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

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 21 2008

WAC 06 076 50944

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:

[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 nature of the petitioner's business is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean cuisine chef. 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 (DOL). 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 demonstrated that the appeal was properly filed, timely and made 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 November 20, 2006, 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)(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 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 either 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 DOL. *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 DOL 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 23, 2002.[1] The proffered wage as stated on the Form ETA 750 is $21.15 per hour ($43,992.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

[1] It has been approximately six years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a support letter dated December 20, 2005, made by [redacted] the sole proprietor of the petitioner; the petitioner's financial statements for 2001, 2002, 2003, 2004 and 2005; the sole proprietor's U.S. Internal Revenue Service Form 1040 tax returns for 2001,[3] 2002, 2003 and 2004; 17 pages of the petitioner's checking account statements from April 1, 2005 through September 30, 2005; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for the last quarter of 2004, and the first three quarters of 2005; a commercial lease for [redacted], Los Angeles, California made July 1, 2003; a page of the restaurant menu; the organizational chart of the petitioner; 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 in 1990 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 14, 2002, the beneficiary did not claim to have worked for the petitioner.

The director issued a request for evidence to the petitioner and requested the beneficiary's W-2 statements and a listing of the petitioner's monthly expenses.

In response counsel submitted an explanatory letter dated June 28, 2006, and a listing of the business' monthly expenses for 2001, 2002, 2003, 2004 and 2005 but not the owner's personal monthly expenses, the petitioner's unaudited financial statements for 2002, 2003, 2004 and 2005, and the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005.

The director's denied the petition on November 20, 2006.

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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."

[2] 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).

[3] Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. The statement stated an adjusted gross income loss for 2001 of <$58,448.00>. The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

On appeal, counsel asserts that the director erroneously made a negative decision regarding the petitioner's ability to pay the proffered wage.

Further, counsel contends that the petitioner's net income equals or exceeds the proffered wage since the priority date, and although the director followed the reasoning in *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983) and considered the petitioner's personal tax returns in the determination of the petitioner's adjusted gross income, counsel contends that the *Ubeda* case can be distinguished under the present fact situation since the sole proprietor's residence is valuable.

According to counsel's explanatory letter dated December 19, 2006, the petitioner has employed the beneficiary since October 2006 at the wage of $21.95 per hour which counsel contends according to Citizenship and Immigration Services' (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, is evidence of the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits an explanatory letter dated December 19, 2006, and additional evidence that includes the following documents: the petitioner's unaudited financial statements for 2002, 2003, 2004 and 2005;[4] a "Homestead Declaration;" and pay checks paid to the beneficiary by the petitioner from October 9, 2006 to December 18, 2006.

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, 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).

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 in 2001 until October 9, 2006. After October 9, 2006, the petitioner paid the beneficiary at a wage rate more than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

[4] Counsel'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 management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See 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. at 647.

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. at 647.

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 until 2004 then herself after that date. The tax returns reflect the following information for the following years:

	2002	2003
Proprietor's adjusted gross income[5] (Form 1040)	$ 44,819.00	$ 44,624.00
Petitioner's gross receipts or sales (Schedule C)	$317,089.00	$303,492.00
Petitioner's wages paid (Schedule C)	$ 73,541.00	$ 58,875.00
Petitioner's net profit from business (Schedule C)	$ 48,226.00	$ 48,016.00
	2004	2005
Proprietor's adjusted gross income (Form 1040)	$ 44,949.00	$ 45,535.00
Petitioner's gross receipts or sales (Schedule C)	$312,258.00	$313,685.00
Petitioner's wages paid (Schedule C)	$ 60,643.00	$ 61,926.00
Petitioner's net profit from business (Schedule C)	$ 48,366.00	$ 48,948.00

In the years for which tax returns were submitted, 2002, 2003, 2004 and 2005, the sole proprietorship's adjusted gross incomes cover the proffered wage of $43,992.00 in each year without consideration of the sole proprietor's personal expenses. Although the sole proprietor failed to provide her personal expenses,[6] under

[5] Without reference to the petitioner's net operating loss.

[6] Counsel submitted in response to the director's request for evidence that specifically requesting a listing of the petitioner's monthly expenses, a list of the "petitioner's" monthly expenses. However no listing was submitted for [redacted] (the sole proprietor is [redacted]. The AAO also notes that in counsel's brief dated December 19, 2006, accompanying the appeal, counsel recognized that according to the case cited,

the particular fact situation of this case in which the adjusted gross incomes barely covered the proffered wage, it is improbable that the sole proprietor could support herself and/or her family member on what remains after reducing the adjusted gross incomes for each year by the amount required to pay the proffered wage and still pay her personal expenses.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[7] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined. According to counsel, the CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, provides guidance that if the petitioner has employed the beneficiary at the proffered wage, then the wages paid to the beneficiary at the proffered wage rate in 2006 are proof of the petitioner's ability to pay the proffered wage. According to the language in CIS memorandum, counsel asserts that the petitioner has paid or currently is paying the proffered wage and therefore counsel urges CIS to consider the wage rate paid in 2006 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The CIS 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, the record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary and paying the proffered wage rate.

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 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 23, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in 2006 when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002, 2003, 2004 and 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.

According to counsel, the petitioner is a sole proprietorship and has sufficient assets to pay the proffered wage. Counsel has submitted 17 pages of the petitioner's checking account statements from April 1, 2005 through September 30, 2005, that according to counsel show funds that can be used towards payment of the proffered wage. Counsel has not provided checking account statements before that date and the five month period in year 2005, three years after the priority date is insufficient evidence to determine the petitioner's ability to pay the proffered wage and the sole proprietor's personal expenses. The petitioner must demonstrate that it is able to pay the proffered wage from the priority date in 2002. Further, the AAO will not consider current assets without balancing the current assets against current liabilities.

Ubeda v. Palmer Id., information concerning [redacted]'s personal living expenses was necessary in the determination of the ability to pay the proffered wage. 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).

[7] 8 C.F.R. § 204.5(g)(2).

Counsel states on appeal that the petitioner's home is valued at $700,000.00 and that this asset demonstrates that the owner of petitioner has the ability to pay the proffered wage. Counsel submitted a submitted a "Homestead Declaration" identifying a parcel in the city and county of Los Angeles as the sole proprietor's homestead but no valuation of the parcel is found on that document. 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).

Further, while the operator of a sole proprietorship may utilize liquid assets to make up deficiencies as already discussed above to pay the proffered wage, by implication counsel is contending that the owner of petitioner has or will convert her real estate assets to cash and have sufficient cash reserves to pay the proffered wage. Since this additional cash infusion does not appear on the tax returns for 2002, 2003, 2004 and 2005, it is apparent that the funds were not available from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The sole proprietor claims that the ratio of total assets against total current liabilities shows that the petitioner has the ability to pay the proffered wage in each relevant year. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.[8]

While the sole proprietor argues that the ratio shows the petitioner has the ability to pay the proffered wage, she provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, she has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. Moreover, because the ratio is not designed to demonstrate an entity's ability to take on the additional new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

Counsel has not proved that in 2002, 2003, 2004 or 2005 that the petitioner had the ability to pay the proffered wage and meet the sole proprietor's living expenses. Therefore, the petitioner had not established

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[8] The observation that a particular ratio is high or low depends on the purpose for which the ration is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. *See Financial Ratio Analysis,* http://www.finpipe.com/equity/finratan.htm (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis,* http://www.zeromillion.com/business/financial/financial-ratio.html (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis,* http://www.ventureline.com/FinAnalindAnalysis.asp (accessed March 21, 2006).

that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.