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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 10 2008

SRC 06 235 51736

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting 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 activity is maintenance. It seeks to employ the beneficiary permanently in the United States as a maintenance repairer, building. 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 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 15, 2006, an 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.

Beyond the decision of the director, an issue in this case is whether or not the petitioner has demonstrated that it is a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, that is whether it is an employer.

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, 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 July 9, 1999.[1] The proffered wage as stated on the Form ETA 750 is $17.78 per hour ($36,982.40 per year). The Form ETA 750 states that the position requires three years of experience in the proffered position.

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 the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; and the owners' (of the petitioner sole proprietorship) U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2003, and 2004 along with the owners' Wage and Tax Statements (Form W-2).

There is no evidence in the record of proceeding how the petitioner is structured. For purposes of this discussion the AAO will assume that it is a sole proprietorship.

On the petition, the petitioner claimed to have been established in 1992 and to currently employ seven 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 April 12, 2006, the beneficiary did not claim to have worked for the petitioner.

The director issued a request for evidence to the petitioner on August 21, 2006.

In response counsel submitted an explanatory letter from the petitioner dated November 5, 2006, and the owners' (of the petitioner sole proprietorship) U.S. Internal Revenue Service Form 1040 tax return for 2005.

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

On appeal, counsel asserts that the petitioner has submitted evidence of its ability to pay the proffered wage to the beneficiary.

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

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[1] It has been approximately nine 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 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).

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).

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. *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 may be 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 four. The tax returns[3] reflect the following information for the following years:

	2001	2003
Proprietor's adjusted gross income (Form 1040)	$ 80,457.00	$105,699.00
Petitioner's gross receipts or sales (Schedule C	$ 29,527.00	$ 18,805.00
Petitioner's wages paid (Schedule C)	$ 0.00	$ 0.00

[3] According to the 2001, 2003, 2004 and 2005 tax returns, revenue reported on Schedule C relates to the principal business described as "horse owner, racing horses." Supplemental incomes reported on Schedule E related to rental incomes but according to a statement by an owner in the record "this is not a business." The owners of the sole proprietorship also reported wage income from their two employers. On appeal, counsel submitted partial copies of the owners of the sole proprietorship 1999 and 2000 tax returns. The adjusted gross incomes stated on that return were $79,405.00 and $111,082.00 respectively.

Petitioner's net profit from business (Schedule C)	<$24,400.00>[4]	<$53,370.00>

	2004	2005
Proprietor's adjusted gross income (Form 1040)	$ 147,161.00	$ 19,215.00
Petitioner's gross receipts or sales (Schedule C)	$ 86,076.00	$ 78,259.00
Petitioner's wages paid (Schedule C)	$ 0.00	$ 0.00
Petitioner's net profit from business (Schedule C)	<$ 6,783.00>	<$ 7,548.00>

In the years for which tax returns were submitted, 2001, 2003 and 2004, the sole proprietorship's adjusted gross incomes cover the proffered wage of $36,982.40 in each year except for consideration of the owners' of the sole proprietorship personal expenses. The owners of the petitioner sole proprietorship failed to provide their personal expenses but have submitted Schedule A from their tax returns which list some but not all of their personal expenses. In year 2005 the adjusted gross income loss was insufficient to pay the proffered wage.

Schedule A as submitted with the owners' of the petitioner sole proprietorship Form 1040 tax return each year listed personal deductible expenses such as medical and dental services, taxes, home mortgage interest, charitable contributions as follows: 2001, $35,173.00; 2003, $24,007.00; 2004, $33,543.00; and 2005 $77,686.00. As already stated, the I-140 petitioner's business maybe a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his/her 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. Based upon the substantial personal expenses listed on Schedule A to the tax returns, it would be necessary to examine the owners' personal expenses for the years from the priority date. Based upon the lack of evidence concerning these personal expenses, the AAO is unable to determine whether or not the petitioner had the ability to pay the proffered wage in any year.

On appeal, counsel submitted partial copies of the owners' of the sole proprietorship 1999 and 2000 tax returns. The adjusted gross incomes stated on those return were $79,405.00 and $111,082.00 respectively. Without complete copies of the 1999 and 2000 tax returns the AAO is unable to determine the petitioner's ability to pay the proffered wage.

As already stated, an issue in this case is whether or not the petitioner has demonstrated that it is a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, that is whether it is an employer. According to a letter dated November 5, 2006, by [redacted] he stated "*Please understand that this is not a business* [emphasis added] but individuals who own six apartment buildings. I have not paid wages to anyone. I have been handling all the maintenance myself."

The pertinent regulation at 20 C.F.R. § 656.3 states in part:

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[4] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

> "Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.
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> * * *
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> "Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation ....

According to the 2001, 2003, 2004 and 2005 tax returns submitted, revenue reported on Schedule C relates to the principal business described as "horse owner, racing horses." The tax payers also reported wage income from their two employers. Supplemental incomes reported on Schedule E of the tax returns related to rental incomes but according to an owners' statement mentioned above, this is not a business.

According to the petitioner, he desires to employ the beneficiary to provide services to these rental properties to replace service he provides. If [redacted] performed other kinds of work, then the beneficiary could not have replaced him. While the petitioner has stated that the beneficiary will assume some duties he performs but he has provided no detail concerning the duties. If these duties are outside the scope of the occupation listed in the labor certification they are not relevant.

It is unclear and not proven by the evidence submitted that at the time of the filing of the Application for Alien Employment Certification Form ETA 750 or the petition that there existed a business to which employees could be referred. The AAO notes that no wages are stated in the tax returns as submitted despite the fact that according to the petition dated May 3, 2006, the petitioner claimed to have been established in 1992 (although what was established is not demonstrated) and to *currently employ seven workers.* The tax returns submitted state no wages expense.

No evidence was submitted to show that the owners or the petitioner actually had employees. We note that there is another I-140 petition signed by an owner, [redacted] in the record, similar in most respects to the petition that was accepted for filing, but that petition dated November 6, 2006, stated that the petitioner *has no employees.*

According to the petition filed the offered job is a new position but the AAO notes that the petitioner has not stated in the petition as filed that the offered job is a full-time position which is a necessary element under the regulations.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner's accountant stated in his letter dated December 14, 2006, that the depreciation expenses can be utilized as assets (or as stated "estimated back") in 2005 and 2006 to determine the petitioner's ability to pay the proffered wage. According to regulation,[5] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537

Counsel has not proved that that the petitioner had the ability to pay the proffered wage and meet the owners' of the sole proprietorship living expenses. Therefore, 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 petitioner has not demonstrated that it is a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, that is whether it is an employer.

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.

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[5] 8 C.F.R. § 204.5(g)(2).