form 1040 tax return for 2002; financial statements of the petitioner for the periods ended December 31, 1988, December 31, 2002, and December 31, 2003; a Schedule C from a U.S. Internal Revenue Service Form1040 tax return for 1988; another ETA 750 Part B signed by the substitute beneficiary on February 2, 2005; an explanatory letter from counsel dated February 3, 2005; and copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 on August 1980. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Forms ETA 750B, signed by the beneficiary on June 30, 2004 and February 2, 2005, the beneficiary did not claim to have worked for the petitioner.

On the appeal Form I-129B filed on January 18, 2006, the petitioner asserts that the director was in error as the beneficiary was actually the beneficiary of a labor certification filed "4/24/01 in N.J. [New Jersey]" and therefore is "grandfathered," and, the beneficiary was not "unlawfully present" in the U.S. for over 180 days.[5]

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[2] It has been approximately 19 years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[3] The petitioner by its letter dated June 30, 2004 in the record, has offered the beneficiary $11.88 per hour which is $24,710.40 annually.

[4] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

[5] In order to reflect the record of proceeding (and, for what evidence the following may provide to the issues of this case relating only to the I-140 petition and subsequent denial), counsel's statements on appeal are stated here. Counsel has commingled assertions relating to the beneficiary's present immigration status, and communications with Citizenship and Immigration Services (CIS) that took place in the context of the adjudication of the alien's application for adjustment of status. The proper venue for consideration of the evidence presented is with the CIS official with jurisdiction over the application for adjustment. The AAO has no jurisdictional authority to determine or review adjustment of status matters. Further, the beneficiary

Accompanying the appeal, counsel submits additional evidence that includes copies of the following documents: a letter from counsel dated January 17, 2006; and a letter to the beneficiary dated July 10, 2003, from Joann Hammill, Assistant Commissioner of the State of New Jersey, Department of Labor.

By transmittal received November 15, 2006, counsel has submitted the following documents: explanatory letters from counsel dated July 7, 2006 and November 2, 2006; CIS Form I-797C; an explanatory letter from counsel; and U.S. Internal Revenue Service Form 1040 tax returns for 1996, 1997, 1998 and 1999.

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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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has no standing in the subject proceeding relating to the issues first set forth above relating to the petitioner and its I-140 petition.

expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two to six for the years examined. The tax returns reflect the following information for the following years:

	1996	1997
Proprietor's adjusted gross income (Form 1040)	$84,985	$87,531
Schedule A[6] or itemized deduction	$18,272	$19,871
Petitioner's gross receipts or sales (Schedule C)	**$65,411**	**$ not provided**
Petitioner's wages paid or cost of labor (Schedule C)	$ 3,696	$ not provided
Petitioner's net profit from business (Schedule C)	$32,405	$ not provided[7]

	1998	1999
Proprietor's adjusted gross income (Form 1040)	$114,829	$120,914
Schedule A or itemized deduction	$ 20,796	$ 20,042
Petitioner's gross receipts or sales (Schedule C)	$105,889	$115,858
Petitioner's wages paid or cost of labor (Schedule C)	$ -0-	$ -0-
Petitioner's net profit from business (Schedule C)	$ 63,037	$ 66,334

	2002

[6] Schedule A as submitted with the petitioner's Form 1040 tax return each year listed personal deductible expenses such as medical and dental services, home mortgage interest, charitable contributions. As already stated, the I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, all of the family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally includes the following: food, car payments (whether leased or owned), installment loans, insurance (auto, household, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the Schedule A statements to the returns.

[7] Asserted by counsel to be $41141 but the Schedule C was not provided. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Proprietor's adjusted gross income (Form 1040)	$ 46,078
Schedule A or itemized deduction	$ 3,925
Petitioner's gross receipts or sales (Schedule C)	$ 53,113
Petitioner's wages paid or cost of labor (Schedule C)	$ -0-
Petitioner's net profit from business (Schedule C)	$ 49,188

In the years for which tax returns were submitted, the sole proprietorship's adjusted gross incomes minus the amounts stated on Schedule A, or in the alternative the itemized deduction in tax year 2002, cover the proffered wage.

However, we note that the director has requested the petitioner's tax returns as of the filing date, August 8, 1998. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 1988 through 1995, 2001, 2003 and 2004. While the petitioner has submitted a portion of Schedule C for tax year 1988 the entire tax return was not submitted. Likewise the 1997 tax return is missing the Schedule C for the petitioner. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Further, the regulation at 8 C.F.R. § 103.2(b)(8) states the following:

> Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied. Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence. Denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15). Nevertheless, as the director's decision was based on the merits of the evidence, we will similarly adjudicate the appeal.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for 1988 through 1995, 2001, 2003 and 2004.

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.

ORDER: The appeal is dismissed.