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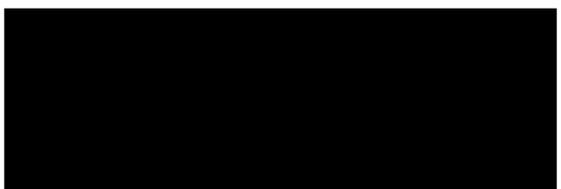
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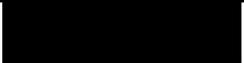


U.S. Citizenship and Immigration Services

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FILE: 
WAC-06-099-50639

Office: TEXAS SERVICE CENTER Date: NOV 07 2007

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 Director, Texas Service Center ("director"), denied the visa preference petition.¹ The petitioner appealed. The matter is now before the Administrative Appeals Office (AAO). The appeal will be sustained.

The petitioner operates an auto repair business, and seeks to employ the beneficiary permanently in the United States as an automobile mechanic ("Auto Mechanic, foreign cars"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's July 26, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).²

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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

¹ The petitioner initially filed the I-140 Petition with the California Service Center, but the matter was transferred to, and decided at, the Texas Service Center.

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). 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).

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 for processing by the relevant office within the DOL employment system on August 31, 1999.³ The proffered wage as stated on the Form ETA 750 is \$18.36 per hour, which is equivalent to \$38,188.80 per year based on a 40-hour work week. The labor certification was approved on April 4, 2002. The petitioner filed an I-140 Petition for the beneficiary on February 6, 2006. The petitioner listed the following information on the I-140 Petition: date established: November 2, 1982; gross annual income: \$484,097.00; net annual income: \$47,503.00; and current number of employees: two.

On April 24, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide the following information: evidence of the petitioner's ability to pay the proffered wage, including the sole proprietor's federal tax returns with all schedules for the years 1999, 2000, 2001, and 2005, as the petitioner had only submitted returns for the years 2002, 2003, and 2004; a statement of the sole proprietor's monthly expenses to include all living expenses; copies of the petitioner's last six bank statements; and evidence of wages that the petitioner paid to employees for the years 1999 through 2005. The petitioner responded. On July 26, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed and the matter is now before the AAO.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on January 17, 2006, the beneficiary did not list that he was employed with the petitioner, rather the beneficiary appears to currently be living abroad. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary.

³ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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. 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 proprietor, 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 himself, his wife, and three children⁴ and resides in Van Nuys, California. The tax returns reflect the following information:

Tax Year	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C) (and costs of labor, "COL")	Petitioner's Net Profit from business (Schedule C)
2005	\$50,227	\$604,789	\$71,680 (COL \$19,172)	\$66,593
2004	\$30,622	\$484,097	\$68,102 (COL \$14,813)	\$47,503
2003	\$65,574	\$551,866	\$65,410 (COL \$19,445)	\$75,115
2002	\$56,261	\$503,947	\$67,385 (COL \$16,562)	\$62,919
2001	\$53,168	\$567,628	\$70,099 (COL \$28,718)	\$59,176
2000	\$44,243	\$553,754	\$78,032 (COL \$26,500)	\$49,054
1999	\$38,849	\$529,648	\$78,198 (COL \$29,282)	\$44,622

If we reduced the sole proprietor's adjusted gross income (AGI) by the amount of the proffered wage, \$38,188.80, that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with an adjusted gross income of: 2005: \$12,038.20; 2004: -\$7,566.80; 2003: \$27,385.20; 2002: \$18,072.20; 2001: \$14,979.20; 2000: \$6,054.20; and 1999: \$660.20.

⁴ The sole proprietor's tax returns for 1999, 2000, 2001, 2002, and 2003 reflect support for three children. The sole proprietor's 2004 return reflects support for two dependent children, and his 2005 return reflects support for one dependent child.

The sole proprietor submitted a list of estimated monthly family expenses, which totaled \$6,143.07 per month, or \$73,716.84 annually. The sole proprietor's estimate included the following expenses: mortgage, food, insurance, utilities, credit cards, clothing, school, gardener, and other recurring monthly expenses. The sole proprietor did not provide any evidence of representative bills to verify that the expenses listed were accurate, or any additional documentation to verify that the sole proprietor did have additional assets, such as bank accounts, or investments upon which the family could rely. Based on the sole proprietor's stated estimate, if we were to accept his estimate without further documentation, the sole proprietor would not be able to support himself and his family and pay the proffered wage in any year, unless the sole proprietor can show personal or business assets through which he could support his family and pay the proffered wage.

The petitioner also submitted Forms 941, evidence of quarterly wages paid for the quarters ending December 31, 2004, March 31, 2005, June 30, 2005, and September 30, 2005. Forms 941 would evidence wages paid to other workers, and generally will not exhibit the petitioner's ability to pay the beneficiary the proffered wage. The petitioner also submitted Forms W-3 for the years 1999 through 2005 to demonstrate wages paid for the year.

While wages paid to others generally cannot be used to show the petitioner's ability to pay the beneficiary, the proffered wage, in the case at hand, the petitioner contends on appeal that the beneficiary will serve to replace another worker, and, therefore, that these prior wages paid should be considered.

Counsel asserts that the petitioner employed a full-time foreign auto mechanic, [REDACTED] until late 1999. After [REDACTED] quit, the petitioner sponsored the initial labor certification beneficiary as a foreign auto mechanic to replace [REDACTED]. However, counsel provides that since the labor certification process would take a while, in 2000 the petitioner hired [REDACTED] on a temporary basis until the initial beneficiary's application could be processed and the beneficiary could enter the U.S. The petitioner employed [REDACTED] as a full-time foreign auto mechanic, and provides that he will be leaving the petitioner's employment once the beneficiary arrives.

In support, the petitioner provided W-2 statements exhibiting payments to [REDACTED] in the following amounts:

	Year	Wags Paid
Cuba Hilmar	1999	\$29,687.00
	2000	\$13,482.00
Gabris Jlenkerian	2006	\$17,550 for the first two quarters of 2006
	2005	\$34,762.50
	2004	\$35,302.00
	2003	\$35,369.00
	2002	\$32,555.00
	2001	\$30,397.50
	2000	\$18,400

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 is, 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. [REDACTED] nationality is unclear, and whether the petitioner is replacing a U.S. worker is unclear.

The petitioner also asserts that it has employed temporary part-time workers, and outside labor, and that as the petitioner's business is solely to provide foreign mechanic auto services, that the beneficiary would replace these temporary workers. We have listed wages paid to others under costs of labor in the chart above. As these individuals are not specifically employed, but are outside additional labor, we would consider wages paid to the outside part-time workers towards the petitioner's ability to pay the proffered wage.

In terms of additional assets through which the petitioner can show its ability to pay, the petitioner provided bank statements. The petitioner also provided bank statements for the business bank accounts for six months ending February 28, 2005, through May 31, 2005, December 30, 2005 and January 31, 2006. The bank statements reflected significant variations in amounts from a high balance of \$15,192.99 (for the month end February 2005) to a low balance of \$4,607.43 (for the month end April 2005). Although the bank statements would provide for additional funds available to the sole proprietor in 2005, the bank statements would not exhibit the petitioner's continuing ability to pay the proffered wage from 1999 to the present, but only funds that the sole proprietor had from the time period of February 2005 to May 31, 2005, and for the last month of 2005, and the first month of 2006. The statements would leave over six years unaccounted for between 1999 and 2004.

As noted above, the petitioner is a sole proprietor, 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. Therefore, the business bank account records, as well as individual savings would be considered. However, the petitioner has provided a bank statement that accounts for only one month. The bank statements would represent only the amounts that the petitioner had in its account for those months end, and would, therefore, be insufficient to demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date, August 31, 1999, until the beneficiary obtains permanent residence.

The sole proprietor asserts that at year-end he had, and his tax returns reflect, that the business had inventory assets worth at least one and one-half times the proffered wage, and that the inventory assets would serve as a net current asset. The sole proprietor provides that the company has no liabilities and that the petitioner's inventory can be quickly converted into cash.

The owner also provided a statement that he was a U.S. citizen, and that the business owned net assets, including inventory, furniture, fixtures, machinery and equipment worth over \$500,000, which was "free and clear of any encumbrance." The owner did not provide any further documentation, or evidence to show what inventory, machinery, or equipment the business owned and the estimated worth of each asset. 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 additionally argues that the totality of the circumstances would warrant approval, that the petitioner has been in business for twenty-four years, the business has shown consistent growth of gross receipts of over \$500,000, the business has continuously employed two full-time employees, as well as consistently employing part-time workers and outside laborers.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner has operated a small sole proprietorship since 1982, which currently employs two full-time workers. The business has consistently generated over \$500,000 in revenue, and has documented wages paid to other workers. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Based on the foregoing, the petitioner has established that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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 been met.

ORDER: The appeal is sustained. The petition is approved.