

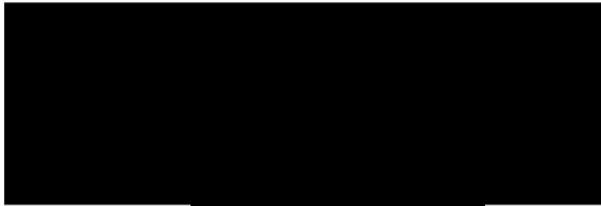
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**U.S. Citizenship
and Immigration
Services**

B6



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WAC-05-198-53694

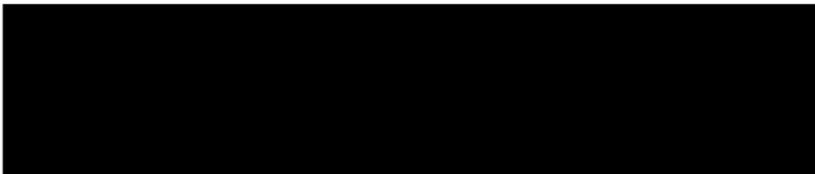
Office: CALIFORNIA SERVICE CENTER

Date: **JUL 13 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail sales, service and repair entity. It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 1, 2006 denial, 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, 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.

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 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$41,600 per year. The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

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. On appeal counsel

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

submits a brief with copies of evidence previously submitted and an Interoffice Memorandum dated May 4, 2004 from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services (CIS) (Yates' May 4, 2004 memo). Relevant evidence in the record includes Stuart and Loreen E. Binns' Form 1040 U.S. Individual Income Tax Return for 2001 through 2004, a statement dated November 8, 2005 from the owner of the petitioner regarding the petitioner's gross sales, gross income and net assets (the owner's November 8, 2005 letter), and a statement of monthly expenses for Stuart Binns' household. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of \$464,261, and to currently employ 3 workers. On the Form ETA 750B signed by the beneficiary on April 26, 2001 and on the form G-325A signed by the beneficiary on June 28, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had net assets of \$49,438 in 2001, \$47,334 in 2002, \$96,956 in 2003, \$111,000 in 2004 and \$128,000 in 2005, which establish the petitioner's ability to pay the proffered wage of \$41,600 per year in each of these years according to Yates' May 4, 2004 memo.

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 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 did not claim to have worked for the petitioner and the petitioner did not submit any W-2 forms, 1099 forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present.

As previously noted, the evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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

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).

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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33², Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Counsel's reliance on gross sales and gross income reported on Schedule C is misplaced. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001 through 2004. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2001, the Form 1040 stated adjusted gross income of \$47,808.
- In 2002, the Form 1040 stated adjusted gross income of \$47,354.
- In 2003, the Form 1040 stated adjusted gross income of \$37,281.
- In 2004, the Form 1040 stated adjusted gross income of \$52,181.

In response to the director's request for evidence (RFE) dated November 29, 2005, the petitioner submitted a statement of monthly expenses for the sole proprietor's household. The sole proprietor's household monthly expenses are a total of \$2,935 (\$35,220 per year) including \$1,540 for mortgage, \$65 for residential insurance, \$300 for property tax, \$75 for auto insurance, \$110 for gasoline, \$75 for life insurance, \$30 for gas, \$65 for electric and water, \$110 for telephone, \$240 for food, \$40 for household supplies, \$60 for clothing and \$150 for entertainment.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage of \$41,600, however, the balance of \$6,208 after paying the proffered wage from the adjusted gross income could not cover the sole proprietor's household living expenses of \$35,220.

In 2002 the sole proprietor's adjusted gross income of \$47,354 was sufficient to pay the beneficiary the proffered wage of \$41,600, however, the balance of \$5,754 after paying the proffered wage from the adjusted gross income was deficient \$29,466 to cover the sole proprietor's household living expenses for that year.

In 2003 the sole proprietor's adjusted gross income of \$37,281 was not sufficient to pay the beneficiary the full proffered wage that year without taking into account the sole proprietor's family living expenses. The petitioner needs an extra \$39,539 to pay the proffered wage and to cover the sole proprietor's living expenses that year.

In 2004 the adjusted gross income of \$52,181 was sufficient to pay the beneficiary the proffered wage of \$41,600, however, the balance of \$10,581 after paying the proffered wage was deficient \$24,639 to cover the sole proprietor's household living expenses for that year.

² The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003 and Line 36 for 2004.

In conclusion, the sole proprietor's adjusted gross income was insufficient to pay the beneficiary the proffered wage in 2003 even without taking into account the sole proprietor's household living expenses; and although the sole proprietor's adjusted gross income in 2001, 2002 and 2004 was sufficient to pay the beneficiary the proffered wage, the balances were not sufficient to cover the sole proprietor's household living expenses. Therefore, the petitioner failed to establish its ability to pay the proffered wage and the sole proprietor's household living expenses for 2001 through 2004.

CIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Counsel asserts that the petitioner had sufficient net assets to pay the proffered wage. However, counsel did not submit any documentary evidence to support her assertions except a statement from the sole proprietor. 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). 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)). Counsel refers to Yates' May 4, 2004 memo. As quoted by counsel, Yates' May 4, 2004 memo indicates that net *current* assets may be an alternative method in determining the petitioner's ability to pay. However, counsel's reliance on the petitioner's net assets to establish the petitioner's ability to pay is misplaced. Furthermore, the petitioner's net assets were not sufficient to pay the proffered wage and to cover the sole proprietor's household living expenses in 2001 and 2002 even if counsel had proved with independent objective evidence that the amounts she claimed were net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through 2004.

Counsel's assertions cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.