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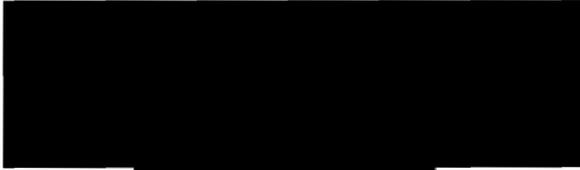
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

WAC 06 130 50764

Office: TEXAS SERVICE CENTER

Date:

MAR 20 2008

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is an Indian restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a restaurant cook, Indian foreign specialty. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the U.S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated June 27, 2006,² the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 at 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. §

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² The director stated that the petitioner had the ability to pay the proffered wage for each year since 2003. This was an error. Notwithstanding the error, the record of proceeding, as will be discussed, clearly reflects the director's determination that the petitioner had not established its ability to pay the proffered wage. The AAO reviews each appeal on a de novo basis.

204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 11, 2003. The proffered wage as stated on the Form ETA 750 is \$15.50 per hour (\$32,240.00 per year). The Form ETA 750 states that the position requires two years of 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 appeal.³

Relevant⁴ evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with an ETA 750, Part B for the substituted beneficiary; cover letters from counsel dated March 8, 2006 and June 20, 2006; a letter dated December 22, 2005, from [REDACTED]; the petitioner's "Take Out Menu;" the petitioner's U.S. Internal Revenue Service Form 1040 returns for tax years 2003 and 2004; the petitioner's U.S. Internal Revenue Service Form 1120S return for 2005; the petitioner's business license [REDACTED]; unaudited financial statements⁵ for 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship until 2001 and in 2005 became an S corporation. On the petition, the petitioner claimed to have been established in 1988 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$34,366.00 and \$302,289.00 respectively. On the Form ETA 750, signed by the beneficiary on November 30, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in her determination that the employer failed to demonstrate the ability to pay the proffered wage of \$32,240.00 per year.

³ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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 qualifications of the beneficiary are not at issue.

⁵ Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements 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.

On CIS Form I-290B, counsel asserts that the director made a “misstatement of law,” has not cited regulation, case precedent or agency memorandum and has misinterpreted the petitioner’s tax returns. A review of the director’s decision demonstrates that the director has cited the Act, regulations and case precedent in her decision.

Accompanying the appeal, counsel submits a legal brief. Counsel contends that the petitioner’s “net annual income amounts” are evidence of the petitioner’s ability to pay the proffered wage.

Counsel has cited *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977) in support of his contentions.

On appeal, counsel submits a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that states in part that “If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit.” Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 Application for Alien Employment Certification 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 (BIA 1967).

In determining the petitioner’s ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed beneficiary.

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 (or adjusted gross income for sole proprietorships) reflected on the petitioner's federal income tax return, without consideration of depreciation. 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). Reliance on the petitioner’s gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner was a sole proprietorship until 2005, 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).

Schedule A as submitted with the petitioner's Form 1040 tax return each year listed personal deductible expenses such as income/general sales taxes, home mortgage interest, charitable contributions as follows: 2003, \$60,957.00 and 2004, \$40,072.00. As already stated, the I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his living costs, all of the sole proprietor's family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally include the following: mortgage principal, food, car payments (whether leased or owned), installment loans, insurance (auto, household, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the schedule A statements to the returns.

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 supported a family of four in 2003 and two individuals in 2004. The tax returns reflect the following information:

	<u>2004</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040, Line 36 or 34)	\$ 17,629.00	\$ 41,259.00
Petitioner's gross receipts or sales (Schedule C, Line 1)	\$302,289.00	\$317,452.00
Petitioner's wages paid (Schedule C, Line 26)	\$ 21,400.00	\$ 26,000.00
Petitioner's net profit from business (Schedule C, Line 31)	\$ 34,366.00	\$ 55,130.00

In 2004, the sole proprietor's adjusted gross income in the amount of \$17,629.00 does not cover the proffered wage of \$32,240.00 per year. In 2003 the petitioner was able to pay the proffered wage from his adjusted gross income. **However this statement must be qualified.** The director requested additional financial evidence from the petitioner of his ability to pay the proffered wage that included, among other required evidence, a listing of petitioner's monthly expenses following the case precedent of *Ubeda v. Palmer*, 539 F. Supp. at 650. A petitioner must provide reasonably obtainable documentation when requested. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), and, *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). Although the petitioner's personal expense statements were not submitted, his income/general sales taxes, home mortgage interest, and charitable contributions were \$60,957.00 in 2003. In 2003, while the petitioner's adjusted gross income exceeded the proffered wage, the petitioner has not established that he could support a family of four on the remaining \$9,019.00 after subtracting

the proffered wage. Therefore, the petitioner has not established that he had the ability to pay the proffered wage in 2003 and 2004.

There is no listing of petitioner's monthly expenses in the record of proceeding although such evidence was requested by the director. 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). On appeal, counsel contends that the director "should not be examining the personal assets of the Petitioner's owners." According to *Ubeda v. Palmer*, 539 F. Supp. at 650, sole proprietors must show that they can sustain themselves and their dependents and therefore the director's request was not only reasonable under the circumstances of the case but a data request necessary for her review. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore the director's consideration of the personal expenses of the sole proprietor as a deduction against his adjusted gross income was reasonable.

The petitioner's Form 1120S⁶ tax return demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2005, the Form 1120S stated net income (Line 21) of \$46,201.00.

Since the proffered wage is \$32,240.00 per year, the petitioner did have sufficient net income to pay the proffered wage for year 2005.

The evidence submitted and the record of proceeding does not establish that the petitioner had the ability to pay the proffered wage in 2003 and 2004.

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.

⁶ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).