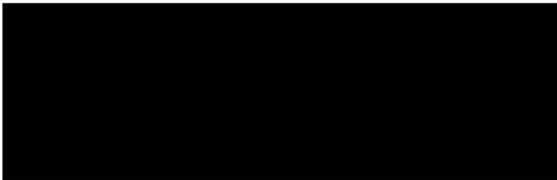




U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly identified
invasion of personal privacy



BU

FILE: [REDACTED]
EAC 05 074 52726

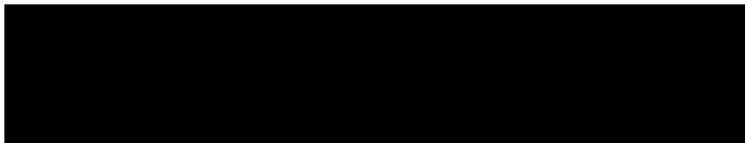
Office: VERMONT SERVICE CENTER

Date FEB 27 2007

IN RE: Petitioner: [REDACTED]
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:



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 a catering and take-out foods sole proprietorship. It seeks to employ the beneficiary permanently in the United States as a cook (continental style). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 and 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, 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 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 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$12.17 per hour (\$25,313.60 per year). The Form ETA 750 states that the position requires two years of experience.

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 appeal¹. Counsel submits copies of the following documentation: Wage and Tax Statements (W-2) for the years 2001, 2002, 2003 and 2004 for an employee, [REDACTED]; and, a statement from the petitioner dated September 15, 2005.

Other relevant evidence in the record includes the petitioner's U.S. federal income tax return, Form 1040, for tax years 2001, 2002 and 2003.²

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 1984 and at the time the petition was prepared employed two workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to work for the petitioner since December 12, 2000 to present.

On appeal, counsel asserts the petitioner had and has sufficient ability to pay the offered wage, and, he submits additional evidence upon appeal for consideration.

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 Sonogawa*, 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 beneficiary has represented that he was employed according to the labor certification since December 12, 2000 to present but no wage evidence was submitted.

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).

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).

² Additional evidence in the record of proceeding relates to the beneficiary and his qualifications.

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. 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 is single. The proffered wage is \$25,313.60 per year. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income ³ (Form 1040)	\$26,340	\$17,946	\$20,280
Petitioner's gross receipts or sales ⁴ (Schedule C)	\$437,581	\$422,486	\$405,999
Petitioner's wages paid ⁵ (Schedule C)	\$23,600	\$20,600	\$23,600
Petitioner's net profit from business ⁶ (Schedule C)	\$30,876	\$22,946	\$23,635

Schedule A as submitted with the petitioner's 2001 Form 1040 tax return listed deductible expenses such as medical and dental services, home mortgage interest, charitable contributions as follows: 2001, \$6,280.00.⁷ In 2002 and 2003 no Schedule A was submitted by the petitioner. 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.

³IRS Form 1040, Line 33, 34, 35 depending upon the year of the return.

⁴IRS Form 1040, Schedule C, Line 1.

⁵IRS Form 1040, Schedule C, Part II, Line 26, or if indicated Part III, Line 37 "Cost of labor. Do not include any amounts paid to yourself."

⁶IRS Form 1040, Schedule C, Line 31.

⁷IRS Form 1040, Schedule A, Line 28, or Form 1040, Line 36, 37, or 38 depending upon the year.

In 2001, the sole proprietorship's adjusted gross income of \$26,340.00 covers the proffered wage of \$25,313.60 per year but in 2002 and 2003 it does not. However, it is improbable that the sole proprietor could support himself on the difference between the adjusted gross income and the proffered wage in 2001, or the deficits, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage in years 2002 and 2003 without consideration of the petitioner's personal expenses.

The petitioner asserts on the appeal that there is another way to determine its ability to pay the proffered wage from the priority date by employing the beneficiary and replacing an existing worker, Lilia C. Baretto, nee' Gamarra.⁸ Counsel cites no legal precedent for the contention, and, according to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the worker indicated by name involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced her. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cook (continental style) will significantly increase petitioner's profits. Additionally, if the beneficiary were working for the petitioner from the year 2000, his employment would over-lap Ms. Baretto, nee' Gamarra's employment so it is unclear why the replacement did not already occur, or, if the petitioner is downsizing. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The petitioner stated on appeal that he would use his social security benefits to pay the proffered wage, but, he provided no evidence of that additional income. Going on record without supporting 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)).

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.

⁸ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner were, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

⁹ 8 C.F.R. § 204.5(g)(2).