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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAY 29 2007**
WAC 01 119 53734

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 director, California Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a specialty cook of Indian food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's September 27, 2005 denial, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position, based on the results of an U.S. Embassy onsite investigation of the beneficiary's claimed place of employment in India and the lack of sufficient corroborating evidence as to the claimed employment submitted in response to a Notice of Intent to Deny the instant petition. The director determined that the record lacked sufficient evidence to establish the beneficiary's two years of relevant work experience, as stipulated by the Form ETA 750. 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 has been discussed in these proceedings previously and 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 petitioner must 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 November 13, 1997.

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 appeal². On appeal, counsel submits a brief and no additional evidence.

With regard to the beneficiary's requisite two years of previous work experience, the record contains a letter of work verification dated December 23, 1988, signed by the manager (name indecipherable), [REDACTED] Jandiala, India. The original of the letter had a photo attached to it, which is copied on the letter

¹ The record indicates that former counsel for the petitioner submitted a Request for Correction form to the California Service Center stating that the beneficiary's name was [REDACTED] and not [REDACTED]. A document entitled "Decree Changing Name" dated December 13, 1999 signed by the Clerk of the Superior Court, the state of California, is also found in the record that notes the change of the beneficiary's name. In addition, the I-140 petition, the Form ETA 750 and the writers of the affidavits and letters of work verification all identify the beneficiary as [REDACTED]

² 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).

submitted to the record. In the letter, the manager stated that the beneficiary worked as a cook and catering assistant in the "Bar and Restaurant" from January 1985 to December 1988. The letter writer stated that the beneficiary knew how to prepare the Indian dishes and sweets, with no further details on the beneficiary's work duties, or hours of work. Finally the letter writer used the letterhead stationary of [REDACTED]

In addition, the record contains a report of an interview of [REDACTED], the [REDACTED]'s manager, conducted in November 2001 by a Citizenship and Immigration Services (CIS) investigator at the [REDACTED] in Jalandhar, Punjab. The report indicates that [REDACTED] stated that the [REDACTED] started its business operations in 1995-1996, and that there was no [REDACTED] in 1985; that the beneficiary was never employed with [REDACTED] never worked as a cook and catering assistant, and had never worked with [REDACTED] in any capacity.

Other evidence in the record includes the following:

An undated letter from [REDACTED], identified as partner and owner, [REDACTED] Restaurant. This document appears to have been submitted to the record in response to the director's request for further evidence dated February 10, 2003. The director requested further evidence as to the beneficiary's work experience, asking for a letter on the previous employer's letterhead, showing the name and title of the person verifying the information; stating the beneficiary's title, duties, dates of employment and number of hours worked per week. In his letter, [REDACTED] stated that the beneficiary was employed from January 1985 to December 1988 fulltime in the position of cook. [REDACTED] also noted the beneficiary's duties in cooking Mugnai and Punjabi style foods. The letter is on another [REDACTED] letterhead, that also states "Spl. In: Kitty Party, Marriage Party, Birthday Party, Star Night and Conference Hall."

An undated affidavit notarized in India from [REDACTED], and an accompanying letter on letterhead, apparently submitted to the record with a copy of the original I-140 petition after the California Service Center could not locate the original I-140 petition. In this letter, [REDACTED] is identified as both owner and partner. [REDACTED] stated that he was notified by his current manager that in November 2001, an officer from the U.S. embassy visited [REDACTED] [REDACTED] stated that his manager answered their questions to the best of his knowledge; however the manager did not mention to them that he had not worked at [REDACTED] & Restaurant during the time the beneficiary was working there, and therefore was not in a position to verify the beneficiary's employment with [REDACTED] & Restaurant. [REDACTED] then states that the beneficiary worked at the [REDACTED] & Restaurant as a cook and catering assistant, and that the restaurant was located close to the current [REDACTED] [REDACTED] stated that the restaurant is now closed and is a residential area, and that the beneficiary had worked at the previous [REDACTED] & Restaurant location only, and not at the current [REDACTED] marriage palace.

Another letter dated July 29, 2005 from [REDACTED] a apparently submitted in response to the director's Notice of Intent to Deny (NOID) the petition. In this second letter, Mr. [REDACTED] stated that he previously owned [REDACTED] & Restaurant, near a bus stand, [REDACTED] [REDACTED] ki M [REDACTED] stated that the manager of [REDACTED] never knew that he [REDACTED]

had hired the beneficiary to work at [REDACTED] and Restaurant because the manager was hired in 1995. [REDACTED] states that the [REDACTED] Restaurant was a business that he opened many years before he opened the current [REDACTED] and that when he closed this restaurant, the location became a residential area. [REDACTED] states that although the beneficiary did not work at [REDACTED] he did work for [REDACTED] at the [REDACTED] & Restaurant.

An affidavit dated August 1, 2005 from [REDACTED] the former manager of [REDACTED] states that he answered truthfully any questions asked of him by somebody from the U.S. Embassy with regard to his knowledge of the beneficiary and his employment at [REDACTED]. [REDACTED] also explained that the owner of [REDACTED] later explained to him that he had hired a Satpal Singh to work at another business, called [REDACTED] & Restaurant, located on the same road many years earlier.

A unsworn statement from the beneficiary, dated August 11, 2005 with regard to his previous employment in India. The beneficiary states that in or about 1985, [REDACTED] and Restaurant began its business operation owned by [REDACTED] and that he was employed as a cook at [REDACTED] & Restaurant. The beneficiary also stated that [REDACTED] & Restaurant closed its business about 1994 due to dwindling revenue. The beneficiary stated that he was paid in cash and that [REDACTED] did not maintain any formal payroll or accounting system and that this paperless business practice is routine and widely accepted in rural villages of India.

The beneficiary then stated that the Form ETA 750 Part B contained incorrect information as to his employment and that the beneficiary's former attorney erroneously indicated [REDACTED] as the beneficiary's previous employer and he signed the form without noticing the error. The beneficiary stated that although the letter was on [REDACTED] letterhead, the contents of the letter clearly indicate that the beneficiary worked for [REDACTED] Restaurant. The beneficiary also stated that because the [REDACTED] & Restaurant had already closed and since he owned both businesses, [REDACTED] decided to use his new business letterhead to verify the beneficiary's employment since it was the only letterhead that he had at the time of writing the letter of work verification.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of specialty cook of Indian food. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School X
 - High School (blank)
 - College (blank)

College Degree Required (blank)
Major Field of Study (blank)

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked for [REDACTED] The Great Restaurant in Anaheim, California from April 1994 to March 1996.⁴ He also represented that he had worked for [REDACTED] from January 1985 to December 1988. He does not provide any additional information concerning his employment background on that form.

On appeal, counsel states that the petitioner has submitted sufficient evidence to establish that the beneficiary has the requisite two years of work experience stipulated by the Form ETA 750, Part A. Counsel reviewed the three letters submitted to the record in response to the director's notice of intent to deny the petition, namely the letters from the beneficiary; [REDACTED], owner, Preet Palace; and [REDACTED], manager, [REDACTED]. Counsel states that it is important to note that the original letter of verification had a stamp indicating that it was being signed on behalf of [REDACTED] & Restaurant, although it was on [REDACTED] letterhead. Counsel states that CIS should accept the petitioner's explanation that the name "[REDACTED]" listed on Form ETA 750, part B was a mistake and "[REDACTED] & Restaurant" should have been listed as the beneficiary's previous employer in India. Counsel asserts that a clerical error was made and has been clarified, and that it would be unfair to deny the petition when it is clear that the beneficiary met the experience requirements in spite of the clerical error.

Counsel also notes that the evidence clearly indicates that the beneficiary's experience was with [REDACTED] & Restaurant and it was improper to rely on an investigative report when the person interviewed, namely, [REDACTED], was not in a position to give information about the beneficiary or the place of employment. Counsel states that it would have been more proper to speak with [REDACTED] since he signed the letter of work verification, and owned both establishments. Counsel states that without such an interview of the owner, the overseas investigation should not be deemed conclusive, and CIS should accept the evidence submitted indicating that the beneficiary has the two years experience as a cook for [REDACTED] & Restaurant. Counsel also stated that the director arbitrarily dismissed the evidence of the record, misstated the character of the evidence in his decision and failed to properly consider the entire body of evidence in the record.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the

⁴ In a document found in the record, the beneficiary apparently refuted this employment with [REDACTED] The Great Restaurant, and stated that he had either worked in a 7-Eleven store or was unemployed during this period of time.

training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In examining the evidence in the record, the AAO notes that counsel refers to several subsequent letters of work verification or clarification submitted to the record. However, the petitioner apparently submitted an initial letter of work verification with the initial petition that the director deemed insufficient, prompting a request for further evidence. The record suggests that this letter of work verification is what prompted the California Service Center's request for an onsite investigation as to the beneficiary's previous employment in India. The letter lacked details as to the beneficiary's fulltime or part time work status, and details on his job duties. Furthermore, the name of the person who signed the letter is indecipherable, with only the word "Manager" identifying the letter writer.

The AAO notes that the director in his decision also referenced an amendment statement sent by the beneficiary to the state of California Employment Development Department (EDD) dated May 13, 1998.⁵ In this amendment, the beneficiary stated that he had never worked at the first place of employment noted on Form ETA 750, Part B, namely [REDACTED] a The Great, in Anaheim, California, and that he had either worked at 7-Eleven from 1991-1996 or was unemployed during relevant periods of time listed on the Form ETA 750, Part B. It is noted that such a significant discrepancy in the beneficiary's previous employment history could have also prompted the request for the overseas investigation. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." The AAO also notes that the claimed employment with the petitioner was part-time, as noted by the director in his decision.

Further, it is noted that the letter writer of the initial letter of work verification used the letterhead of [REDACTED] although based on the subsequent letters of work verification, this marriage or party reception business did not exist in 1988. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) further 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.

In the instant petition, the subsequent letters submitted to the record to further establish the beneficiary's work credentials have only further confused the record. There is no further explanation or clarification of the initial letter of work verification, but rather letters that point out why the conclusions of the Embassy investigation report are in error. However, the subsequent letters, written on [REDACTED] letterhead and with clear statements that [REDACTED] did not exist prior to 1995, only further weaken the sufficiency of the initial letter

⁵ The director in his decision erroneously stated the date of this amendment document was May 13, 1988; however, the document is dated May 13, 1998.

of work verification submitted on letterhead and dated 1988.

While counsel's assertions with regard to interviewing [REDACTED] in Jandiala who did not work with either [REDACTED] or [REDACTED] & Restaurant in the 1980's and was not the owner may be valid, the AAO also notes that the original letter of work verification was allegedly signed by the manager of either the [REDACTED] (used on the letterhead used for the letter) or of [REDACTED] Restaurant (based on the stamp used on the letter.) Therefore the U.S. Embassy's interview of the then manager of [REDACTED] in 2001 was not illogical. Rather, because [REDACTED] had not worked at the previous establishment and was not the actual claimed employer of the beneficiary, the report was not complete. In addition, the beneficiary's unsworn statement with regard to the claimed clerical error of the petitioner's first counsel [REDACTED] and to why [REDACTED] used the [REDACTED] letterhead on his letter of work verification are given very little weight in these proceedings. Of more probative weight would have been sworn statements by either former counsel or [REDACTED] with regard to these issues. Based on the initial letter of work verification, [REDACTED] would also have to explain why the initial letter of work verification was written on [REDACTED] letterhead some six or seven years prior to the establishment of [REDACTED]

The record as presently constituted, reflects that the petitioner has not provided sufficient evidence to establish that the beneficiary has the requisite two years of previous work experience prior to the 1997 priority date. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage as of the 1997 priority date and until the beneficiary obtains lawful permanent residence. 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 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 November 13, 1997. The proffered wage as stated on the Form ETA 750 is \$11.59 an hour, or \$24,107.20 per year.

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 on August 3, 1996 and to currently employ four workers. In support of the petition, the petitioner submitted its Forms 1040 U.S. Individual Tax Return for the years 1997, 1998, 1999, 2000, and 2001, with accompanying Schedules C. The petitioner also submitted an itemized list of monthly expenses that totaled \$48,000 a year.

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1997 onwards.

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).

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 supports a family of 5 persons. The tax returns reflect the following information for the following years:

	1997	1998
Proprietor's adjusted gross income (Form 1040)	\$ 33,926	\$ 31,656
Petitioner's gross receipts or sales (Schedule C)	\$ 146,758	\$ 216,314
Petitioner's wages paid (Schedule C)	\$ 0	\$ 22,702
Petitioner's net profit from business (Schedule C)	\$ -11,428	\$ 3,472
	1999	2000
Proprietor's adjusted gross income (Form 1040)	\$ 42,728	\$ 84,980
Petitioner's gross receipts or sales (Schedule C)	\$ 264,261	\$ 321,913
Petitioner's wages paid (Schedule C)	\$ 40,904	\$ 39,031
Petitioner's net profit from business (Schedule C)	\$ 6,066	\$ 8,605
	2001	
Proprietor's adjusted gross income (Form 1040)	\$ 87,491	
Petitioner's gross receipts or sales (Schedule C)	\$ 511,025	
Petitioner's wages paid (Schedule C)	\$ 50,458	
Petitioner's net profit from business (Schedule C)	\$ 43,604	

In 1997, the sole proprietor's adjusted gross income of \$33,926 covers the proffered wage of \$24,107.20; however, the sole proprietor would have only \$9,000 left to cover his household expenses estimated at \$48,000 per year. It is improbable that the sole proprietor could support himself and four other dependents on \$9,000, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. It is noted that the record contains the bank statements for the sole proprietor's business checking account, and that former counsel notes that the bank balances also establish the petitioner's ability to pay the proffered wage. However, the record only contains the sole proprietor's November and December 1997 bank statements which could not establish that the petitioner had sufficient monthly balances throughout 1997 to pay the entire proffered wage. Furthermore, the 1997 business checking account funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses.

In tax years 1998 and 1999, the sole proprietor's adjusted gross income would be sufficient to cover the proffered wage; however, the sole proprietor would not have sufficient adjusted gross income to also cover the household yearly expenses of five individuals, identified by the sole proprietor as \$48,000 each year. It is noted that the record contains the 1998 and 1999 bank statements for the sole proprietor's business checking account, and that former counsel notes that the bank balances also establish the petitioner's ability to pay the proffered wage. However, the bank statements for both years do not indicate that the petitioner had sufficient

monthly balances throughout 1998 or 1999 to pay the entire proffered wage. In tax year 1998, the monthly balances range from \$13,709.66 to \$3,433.04, while in tax year 1999, the petitioner's bank statement monthly balance range from \$27,053.22 to \$7,383.75. Furthermore, the 1998 and 1999 business checking account funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses.

The AAO notes that for both tax years 2000 and 2001, the sole proprietor does appear to have sufficient adjusted gross income to both pay his household expenses and pay the proffered wage. However, 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).

It is noted that former counsel stated that the sole proprietor himself was receiving wages from the business and that these wages could be lowered to provide further additional funds with which to pay the proffered wage. However, the Forms 1040 and Schedules C for tax years 1997, 1998, and 1999 do not indicate any such wages that would be significant enough to pay difference between the sole proprietor's adjusted gross income and the combined proffered wage and sole proprietor's personal expenses.

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.