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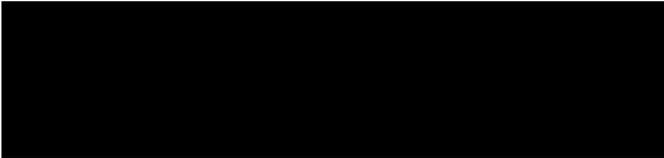


FILE: WAC-05-216-53407 Office: CALIFORNIA SERVICE CENTER Date: SEP 20 2007

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 owns and operates a restaurant, and seeks to employ the beneficiary permanently in the United States as a chef and head cook ("Cook Restaurant"). 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 June 1, 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 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>1</sup>

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 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 for processing by the relevant office within the DOL employment

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<sup>1</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).

system on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$20.60 per hour, \$42,848 per year based on a 40 hour work week. The labor certification was approved on March 24, 2005. The petitioner filed an I-140 Petition for the beneficiary on July 29, 2005. The petitioner listed the following information on the I-140 Petition: date established: April 1, 1989; gross annual income: \$1,465,701; net annual income: \$206,333; and current number of employees: 23.

On January 26, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide the following information: to submit evidence that the beneficiary had the experience required as listed on Form ETA 750;<sup>2</sup> evidence of the petitioner's ability to pay the proffered wage, including either the petitioner's federal tax returns, including all schedules, audited financial statements, or annual report; copies of quarterly wages paid; a statement of the sole proprietor's monthly expenses to include all living expenses; if the sole proprietor will use personal assets to pay the wage, to submit evidence to verify sufficient assets to pay the proffered wage; and for the petitioner to amend the wage listed on Form I-140.<sup>3</sup> The petitioner responded.

On April 20, 2006, the director issued a second RFE for the petitioner to provide copies of the beneficiary's Forms W-2 if the petitioner employed the beneficiary. The petitioner responded.

On June 1, 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.

We will examine the information in the record, and then address counsel's arguments on appeal. 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 April 23, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did submit the following evidence of prior wage payment to the beneficiary:

<u>Year</u>	<u>W-2 Wages Paid</u>
2005	\$18,450
2004	\$18,900
2003	\$16,800
2002 <sup>4</sup>	\$11,900

<sup>2</sup> The petitioner submitted a letter to evidence that the beneficiary had the four years of required experience as a cook, specifically with experience in preparing Mexican style food.

<sup>3</sup> As noted above, the Form ETA 750 required that the petitioner pay the beneficiary \$20.60 per hour, which would be equivalent to \$824 per week. The petitioner listed the wage as \$394 per week on Form I-140, which is less than the proffered wage, and, therefore, unacceptable. A petitioner is required to pay the wage as certified on Form ETA 750. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

<sup>4</sup> In 2001, the beneficiary was employed by a different employer, [REDACTED], and received W-2 wages in the amount of \$12,771.13. These wages would not exhibit the present petitioner's ability to pay the proffered wage.

The wages that the petitioner paid to the beneficiary were less than the proffered wage in each year. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage for the years 2002 through 2005, and that it can pay the full proffered wage in 2001.

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 children and resides in Carson, California. The tax returns<sup>5</sup> reflect the following information:

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<sup>5</sup> The petitioner also submitted Forms 941, Quarterly Tax Returns, for the quarters ending March 31, 2005, June 30, 2005, September 30, 2005, December 31, 2005. Forms 941 for the dates September 30, 2005, and December 31, 2005 list the entity as "JB&L Incorporated," rather than Chile Verde. It is unclear whether and when the petitioner incorporated the business, and changed the entity from a sole proprietorship to an incorporated entity. As the petitioner provided the beneficiary's Form W-2 for the year 2005, the Forms 941 do not present any additional evidence to show the petitioner's ability to pay, as wages paid to others generally do not demonstrate the petitioner's ability to pay the proffered wage.

The petitioner also submitted an unaudited Profit and Loss statement dated July 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted with the petition are not persuasive evidence. The statements are in a compilation format rather than audited.

Petitioner's business	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2004	\$258,309	\$1,465,701	\$198,508	\$206,333
2003	\$34,040	\$778,256	\$99,900	-\$9,010
2002	\$60,704	\$526,371	\$86,067	\$9,227
2001	\$44,670	\$220,383	\$35,573	\$630

If we reduced the sole proprietor's adjusted gross income (AGI) by \$42,848, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, and factored in the wages already paid to the beneficiary, the owner would be left with an adjusted gross income of: 2004: \$234,361; 2003: \$7,992; 2002: \$29,756; and 2001: \$1,822.

The sole proprietor submitted a list of estimated monthly family expenses, which totaled \$4,974 per month, or \$59,688 annually. Based on the sole proprietor's estimate, and the amount that the sole proprietor would have remaining after payment of the proffered wage, the sole proprietor would be able to pay the proffered wage and support himself and his family only in one year: 2004. In each of the other years, the income remaining after payment of the proffered wage would be insufficient to maintain the family on the estimated \$59,688 budget.

On appeal, counsel provides that CIS is in error, and that the sole proprietor's adjusted gross income of \$44,670 and \$60,704 are sufficient for the petitioner to pay the proffered wage of \$42,848. Counsel further contends that CIS erred and misapplied the sole proprietor's cost of living estimate by using the family's 2006 expense estimate, and applying that estimate to the years 2001 to 2003.

As noted above, the sole proprietor must demonstrate that he can pay the proffered wage and support himself, and his family. Based on the calculations above, the sole proprietor's gross income is insufficient to demonstrate this.

A petitioner must demonstrate its ability to pay the proffered wage from the time of the priority date onward. See 8 C.F.R. § 204.5(g)(2). The sole proprietor submitted the list of estimated monthly expenses and did not indicate that the expenses were for 2006 onward. Alternatively, the sole proprietor did not indicate that expenses in prior years were lower. On appeal, the sole proprietor does not provide any estimate of his past expenses for the years 2001 to 2003, or any estimate to show the difference between his current and former expenses. 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 further provides that as a sole proprietorship, CIS may consider the individual's personal assets. Counsel asserts that CIS failed to request or refer to the individual owner's assets.

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Statements produced pursuant to a compilation are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

We note that the January 2006 RFE specifically provided that "if the sole proprietor will use personal assets to pay the wage, to submit evidence to verify sufficient assets to pay the proffered wage." The sole proprietor did not submit any such evidence with the initial filing or in response to the RFE, such as individual bank statements, or other evidence of readily liquefiable assets. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel provides that the sole proprietor has additional assets, which should be considered. The sole proprietor sold real estate worth \$370,000 for an approximate profit of \$240,000 in December 2003. In support, the sole proprietor provided a letter from Capital Group Realty dated July 12, 2006, which provided that the sole proprietor and his wife were the sole owners of the home and after paying of the remaining mortgage, the couple realized an approximate gain of \$240,000. Counsel additionally provided a property profile to further confirm the property sale.

While the sole proprietor realized a gain from the sale of the property, counsel does not provide whether the sole proprietor kept the profit realized in the form of liquefiable assets. It is unclear whether the sole proprietor used all or part of those funds to purchase a larger residence, or whether the funds were deposited into a bank account, which could then be used to either support the sole proprietor and his family, or to pay the proffered wage. Counsel did not provide any bank statements for the sole proprietor to evidence that part, or all of the profit from the sale could be used to pay the proffered wage. See *Matter of Soffici*, 22 I&N Dec. 158, 165. Further, the property sale was in late 2003, and any funds from the sale would only be available after that date. A petitioner must establish its ability to pay from the time of the priority date, which in this matter is April 25, 2001. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel additionally submitted the sole proprietor's brokerage statements to evidence personal assets in the form of money market accounts and equities held. The statements were for the months ending January 31, July 31, and December 31, 2001; January 31, July 31, and December 31, 2002; and January 31, July 31, and November 30, 2003. The statements showed a range in account value from a high balance of \$84,715 in January 2001, to a low balance of \$19,588 in January 2002. We note that the balances for 2003 do not reflect any large month-end amounts, which would reflect that the sole proprietor deposited the proceeds from his house sale into the brokerage or money market account.

If the sole proprietor were to use these funds to support himself and his family, taking the December 2001 year-end brokerage account balance of \$60,691, and adding the \$1,822 of remaining income in 2001 after paying the proffered wage, the sole proprietor would have \$62,513 for the year to support himself and his family. Based on the sole proprietor's estimate of expenses, we would subtract \$59,688 from that amount, which would leave \$2,825 remaining in the sole proprietor's account for the next year. In 2002, if we added the remaining amount to the petitioner's adjusted gross income remaining after payment of the proffered wage, the sole proprietor would have \$32,581 in funds available to support himself and his family, which is below the estimated personal living expenses of \$59,688.<sup>6</sup>

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<sup>6</sup> While counsel objects that this expense estimate reflects 2006 expenses, the sole proprietor did not provide

Accordingly, even if we were to consider the sole proprietor's personal assets, the petitioner cannot demonstrate its continuing ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence, but could likely only show its ability in 2001, and in 2004.

Based on the foregoing, the petitioner has not demonstrated that the sole proprietor can support himself and his family, and pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

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.