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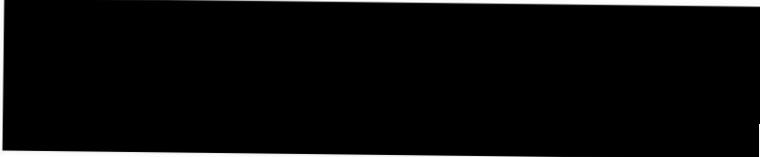
Date:

IN RE: Petitioner:  
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:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The petitioner is a copier sales and repair company. It seeks to employ the beneficiary permanently in the United States as a copy machine rebuilder. 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 was the successor in interest to the original petitioner that had filed the Form ETA 705. 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 June 1, 2005 denial, the single issue in his decision was whether or not the petitioner was the successor in interest to the petitioner that originally submitted the Form ETA 750.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by Citizenship and Immigration Services (CIS), a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.<sup>1</sup> *See, e.g., Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985).

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.<sup>2</sup> Counsel submits an affidavit from the present petitioner, copies of service contracts for three businesses that note earlier services provided by the original petitioner and then subsequently by the present petitioner; and a letter from [REDACTED] Mr. [REDACTED] claims he leased space from 1990 to 2000 to the original petitioner and that in August 1999, the company was sold to the present petitioner who maintained operations in the South [REDACTED] location until June 2004. The petitioner also submits to the record a letter written by [REDACTED] Director, Business and Trade Services, legacy INS, dated October 17, 2001. In this letter, Mr. [REDACTED] states "The INS has taken the position that a company is a successor in interest when it has taken on all of the immigration-related liabilities of the company it has acquired, merged, etc."

The record contains other evidence submitted by counsel to the record with regard to the current petitioner's status as successor in interest in response to the director's request for further evidence. Included in this evidence is a document entitled "Purchase of Company Assets", dated August 16, 1999 from the current

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<sup>1</sup> *See* DOL Field Memorandum No. 47-92, dated May 7, 1992, 57 Fed. Reg. 31219 (1992).

<sup>2</sup> 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).

petitioner, the sole proprietor, [REDACTED]. Mr. [REDACTED] initially discusses what he will pay for the assets, control of the phone number and the name [REDACTED] and Sales. This document [REDACTED] document entitled "Bill of Sale" dated August 23, 1999. These two documents state that [REDACTED] will buy the good will, phone number, customer list, and existing service agreements from the original petitioner for \$4,000; the furniture and equipment for \$15,000; the covenant not to compete for \$1,000, and the existing inventory for \$5,000. The Purchase of Company assets agreement states that the original petitioner warrants that the assets it is transferring to Mr. [REDACTED] are owned free and clear, and that the original petitioner will pay all the salaries of the remaining employees, and keep all accounts receivable.<sup>3</sup>

On appeal, counsel submits an affidavit from Mr. [REDACTED]. In his affidavit Mr. [REDACTED] states that the petitioner, [REDACTED] Inc., is in the business of selling and repairing copy machines since 1988 with offices at 15736 Gault Street, Van Nuys, California. Mr. [REDACTED] states that due to the small amount of the purchase price for the original petitioner, he did not feel it necessary to have an attorney draw up the paperwork and contract, and Mr. [REDACTED] himself negotiated and drafted the contract himself. Mr. [REDACTED] then stated his true intent in the acquisition of the Rapid Copier Repairs & Sales business was to acquire all the assets and to assume all the liabilities of Rapid Copier. Mr. [REDACTED] states the assets of a copier sales and parts business are the furniture and inventory, while the liabilities of such a business include service contracts that obligate the business to service and repair the machines its sells, its lease for premises serving as the showroom and offices and its employee and immigration liabilities, if any.

With regard to the taking over of service contracts form Rapid Copier's customers, Mr. [REDACTED] submits bills for the law offices of [REDACTED] from May 1998, May 28, 1999, January 1, 2001, and June 1, 2000. The first two bills for equipment and services contracts are from Rapid Copier Repairs at the Robertson Street location, while the latter two bills are from [REDACTED] located at 15736 Gault Street, Van Nuys, California. Mr. [REDACTED] also submits similar documentation for [REDACTED] CPA, and for Valley Plating Work. The record does establish that the current petitioner did lease and service copy machines for the original petitioner's clients.

With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The AAO will examine initially whether the petitioner qualifies as a successor in interest to the petitioner that originally submitted the Form ETA 750.

Upon review of the record, the petitioner has not established that it assumed all the rights, duties and obligations of the predecessor company. The document drawn up by the petitioner and signed by the owner of the original petitioner clearly leaves the responsibility of paying the original petitioner's remaining employees to the original petitioner. The document entitled "Purchase of Company Assets" does not reflect any responsibilities that the current petitioner has towards the employees of the original petitioner. Thus, the current petitioner, while acquiring certain assets of the original petitioner, namely, its name, its telephone

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<sup>3</sup> This wording in the context of the document appears to mean the original petitioner will receive any payment of the current account receivables.

<sup>5</sup> As stated previously, the current petitioner entered into a sales agreement with Rapid Copier Repair in August 1999.

number, and service contracts, did not assume all the responsibilities of the predecessor company. It is noted that the petitioner submitted documentation with regard to the payment of the beneficiary's wages in 1998 and 1999.<sup>5</sup> With regard to the priority year 1998,<sup>6</sup> the record reflects a Form 1099-MISC provided by Rapid Copier Repair for \$19,949. For tax year 1999, the record reflects a W-2 form for [REDACTED] in the amount of \$9,000.<sup>7</sup> The W-2 form is produced by National Administrative Services, Inc.<sup>8</sup> The record also reflects that the beneficiary filled out a 4852 to report \$9,000 in wages received by paychecks from Rapid Copier Repair in tax year 1999. The beneficiary, in his Form 1040 for tax year 1999 submitted to the record identifies himself as a copier repairer, although no Schedule C is submitted with this tax return to identify the beneficiary's actual employer. Furthermore, the beneficiary's Schedule C for his Form 1040 for tax year 2000 identifies the beneficiary's occupation as copier repairer but his place of business as [REDACTED]. The record as presently constituted, does not support any clear finding that the current petitioner as of the time of the sale of the company assets of Rapid Copier Repair took over any immigration obligations towards the original petitioner's employees.

On appeal, counsel states that based on Mr. [REDACTED] October 2001 letter submitted to the record, the petitioner took on all of the immigration liabilities of the original petitioner. At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). Furthermore, the AAO notes that the [REDACTED] letter simply states what a petitioner has to do procedurally to continue as a successor in interest petitioner, namely file a new I-140 and provide documentation as to whether the petitioner is a successor in interest. The memo in no manner establishes that the current petitioner is a successor in interest to the original petitioner. The current petitioner would still have to submit documentation that it had assumed the rights, duties, obligations, and assets of the original employer. As previously stated the sales agreement entered into by the original petitioner and the current petitioner is not clear that the current petitioner did assume all such rights, duties, and obligations.

Finally it is noted that the original petitioner on the form ETA 750 on March 7, 2000 submitted corrections to the Department of Labor with regard to the Form ETA 750 originally submitted to DOL. In her letter, the original petitioner stated that it had moved its business to a new location and identified the petitioner as Rapid [REDACTED] inc., 15736 Gault Street, Van Nuys, California. As noted previously, this address is the address of the current petitioner. This statement puts into further doubt the current petitioner's assertion with regard to assuming the original petitioner's lease and also Mr. [REDACTED] statement with regard to the current petitioner working out of the South Robertson Boulevard location until 2004. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the

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<sup>6</sup> The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 12, 1998.

<sup>7</sup> The beneficiary provided a letter to the record to establish why he used the name of [REDACTED] in the wage record submitted to the record.

<sup>8</sup> The record contains no information on the relationship between National Administrative Services, Inc. and the current petitioner. The petitioner did submit a letter from PES Payroll, Burbank, California that stated it was the employer of records for the petitioner. This letter is dated June 3, 2005.

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.”

Although the AAO acknowledges that payment for company assets was effected between the original petitioner and the current petitioner, the record remains confused as to whether the current petitioner is the successor in interest to the original petitioner. Therefore the director’s decision will be upheld, and the petition will be denied.

The AAO will also examine an issue not addressed by the director in his decision. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also 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 director in his decision did not address whether the current petitioner had established first, the ability of the original petitioner to pay the proffered wage as of 1998 and in 1999, and, second, the current petitioner’s ability to pay the proffered wage. Thus, even if the petitioner clarified its business relationship with the original petitioner, the issue of whether both the original petitioner and the current petitioner have the ability to pay the proffered wage is not established in the record.

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). Here, the Form ETA 750 was accepted on June 12, 1998. The proffered wage as stated on the Form ETA 750 is \$18.63 an hour, or \$38,750.40 per year.

As stated previously, 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<sup>9</sup>.

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<sup>9</sup> 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

Counsel submits no further evidence as to the petitioner's and its claimed predecessor petitioner's ability to pay the proffered wage as of the 1998 priority date and onward. Other relevant evidence in the record includes the first page of the original petitioner's Form 1120 for tax years 1998 and 1999, the current petitioner's Form 1040 for tax years 1998 and 1999, and the current petitioner's Form 1120 for tax year 2000. In response to the director's request for further evidence, the current petitioner also submitted its Forms 1120S for tax years 2001, 2002, 2003, and 2004. The record also contains a document that details the original petitioner's balances as of December 31, 1999 in an American Century money market account and a Dreyfus Growth and Income Fund. These documents indicate that as of December 31, 1999, the original petitioner had available money market funds of \$96,243.60 and \$32,924.22 in a mutual fund.

The evidence in the record of proceeding shows that the original petitioner was structured as a corporation in 1998, the year in which the priority date was established. On the petition, the petitioner claimed to have been established in 1988 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on September 1, 1999, the beneficiary claimed to have worked for the original petitioner since June of 1995.

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 record establishes that the original petitioner paid the beneficiary

Based on the 1998 Form 1099-MISC found in the record, the original petitioner paid the beneficiary \$19,949 during tax year 1998. Therefore, as of the 1998 priority date, the original petitioner did not pay the beneficiary the proffered wage. In the subsequent 1999 tax year, it appears that National Administrative Services, Inc. paid the beneficiary \$9,000, while he was using a temporary social security number and/or fictitious name [REDACTED]. The source of the additional \$9,000 paid to the beneficiary in checks and reported by the beneficiary on his Form 1040 is unclear. The record then reflects that the beneficiary, apparently still identified as Jose Castellon, received wages from companies such as National Administrative Services, Inc.<sup>10</sup>

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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).

<sup>10</sup> As previously stated, the current petitioner submitted a letter dated June 3, 2005, written by an unidentified individual that stated PES Payroll is the employer of records for [REDACTED]. It is not clear what relationship, if any, PES Payroll has with National Administrative Services, Inc.

and Elite Management, Inc, in subsequent years.<sup>11</sup> Additionally, based on a W-2 submitted to the record, the beneficiary received wages of \$25,412.50 from [REDACTED] Inc. in tax year 2003.

In sum, the record is confused as to what entity paid the beneficiary beyond the initial 1998 priority date year and how much the entity paid the beneficiary. Again, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."<sup>12</sup> Furthermore the record does not reflect that either the original petitioner or the current petitioner paid the beneficiary the proffered wage of \$38,750.40.

Given the confused nature of the evidence provided by the petitioner, this documentation is given limited evidentiary weight. The current petitioner will have to establish the original petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in the priority date 1998. It will also have to clearly establish what wages were paid to the beneficiary by the original petitioner in tax year 1999 and what wages were paid by the current petitioner. With regard to the remaining years, due to the confused nature of evidence submitted to the record, the petitioner has to establish its ability to pay the entire proffered wage during tax years 2000 to 2004.

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).

In the priority year 1998, the original petitioner was a corporation. As a corporation, the net income of the original petitioner would be indicated on line 28, taxable income before net operating loss deduction and special deductions. In the instant petition, the original petitioner's net income for tax year 1998 and 1999 is - \$21,854 and -\$55,764. Neither of these sums is sufficient to pay the difference between the beneficiary's wages in 1998 and the proffered wage.<sup>13</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in

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<sup>11</sup> The W-2 processed by Elite Management in 2003 indicates the document is for a worksite identified as [REDACTED]

<sup>12</sup> It is noted that the beneficiary has provided substantial evidence as to his tax returns; however, it is the burden of the petitioner to establish its eligibility for the visa petition.

<sup>13</sup> Even if the source and amount of the beneficiary's wages in tax year 1999 from the original petitioner were clarified, the petitioner's negative net income would not be sufficient to pay the difference between the actual wages and the proffered wage.

the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>14</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As previously stated, the current petitioner only submitted the first page of the original petitioner's Forms 1120 for tax years 1998 and 1999. Therefore the AAO cannot examine the original petitioner's Schedules L to calculate the original petitioner's net current assets as of tax year 1998 or 1999. Thus, the petitioner has not established that the original petitioner had the ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the 1998 priority date or during 1999 based on its net income, net current assets or wages paid to the beneficiary.

With regard to the current petitioner's ability to pay either the difference between the beneficiary's wages and the proffered wage, if the record were clarified, or the entire proffered wage, in tax years 1999 to the present, the record reflects that in tax years 1998 and 1999, the current petitioner was 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 supports a family of four, himself, his wife and two children. It is noted that since the current petitioner had no ownership interest in the original petitioner in tax year 1998, the current petitioner's 1998 financial information is not dispositive in these proceedings. Therefore the AAO will only examine the petitioner's Form 1040 for tax year 1999. The tax returns reflect the following information for tax years 1999:

	1999
Proprietor's adjusted gross income (Form 1040)	\$ 66,458
Petitioner's gross receipts or sales (Schedule C)	\$ 827,179

<sup>14</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Petitioner's wages paid (Schedule C)	0
Petitioner's net profit from business (Schedule C)	\$ 75,126

In 1999, the sole proprietorship's adjusted gross income of \$66,458 appears sufficient to cover the proffered wage of \$38,750.40. It is noted that the record contains no information as to the sole proprietor's monthly expenses; however, it appears reasonable that the petitioner could support both himself and his family and pay either the difference between the beneficiary's claimed wages and the proffered wage, or the entire proffered wage..

For the remaining years in question namely 2000 to 2004, the petitioner is structured as an S Corporation. As explained above, the AAO examines the petitioner's net income, among two other avenues of analyzing in its determination as to whether the petitioner has the ability to pay the difference between the beneficiary's actual wages and the proffered wage, or the entire proffered wage. With regard to S corporations, the AAO views the petitioner's net income as the figure identified as ordinary income from trade or business activities, on line 21 of the first page of the tax return, unless the petitioner has indicated income from other activities on lines one through six of the petitioner's Schedule K. In the instant petition, the petitioner does not indicate any additional income, therefore the petitioner's net income is established by line 21 of the Form 1120S. The record indicates the current petitioner has net income from the tax years 2000 to 2004 as follows: \$87,480, \$55,799, \$69,422, and \$121,194. These sums are sufficient to establish the petitioner could pay either the difference between the beneficiary's wages and the proffered wage, if these wages were clarified, or the entire proffered wage.

However, as stated previously, the petitioner has not established that the claimed original petitioner had the ability to pay the proffered wage in priority year 1998. As stated previously, 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). Thus, the petitioner has not established that both the original petitioner and the claimed current petitioner have the ability to pay the proffered wage from the 1998 priority date and to the present.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.