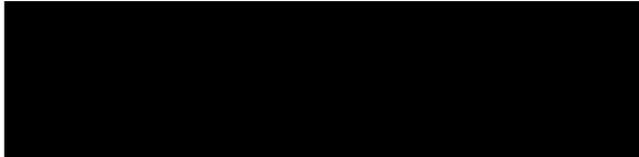




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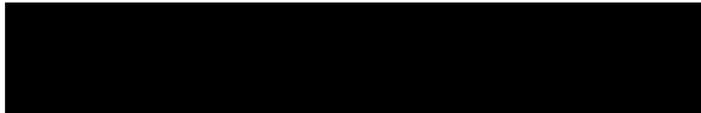
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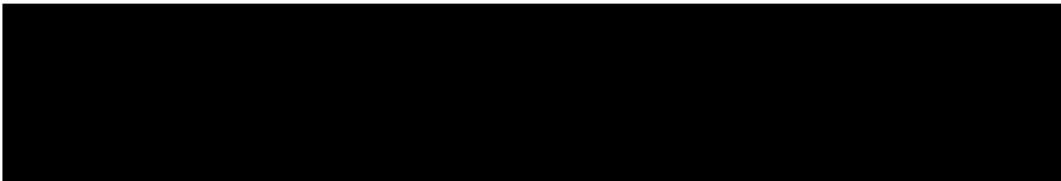
Petitioner:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a maintenance and household repairer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.² The director determined that the petitioner did not have sufficient net income or net current assets to pay the proffered wage as of the 1998 priority date and in subsequent years. 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 August 4, 2006 decision, the single issue in this case is whether the petitioner established its ability to pay the proffered wage as of the 1998 priority date and until the beneficiary obtains legal permanent residence. The director also stated that the petitioner did not appear to have sufficient financial resources to both pay the proffered wage and the petitioner's annual household expenses.

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

¹ The petitioner had previously filed another I-140 petition that the director denied on December 13, 2003. Former counsel submitted an untimely appeal and the petitioner took no further action with regard to the initial I-140 petition.

² The record contains a duplicate copy of the petitioner's Form ETA 750 obtained from the San Francisco U.S. Department of Labor office on October 14, 2003. The duplicate copy was requested and obtained during the adjudication of the petitioner's previous I-140 petition submitted on behalf of the beneficiary.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$15.77 an hour, or \$32,801.60 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal³. On appeal, current counsel submits a brief and the following documents:

A copy of the Federal Poverty Income Guidelines for 1999, as published in *Interpreter Releases*, March 22, 1999;

A copy of the beneficiary's IRS Form W-2 for tax year 1998. This document indicates the petitioner, identified as [REDACTED], paid the beneficiary wages of \$6,940.75; and

A letter dated September 5, 2006 written by the petitioner's accountant, [REDACTED] C.P.A., [REDACTED], Turlock, California. In her letter, [REDACTED] states that the petitioner's 1998 adjusted gross income, Schedule E depreciation, Form 4835 depreciation, and the petitioner's non-taxable social security income totaled \$92,812, and that all these items should be considered the petitioner's financial resources. After subtracting the proffered wage of \$32,801, [REDACTED] states that in tax year 1998, the petitioner had \$60,011 available for household expenses. [REDACTED] also notes that the petitioner's 1998 income tax return showed interest of \$7,631 earned on certificates of deposits from Sanwa Bank. [REDACTED] refers to a printout of the Federal Reserve Bank's historical rates of return submitted with her letter and calculates that the petitioner's certificates of deposit were worth \$140,275 in 1998 based on the 1998 historical interest rate of 5.44 percent.

With the initial I-140 petition, the petitioner also submitted its IRS Forms 1040, Individual Income Tax Return, for tax years 1998 to 2004; and the beneficiary's IRS W-2 Forms from tax years 1998 to 2004.⁴ The petitioner also submitted IRS Forms 1041, U.S. Income Tax Return for Estates and Trusts, for tax years 2001 and 2002.⁵ The record also contains a letter dated February 19, 2004 written by the petitioner's previous

³ 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).

⁴ The AAO notes that the petitioner reported these wages on Form 4835, Farm Rental Income and Expenses, item 20, labor hired.

⁵ For tax year 2001, the petitioner submitted a Form 1040 for both spouses, and also a Form 1041, for the [REDACTED] (EIN [REDACTED]) for the period of time from August 18, 2001 to December

accountant, [REDACTED], Modesto, California. In his letter, [REDACTED] stated that the petitioner's husband died on August 17, 2001 after a long history of respiratory disease, and at that time, the petitioner and her spouse owned, rented and maintained twenty two residential rental units and a 70 acre farm. [REDACTED] stated that the real estate property was valued at \$2,270,000 on August 17, 2001, and it is debt free. The accountant further stated that when [REDACTED] died in 2001, the petitioner received a 'step-up' in tax basis on all the real estate property to fair market value. [REDACTED] explained that the petitioner as a consequence could depreciate the new increased values instead of the original cost basis, with a resulting \$45,149 in additional depreciation on the same properties. [REDACTED] explains that this non-cash expense was the main reason for the petitioner's decreased adjusted gross income on her 2002 tax returns. [REDACTED] also asked that the director consider the fact that the petitioner's household only consists of one family member as of 2001.

The record also contains an earlier letter from [REDACTED] dated November 18, 2005. In this letter, [REDACTED] stated that she has been the petitioner's accountant since 2004 when her firm purchased the accounting practice of [REDACTED] and that she prepared the petitioner's 2003 and 2004 tax returns as well as reviewed the prior returns prepared by [REDACTED]. [REDACTED] stated that the petitioner's 2005 tax return will show an increase in taxable income as the petitioner sold three rental properties in 2005. [REDACTED] stated that the cash from the sale of these properties, which were free of encumbrances, totaled \$599,416.45. Submitted with this letter are U.S. Housing and Urban Development Settlement documents for the sale of three properties whose seller is identified as [REDACTED] trustee. The properties are identified as [REDACTED] Newman, California; [REDACTED] Newman, California, and [REDACTED] Newman, California. Based on the settlement documents, the total amount of cash due the seller is \$599,416.45.

Finally the record contains a letter signed by [REDACTED] dated December 17, 2002 that states the beneficiary has worked for her since 1992 and that she was personally familiar with his work. [REDACTED] also stated that the beneficiary worked on the repair and maintenance of the physical structure of commercial establishments.

On appeal, counsel asserts that the director did not provide the petitioner the opportunity to clarify her expenses in the 1998 priority year. Contrary to the director's comments in her decision, counsel states that it would have been reasonable to assume that the petitioner's household of two could have lived off the income remaining after the beneficiary's wage had been subtracted in 1998 because the petitioner had very little expenses in 1998. Counsel states that the petitioner's house was already paid off, and thus no mortgage interest was deducted on her 1998 tax return. Counsel also notes that the petitioner had savings, based on Schedule B of the petitioner's 1998 tax return that shows interest earned from Sanwa Bank. Counsel refers to the petitioner's current accountant's letter submitted on appeal and reiterates her remarks with regard to adding back depreciation expenses and the petitioner's non-taxable social security income to the petitioner's adjusted gross income. Counsel also notes that with the remaining \$60,011 in income available after paying the beneficiary's proffered wage in 1998, plus the amount of \$140,275 in certificates of deposits estimated by the petitioner's accountant, the petitioner had \$200,286 available to maintain a household of two persons in 1998.

31, 2001. The petitioner also submitted Form 1041 for the Estate of [REDACTED] (EIN [REDACTED]), an entity created on August 18, 2001, for which the petitioner is the trustee, and an additional Form 1041, for [REDACTED] (EIN [REDACTED]) of which the petitioner is trustee. For tax year 2002, the petitioner submitted a Form 1041 for the [REDACTED] Residuary Trust, a second Form 1041 for the Estate of [REDACTED], and a Form 1040, for [REDACTED], the surviving petitioner.

Counsel also notes that the director did not take into consideration the beneficiary's wages paid by the petitioner in tax year 1998, and that these wages should have been considered in the director's determination of whether the petitioner had the ability to pay the proffered wage and pay their household expenses. Finally counsel states that in tax year 1998 after subtracting the beneficiary's proffered wage from the petitioner's adjusted gross income, \$36,753 would have remained, and this sum is above the 125 percent Federal Poverty Guidelines used by Citizenship and Immigration Services (CIS) to determine minimum income requirements for all the years in question.

The evidence in the record of proceeding shows that the petitioner, as a private household, is most similar in structure to a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on January 10, 1998, the beneficiary claimed to have worked for the petitioner since November 1992. In addition, the initial petition indicated that the petitioner was filing for the classification of skilled worker, requiring two years of requisite work experience. The petitioner also submitted two letters verifying the beneficiary's previous work as a household and maintenance repairer in California, in addition to the petitioner's letter verifying the beneficiary's previous work experience.

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).

On appeal, both counsel and the petitioner's accountant state that the petitioner's depreciation expenses should be added back to the petitioner's adjusted gross income when considering the petitioner's ability to pay the proffered wage based on the petitioner's adjusted gross income. However, the AAO does not consider the petitioner's depreciation expenses when examining the petitioner's ability to pay the proffered wage as will be discussed further in these proceedings.

With regard to the petitioner's accountant's and counsel's assertions with regard to the petitioner's savings in tax year 1998, the assertions of counsel, and by extension, the petitioner's accountant, 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). If the petitioner holds bank accounts such as savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money is considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, in the instant matter, the petitioner has submitted no further evidentiary documentation with regard to her savings, or certificate of deposits. Without some evidence as to any actual savings existing at the end of the 1998 priority year and any subsequent year, the AAO cannot determine what additional financial resources are available to support the petitioner's household expenses.

On appeal, and throughout the record, counsel refers to the petitioner's interest income as a source of additional financial resources. The AAO notes that the petitioner's Schedule B, submitted with the petitioner's 1998 tax return, lists combined interest and ordinary dividends of \$23,155; however, the AAO also notes that the petitioner's interest income in the instant matter is recorded on the first page of the petitioner's Forms 1040 and in

every tax year constitutes a substantial amount of the petitioner's adjusted gross income. Thus, of more probative weight would be bank statements documenting the petitioner's savings account or certificates of deposit during the relevant years in question. The AAO also notes that if the petitioner would add income from trusts and estate to establish its ability to pay the proffered wage, the AAO would need to see the trust documentation to determine how property or income is to be distributed in any relevant period of time following the death of the petitioner's spouse.

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 submitted W-2 Forms for the beneficiary for tax years 1998 to 2004. These documents indicated that the petitioner paid the beneficiary \$6,940.75 in 1998, \$8,884.16 in 1999; \$8,620.33 in 2000; \$7,249.84 in 2001, \$15,139.42 in 2002, \$11,547.82 in 2003, and \$16,482.43 in 2004. As stated previously, these wages are reflected in the petitioner's Forms 4835, Farm Rental Income and Expenses. Thus while the petitioner has established it has paid wages to the beneficiary, it has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1998 onwards. The petitioner, thus, has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage for tax years 1998 to 2004. Thus, the petitioner has to establish its ability to pay the beneficiary \$25,860.65 in tax year 1998; \$23,917.24 in tax year 1999; \$24,181.07 in tax year 2000; \$25,551.56 in tax year 2001; \$16,661.98 in tax year 2002; \$21,253.58 in tax year 2003; and \$16,318.97 in tax year 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, contrary to counsel's and the petitioner's accountant's assertions, 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 *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537. While the petitioner is not a corporate entity, the findings of the court in *Chi-Feng Chang* with regard to depreciation expenses are applicable in the instant matter.

A private household is analytically similar to a sole proprietorship, which is 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 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). Thus, the AAO will consider the personal assets of the petitioner in this case.

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 petitioner supported two persons in tax years 1998 through 2000, and then following the death of the petitioner's husband, the petitioner supported herself during tax years 2001 to 2004. The petitioner's adjusted gross income, based on the submitted IRS Forms 1040 for tax years 1998 to 2004 are as follows: \$69,554 in 1998, \$56,904 in 1999, \$60,589 in 2000, \$58,735 in 2001, -\$9,141 in tax year 2002, -\$30,893 in tax year 2003; and -\$22,868 in 2004.

In his decision, the director stated that it was not reasonable that the petitioner could both pay the beneficiary's proffered wage and pay the petitioner's household expenses in tax year 1998. The director provided no rationale for this statement. The director also did not request an itemized list of monthly expenses from the petitioner prior to making this determination, nor did counsel on appeal provide any such list. On appeal, counsel states that the remaining sum of adjusted gross income left over in tax year 1998 after paying the beneficiary's proffered wages of \$32,801.60 is sufficient to pay the proffered wage because it is more than the Federal Poverty Guidelines. Counsel further asserts the petitioner had minimum expenses in tax year 1998, since the petitioner's house was paid off as indicated by the lack of any mortgage interest deductions on the petitioner's 1998 Schedule A. Counsel also claims that in 1998 the petitioner had significant savings held in certificates of deposit, based on the dividend interest from Sanwa Bank reported on her Schedule B; however, as stated previously, no evidence is submitted to the record as to the actual savings accounts or certificates of deposit held by the petitioner as of the 1998 priority date and continuing to the present date.

The AAO notes that assertions of counsel, or of the petitioner's accountant, by extension, do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Of more probative weight in establishing whether the petitioner had sufficient income available to it after paying the remainder of the beneficiary's proffered wage to pay her own household expenses would be an itemized list of the petitioner's monthly or annual expenses for the relevant years in question, namely 1998 to 2004. Such expenses would include items such as food, utilities, clothing, health and house insurance, and medical expenses.

Further the AAO notes that although both the director and counsel examine the petitioner's ability to pay both the proffered wage and the petitioner's household expenses in the 1998 priority date year, the petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains legal permanent residency. Thus, the petitioner has to establish its ability to pay the proffered wage not only in tax

year 1998, but through tax year 2004.⁶ In the present proceedings, the AAO will examine the petitioner's ability to pay the proffered wage from the 1998 priority year to tax year 2003. Finally, with regard to counsel's assertion that the petitioner has established her ability to pay the proffered wage based on the Federal Poverty Guidelines, the AAO notes that CIS does not utilize the Federal Poverty Guidelines when examining the petitioner's ability to pay a proffered wage.

In examining the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage and also to pay its yearly household expenses, the AAO will examine first the petitioner's tax returns for the years in which the petitioner had positive adjusted gross income, namely tax years 1998 to 2001. The AAO notes that during the years 1998 to 2001, the petitioner had the following sums of adjusted gross income available for the payment of the petitioner's annual household expenses after subtracting the difference between the beneficiary's actual wages and the proffered wage: \$43,693.35 in tax year 1998, \$32,986.76 in tax year 1999, \$36,407.93 in tax year 2000, and \$33,183.44 in tax year 2001.

With regard to the petitioner's household expenses, as stated previously, the director did not request nor did counsel submit an itemized list of monthly household expenses. The petitioner's tax returns, as correctly stated by counsel, do not reflect any deductions for mortgage interest payments. For the tax years in which the petitioner itemized deductions during the period of time between tax year 1998 and 2001, namely tax year 1999 and 2000, the petitioner's Schedules A reflect medical expenses, and state income taxes that total \$12,905 in tax year 1999 and \$13,720 in tax year 2000. Such expenses when filing joint tax returns, would indicate that the petitioner had \$20,001.46 and \$22,687.93 available to cover its remaining household expenses such as food, insurance, and utilities, in tax years 1999 and 2000.

The large number of rental properties held by the petitioner in the 1998 priority year as well as the petitioner's positive adjusted gross income suggests that the petitioner could have established its ability to pay the proffered wage as of the 1998 priority date and through tax year 2001. Although the AAO acknowledges that the record is incomplete with regard to any of the petitioner's household expenses in tax years 1998, and 2001, the petitioner's remaining available adjusted gross income for the priority year 1998 and in tax year 2001 appears sufficient to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage during these years and her household expenses. Thus, the AAO finds it reasonable that the petitioner could have both paid the beneficiary the difference between his actual wages and the proffered wage and her household expenses during the tax years 1998 through 2001.

With regard to tax years 2002 to 2004, the petitioner has a negative adjusted gross incomes which cannot establish the petitioner's ability to both pay her monthly household expenses, and the difference between the beneficiary's actual wages and the proffered wage. On appeal, and earlier in the proceedings, the petitioner's accountants both noted that the petitioner has significant real estate property available in 1998. In the appeal filed untimely, former counsel noted that in 2005, the petitioner sold three properties, and provided documentary evidence as to the sale of these properties and the combined sale price of \$599,416.45. While the sale of three properties in tax year 2005 may provide sufficient additional financial resources to pay the

⁶ The AAO notes that the record closed as of August 4, 2006 when the director issued her denial of the instant petition. When the record closed, the petitioner's tax returns for tax years 2005 and 2006 may have been available. The director did not issue a request for further evidence as to the petitioner's ability to pay the proffered wage from 1998 to tax year 2006, and only referred to the petitioner's ability to pay the proffered wage in the 1998 priority date year in her decision. However, the petitioner submitted her tax returns for tax years 1998 to 2004 to the record. Based on the record as presently constituted, the AAO will examine the petitioner's ability to pay the proffered wage from tax years 1998 to 2004.

difference between the beneficiary's wages and the proffered wage in tax year 2005, such sales do not establish the existence of additional financial resources in tax years 2002, 2003 and 2004. Thus, the sale of these properties in 2005 is not dispositive of the petitioner's ability to pay the proffered wage in tax years 2002 to 2003. Further, the record does not indicate that the proceeds from these sales are actually available to the petitioner in a savings account or money market account that can be easily accessed.⁷ Thus, the petitioner cannot establish its ability to pay the proffered wage in tax years 2002 to 2004 based on her tax returns, or from additional financial resources based on the sale of properties.

Although counsel on appeal draws attention to the petitioner's interest income sums and, using historical rates of interest, theorizes as to what the actual sum of money was producing the documented interest income, the AAO notes that if the petitioner utilized this interest income in tax years 2002 to 2004 to pay remaining household expenses, the resulting interest income for the subsequent tax years might have been decreased, which would have further decreased the petitioner's adjusted gross income in these years. While the AAO acknowledges that the petitioner's accountant is correct in stating the petitioner's adjusted gross income is based on the increased depreciation deductions allowed following the death of the petitioner's spouse, the record does not contain sufficient evidence to establish that the petitioner has sufficient financial resources in the tax years 2002 to 2004 to both pay her household expenses and pay the difference between the beneficiary's actual wages and the proffered wage. As stated previously, the AAO does not consider depreciation expenses in its examination of the petitioner's adjusted gross income. Therefore, although the petitioner has established its ability to pay the proffered wage as of the 1998 priority date and through tax year 2001 and its household expenses, the petitioner cannot establish its ability to pay the proffered wage and its household expenses as of tax years 2002 to 2004.

The AAO also concurs with counsel that the non-taxable portion of the petitioner's non-taxable Social Security benefits can be added back to the petitioner's adjusted gross income; however, the record does not indicate that these sums in tax years 2002, 2003, and 2004 were sufficient to change the decision with regard to the petitioner's ability to pay the proffered wage in these three tax years. Based on the petitioner's tax returns for tax years 2002, 2003, and 2004, the petitioner had non-taxable Social Security benefits of \$5,352 in 2002, \$5,420 in 2003, and \$5,539 in 2004. As previously stated, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$32,801.60 in tax years 2002 to 2004, or \$16,661.98 in 2002, \$21,253.58 in 2003, and \$16,318.97 in 2004. The petitioner's non-taxable Social Security benefits alone are not sufficient to establish the petitioner's ability to pay the proffered wage in tax years 2002 to 2004.

Counsel's assertions on appeal, without more evidentiary documentation, cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor and until the beneficiary obtains lawful permanent residence.

⁷ The AAO also notes that based on the petitioner's tax returns for tax years 2001 to 2004, the number of actual rental income properties owned by the petitioner has steadily declined. For example, the petitioner's Schedule E for tax year 2001 reflects twelve rental or real estate properties, while the petitioner's tax return Schedule E for tax year 2004 reflects that the petitioner owns six properties. The record is not clear as to any earlier sales of properties in the period of tax years 2001 to 2004 that would indicate additional financial assets that could be used to pay both the petitioner's household expenses and the difference between the beneficiary's actual wages and the proffered wage. Neither the petitioner nor counsel has provided any evidentiary documentation that the petitioner sold these properties, and that the proceeds from these sales are readily accessible to the petitioner.

The evidence submitted does not establish that the petitioner had 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.