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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 13 2009

SRC 06 265 50949

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.

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 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 petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 January 10, 2007, the single issue in this case is whether or not the petitioner, a sole proprietor, 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 26, 2001.[1] The proffered wage as stated on the Form ETA 750 is $3,250.00 per month ($39,000.00 per year).

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; the sole proprietors' U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 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 in 1992 and to currently employ three 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 25, 2004, the beneficiary did claim to have worked for the petitioner since February 2001. According to the Form G-325 prepared by the beneficiary and signed August 8, 2006, the beneficiary stated that he had been employed by the petitioner since 1996.[3]

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[1] It has been over seven 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." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

[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] It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel asserts that the sole proprietor's spouse has a retirement savings account which can be borrowed against to pay the proffered wage, and the sole proprietor owns the realty which is the business premises.

As additional evidence on appeal, counsel submits three Fidelity Investments retirement savings (IRA) statements for the sole proprietor's wife for years 2001, 2002 and 2003; a letter from the petitioner's accountant dated February 9, 2007; a print copy of data showing assessment history for tax parcel [redacted] ("situs" [redacted]) from the Internet website, http://www.txcountydata.com, along with a "Walker County Appraisal District, Texas" property appraisal.

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, USCIS 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, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. In a request for evidence dated September 25, 2006, sent to the petitioner, the director requested the beneficiary's W-2 statements. No W-2 statements or any documentary evidence for wage payments were submitted.

A letter from the petitioner's accountant dated February 9, 2007, stated that the beneficiary's "income" was already deducted from the sole proprietor's income for the years 2001, 2002 and 2003. However, the petitioner failed to provide any documentation of wages paid such as W-2 or 1099-MISC statements, cancelled checks, or the beneficiary's Form 1040 returns to support the accountant's statement that the petitioner paid the beneficiary.[4] Going on record without supporting

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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. *Id. at* 591.

[4] We note the petitioner has petitioned for a permanent full-time position of manager in the grocery business, and that the proffered wage is $39,000.00 per year. The "income" that the accountant in his letter dated February 9, 2007 states was paid to the beneficiary was $7,059.00, $10,717.00 and $6,236.00 in 2001, 2002 and 2003 respectively. These amounts are significantly under the proffered

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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, USCIS will next examine the adjusted gross 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 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 supports a family of five. The tax returns[5] reflect the following information for the following years:

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wage especially for full-time employment. Other than this statement and a general listing of salary and wage payments stated in the tax returns on Schedule C, the petitioner provided no wage, compensation or income amounts paid to the beneficiary.

[5] The sole proprietors operate five other businesses in addition to the petitioning entity for which they prepared six Schedule C statements filed with their Form 1040 tax returns. Additionally, the

	2001	2002
Proprietor's adjusted gross income[6] (Form 1040)	$ 49,032.00	$ 38,770.00
Petitioner's gross receipts or sales (Schedule C)	$204,997.00	$212,923.00
Petitioner's wages paid (Schedule C)	$ 17,091.00	$ 35,603.00
Petitioner's net profit from business (Schedule C)	<$ 30,403.00>[7]	<$ 42,714.00>

	2003	2004
Proprietor's adjusted gross income (Form 1040)	$ 50,557.00	$100,295.00
Petitioner's gross receipts or sales (Schedule C)	$199,270.00	$192,248.00
Petitioner's wages paid (Schedule C)	$ 26,496.00	$ 12,768.00
Petitioner's net profit from business (Schedule C)	$ 9,656.00	<$ 24,617.00>

	2005
Proprietor's adjusted gross income (Form 1040)	$107,401.00
Petitioner's gross receipts or sales (Schedule C)	$163,263.00
Petitioner's wages paid (Schedule C)	$ 18,726.00
Petitioner's net profit from business (Schedule C)	$ 9,398.00

In year 2002, the sole proprietorship's adjusted gross income of $38,770.00 does not cover the proffered wage of $39,000.00 per year. In the years 2001, 2003, 2004 and 2005, the sole proprietorship's adjusted gross incomes of $49,032.00, $50,557.00, $100,295.00 and $107,401.00 do cover the proffered wage of $39,000.00 per year in each year, but without consideration of the sole proprietor's personal expenses. The sole proprietor must demonstrate that it can pay the proffered wage and support his dependents. *Ubeda*, 539 F. Supp. at 647.

The sole proprietor provided a statement of personal expense estimates which varied over the years. They were in 2001: $45,300.00, 2002: $48,300.00; 2003: $52,050.00 and 2004: $55,300.00. The personal expense items listed by the petitioner were for food, housing, utilities, medical, auto and education. The differences between the sole proprietors' adjusted gross incomes for each year and the yearly personal expense figures are as follows:

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returns also include and report income from two rental properties. Therefore, the Form 1040 adjusted gross income stated reflects taxable income from all sources but the Schedule C referenced above relates to the business activity of the petitioning entity, trading as [redacted]

[6] Adjusted Gross Income (AGI).

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

Tax Return for Year:	Sole Proprietor's AGI (1040)	Proffered Wage	Petitioner's stated personal yearly expenses	Remainder AGI after subtracting proffered wage and personal expenses
2001	$49,032.00	$39,000.00	$45,300.00	-$35,268.00
2002	$38,770.00	$39,000.00	$48,300.00	-$48,530.00
2003	$50,557.00	$39,000.00	$52,050.00	-$40,493.00
2004	$100,295.00	$39,000.00	$55,300.00	$5,995

Although the sole proprietors did not provide their personal expenses for 2005, the average of their expenses for the years 2001 to 2004 is $50,237.00. The sole proprietors' AGI for 2005 is $107,401.00 and therefore the difference between the AGI and $50,237.00 is $57,164.00.

Considering the sole proprietors' AGI, proffered wage, and personal expenses for the years 2001, 2002 and 2003, the sole proprietors had insufficient income to pay both the proffered wage and their personal expenses.[8] In 2004 and 2005, it appears that the sole proprietors were able to pay the proffered wage.[9]

Counsel asserts in the 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,[10] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined. Insufficient evidence was submitted concerning wage or compensation paid to the beneficiary by the petitioner even though he had been employed since 1996 or 2001 depending what document is referenced in this matter. No explanation was provided by counsel for this inconsistency concerning the beneficiary's employment dates or the failure to provide independent objective evidence of the amounts the sole proprietors paid the beneficiary.

According to counsel, the sole proprietor has sufficient assets to pay the proffered wage. Counsel has submitted copies of the sole proprietor's retirement funds, and documentation that the owners own the realty which is the business premises. There is no such statement from the sole proprietors that they are willing and able to withdraw retirement funds subject to tax penalty to pay the proffered wage. Further the business property is not a readily liquefiable asset through which it can pay the proffered wage. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). There is insufficient evidence to

[8] Assuming for the sake of argument, that the "income" stated by the sole proprietors' accountant of $7,059.00, $10,717.00 and $6,236.00 in 2001, 2002 and 2003, was paid to the beneficiary as wages, the sole proprietors still had insufficient AGI to pay the proffered wage in 2001, 2002 and 2003.

[9] The sole proprietor can pay the proffered wage in 2004 and 2005 only if we accept the sole proprietor's estimate of personal expenses, but we note that sole proprietor did not provide any documentation in support of its estimate to evidence it accuracy such as evidence of charges and bills paid for each year. The petitioner must provide such evidence in any further proceeding.

[10] 8 C.F.R. § 204.5(g)(2).

determine the petitioner's ability to pay the proffered wage and pay the sole proprietors' personal expenses. The petitioner must demonstrate that it is able to pay the proffered wage from the priority date.

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 owners of petitioner has or will convert their real estate asset 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 2001, 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).

Counsel has not proved that in 2001, 2002 or 2003, that the petitioner had the ability to pay the proffered wage and meet the sole proprietors' living expenses. Further documentation is required to show that the sole proprietor can pay both the proffered wage, and his personal expenses in 2004 and 2005. 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 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.