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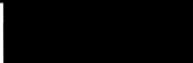


U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JAN 16 2009

WAC 06 003 52438

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John E. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner submitted a motion to reopen to the director that the director subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a business that produces specialized stainless steel prototypes. It seeks to employ the beneficiary permanently in the United States as a Heli-Arc welder. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.

In his denial, the director determined that the petitioner had not established that the beneficiary had the requisite two years of work experience as a welder as stipulated on the Form ETA 750 prior to the 1998 priority date. In particular, the director noted the lack of translation for Spanish language documents submitted to the record, the inconsistency of information contained in letters of work verification submitted to the record, and also noted that the petitioner had provided no explanation why the dates of the beneficiary's claimed work experience from October 1996 to May 1997 were inconsistent with the 1997 date of entry into the United States claimed by the beneficiary on both the Form I-140 petition and the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status. The director also noted that an additional letter written by [REDACTED] was inconsistent with the initial letter of work experience from a business called [REDACTED] as it noted the beneficiary went to the United States during the time frame in which the writer of the initial letter of work verification claimed the beneficiary worked in Mexico as a welder. Finally the director questioned why the petitioner could not establish any record of the beneficiary within the Mexican Social Security Institute records, given the beneficiary's documented significant business activities and paper trail in Mexico. 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 January 5, 2007 decision, the single issue in this case is whether or not the petitioner had established the beneficiary's qualifications for the proffered position. The AAO notes that although the director requested further evidence as to the petitioner's ability to pay the proffered wage, the director did not address this issue in his denial of the petition. The AAO will examine this issue further in this proceeding following the examination of the beneficiary's qualifications for the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 16, 1998.

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

(ii) *Other documentation*—

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

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

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 appeal¹.

The petitioner did not submit a letter of work verification with the I-140 visa petition. In response to the director's Request for Evidence dated March 13, 2006, the petitioner submitted a letter of work verification dated January 15, 2002, and written by [REDACTED]

[REDACTED]. In his letter, [REDACTED] states that the beneficiary was employed by his company from October 1995 to October 1997.

The record also contains the investigation report done by U. S. Citizenship and Immigration Services (USCIS) personnel in Mexico City to verify the beneficiary's claimed place of previous work. The report notes that a check with the Mexican Social Security Institute revealed no employment information for the beneficiary, and that no other reliable sources of employment were available to

¹ 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).

verify the beneficiary's employment. The report also stated that the investigator went to the address provided on the letter of work verification submitted in response to the director's RFE, and that there was a store named [REDACTED] there and that "nothing referred to a factory called [REDACTED]"

In response to the director's NOID dated September 5, 2006, the petitioner submitted further documentation with regard to the beneficiary's previous work in Mexico City. Evidence included translated letters of reference that included a description of the beneficiary's work in 1992 to 1993 working at [REDACTED] in Guadalupe; a description of work done by the beneficiary at the house of [REDACTED] during May and June 1990; a description of work done by the beneficiary and employees in the construction of aluminum windows and steel stairs for the writer business in Guadalupe, from October 1996 to May 1997; and a letter written by [REDACTED] written on September 15, 2006. In his letter [REDACTED] states that his address is [REDACTED] [REDACTED] z and that there is a "miscellaneous" store at this address. [REDACTED] states that on the same street there is another building with the same lot and block number where the beneficiary lived and had a blacksmithing workshop called "[REDACTED]" Mr. [REDACTED] stated that about eight or ten years ago, the beneficiary left for the United States and his workshop has been closed since that date. [REDACTED] also stated that on many occasions he had received documents for the beneficiary's family because they shared the same address.

The petitioner also submitted a significant number of untranslated Spanish language documents including what appear to be bills for work done by the beneficiary on the beneficiary's letterhead, supplies bought by the beneficiary, and official documents from Mexican public health officials. Finally the petitioner submitted photographs of what he described as photographs of the beneficiary's welding workshop and employees. One photograph shows the inside of a small workshop with the sign [REDACTED] on the wall; as well as a photo of a metal door with a plaque that states the following:

On appeal, counsel submits a brief and additional evidence. The additional evidence includes the following:

A translated copy of a Registration Form that identifies the beneficiary as well as a business address of [REDACTED]. This form is stamped with the acronym of "S.H.C.P."² and is dated August 3, 1994. The document under the section "Change of Fiscal Situation" states "Suspension of Activities" as of July 31, 1994;

Translated copies of four documents entitled "Provisional Payments, partials and Withholding of Federal Tax," for various quarters of tax years 1992, 1993 and 1994 that also identify the beneficiary and the [REDACTED] address;

² This acronym is translated as "Department of the Treasury and Public Credit" elsewhere in the record.

Translations of documents including the beneficiary's business card, taxpayer identification card, and membership card in a neighborhood renovation council. The beneficiary's business card indicates his business is called [REDACTED] that the beneficiary is a contractor, and that his business consists of iron works, aluminum, metallic structures, stairs, roofs, gates, and protections. The address on the business card is Calle [REDACTED], Mexico City. The beneficiary's business telephone number was noted as [REDACTED]; and

A translated letter of work verification dated September 15, 2006 and written by Engineer [REDACTED]. In his letter, [REDACTED] states that he has worked in private and electro mechanic construction and that in approximately 1992 to 1995, he used the beneficiary's services in the areas of welding, pallets and ironworks. [REDACTED] states that he has known the beneficiary for approximately twenty years and that the beneficiary has an "ironworks and aluminum welding, stainless steel and coal steel" on Santa Isabel [REDACTED], delegation [REDACTED]. Mr. [REDACTED] also notes that the beneficiary is not working there because he is in the United States.³

On appeal, counsel states that the beneficiary's actual date of entry into the United States "for purposes of this application" is January 19, 1997, and that when this date is considered as the beneficiary's last date of entrance, the beneficiary's work history, and his work experience correspond with the federal requirements for the visa petition. Counsel states that the claimed earlier date of entrance of January 1, 1995 was when the beneficiary came into the United States temporarily. Counsel also asserts that the USCIS investigation in Mexico City was inadequate, as the beneficiary's business was located behind the Cubas store, and that both businesses had the same address. Counsel also asserts that the affidavits submitted to the record from individuals stating that a welding business exists or existed at this address should be construed as testimony under penalty of perjury, with the weight of testimony in court. Counsel finally asserts that the Mexican Social Security system is voluntary, not required, and that a search of such records may reveal nothing about a business and may not be relied upon as proof that a particular business does or does not exist. Counsel states that it is better to rely on the submitted state and federal tax records that are required, and not voluntary records.

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

³ As stated previously, this letter was submitted with the petitioner's response to the director's NOID.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Heli-Arc welder. In the instant case, item 14 does not describe any educational or training requirements for the proffered position, but does require two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on ETA Form 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked for the petitioner from December 1997 to the date he signed the ETA Form-750B on January 12, 1998 as a Heli-Arc welder. He also represented that he had worked for [REDACTED] Mexico City from October 1995 to October 1997, as a Heli-Arc welder. The beneficiary lists duties identical to those he performed for the petitioner. The ETA Form 750B also contains an approved DOL correction that notes the beneficiary was unemployed from January 1995 to October 1995. The beneficiary does not provide any additional information concerning his employment background on that form.

The AAO notes that the record establishes that the beneficiary operated a business identified by the beneficiary's name on official government documents and as "[REDACTED]" on the beneficiary's bills and business card. The AAO notes that other documents contained in the record identify this address as a family address. For example, the birth certificate for the beneficiary's daughter [REDACTED] indicates that as of February 24, 1993, the beneficiary's parents lived at [REDACTED], while the beneficiary lived at [REDACTED]. Thus, the beneficiary and/or his family have lived in same address as the beneficiary's business. The AAO considers the translated letters submitted to the record on appeal that detail the beneficiary's work on various welding and construction projects in Mexico as sufficient to establish that the beneficiary performed welding job duties earlier than the experience claimed on the Form ETA 750. The AAO notes that this earlier work experience is not listed on the ETA Form 750, Part B, and that the letter writers do not establish that such work was full-time.

What the petitioner has not established is that the beneficiary worked as a welder for [REDACTED] business, located at the same address as the beneficiary's workshop, from 1995 to 1997, as stated on the ETA Form 750, Part B, or that he was unemployed from January 1, 1995 to October 1995, as also stated on the ETA Form 750. Further, the AAO concurs with the director that the various letters of work recommendation confuse the record in particular with regard to the beneficiary's claimed entry date of January 1, 1995 as indicated on the petitioner's I-140 petition and the beneficiary's Form I-485 application.

The AAO notes that although counsel on appeal states that the beneficiary's actual date of entry is January 19, 1997; the petitioner provides no evidence to substantiate this assertion. The unsupported assertions of counsel 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).

On appeal, counsel states that the affidavits on file that indicate a welding business existed on the same address as [REDACTED] general store provide the weight of testimony in court. However, the AAO notes that the declarations that have been provided in response to the director's RFE, NOID, or on appeal are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Such statements 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).

The AAO finds sufficient evidence in the record to establish that the beneficiary had a welding business in Mexico City that operated under the guidelines of various Mexican federal or state institutions from 1992⁴ to 1994. The director's comments on the beneficiary's employment not being documented by the Mexican Social Security Institute appear to put unwarranted reliance on this system, especially if the beneficiary were self-employed, as the record suggests. Furthermore, the USCIS investigation appears to be incomplete, in that the investigator did not speak to anyone at the address to clarify whether the [REDACTED] business or similar workshop exists or had ever existed at the address.

Nevertheless, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a welder prior to the 1998 priority date based on the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

As stated previously, the AAO will discuss the petitioner's ability to pay the proffered wage, an issue raised by the director in his Request for Evidence dated March 13, 2006, but not addressed in the director's denial of the instant petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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:

⁴ Several untranslated Spanish language State or Federal documents submitted to the record in response to the director's NOID show 1992 dates. One in particular with regard to the opening of the beneficiary's business contains the date of initiation of October 23, 1992.

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). Here, the Form ETA 750 was accepted on January 16, 1998. The proffered wage as stated on the Form ETA 750 is \$14.13 an hour, or \$29,390.40 per year.

The petitioner did not submit evidence as to the petitioner's ability to pay the proffered wage with the I-140 petition. In response to the director's RFE dated March 13, 2006, the petitioner submitted the sole proprietor's IRS Forms 1040 for tax years 2002 through 2005, with Schedules C; copies of the beneficiary's W-2 Wage and Tax Statements for tax years 2001 to 2005;⁵ and a Payroll Earnings Record document that lists the beneficiary's wages from January 13, 2006 to March 24, 2006 that indicates the petitioner paid the beneficiary \$680 for a forty-hour work week during this period of time.⁶ The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in October 1, 1967, to have a gross annual income of \$250,000, a negative net annual income, and to currently employ one worker.

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

⁵ The AAO notes that the petitioner submitted W-2 Forms processed by two companies, namely, Personnel Plus, Inc., Norwalk, California, and Hamilton Services, Anaheim, California. Counsel submitted the beneficiary's W-2 Forms processed by Hamilton Services for tax years 2003, 2004 and 2005, as well as the beneficiary's W-2 Wage and Statements Forms processed by Personnel Plus, Inc. for tax years 2001, 2002, 2003, and 2005. Counsel, in his cover letter for the RFE response, stated that Personnel Plus, Inc. was the payroll agency utilized to process the petitioner's payroll checks. Therefore, the AAO will only examine the W-2 Forms processed by Personnel Plus, Inc. in its examination of the petitioner's ability to pay the proffered wage, and will not comment further on the W-2 Forms processed by Hamilton Services found in the record.

⁶ The rate of hourly pay for the proffered position as stipulated by the ETA Form 750 is \$14.13, or \$565.20 for a forty-hour week. Therefore the petitioner is paying the beneficiary over the proffered wage during this period of time in 2006.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. Based on the beneficiary's W-2 Forms processed by Personnel Plus, Inc. the petitioner paid the beneficiary \$2,193.75 in tax year 2001; \$15,944.50 in tax year 2002; \$20,942.50 in tax year 2003; and \$13,974 in tax year 2005. For the period of January through March 2006, the petitioner paid the beneficiary a total of \$7,259, at an hourly rate higher than the proffered hourly wage of \$14.13. The petitioner submitted no evidence as to any wages paid by the petitioner to the beneficiary as of the 1998 priority date and through tax years 1998, 1999, and 2000. Thus, the petitioner cannot establish it paid the beneficiary a wage equal to or greater than the proffered wage of \$29,290.40 during tax years 1998 to 2005, and has only established that it paid the beneficiary a wage higher than the proffered hourly wage as of the first three months of tax year 2006. The petitioner has to establish its ability to pay the entire proffered wage in tax years 1998 through 2000 and in tax year 2004. The petitioner also has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2001, 2002, 2003, and 2005.⁷

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

⁷ The AAO notes that the record closed as of the petitioner's response to the director's NOID dated October 2, 2006. At that time, the petitioner's tax return for tax year 2006 would not have been available. Therefore the AAO will not examine any further the petitioner's ability to pay the proffered wage for the remainder of 2006 based on the petitioner's net income.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two individuals. The sole proprietor did not submit any tax returns with the initial I-140 petition. Therefore the director could not have identified the petitioner as a sole proprietor until the sole proprietor submitted its tax returns in response to the director's RFE. As stated previously, the petitioner did not submit any evidentiary documentation with regard to its ability to pay the proffered wage in tax years 1998 through 2001. In his RFE, the director did not request that the petitioner identify its corporate structure, and if the petitioner was a sole proprietor, to submit an itemized list of monthly or annual household expenses. The AAO notes that the sole proprietor's tax returns do indicate items such as mortgage interest payments, and medical payments; however, the record does not contain any itemized monthly household expenses.

Therefore the AAO cannot examine the sole proprietor's ability to pay the proffered wage and pay its annual household expenses during any of the relevant years in question. Based on the absence of any information with regard to the sole proprietor's ability to pay the proffered wage in tax years 1998 to 2001, the petition shall be denied. For illustrative purposes, the AAO will briefly examine the sole proprietor's ability to pay the proffered wage of \$29,390.40 during tax years 2002 to 2005. The sole proprietor's tax returns reflect the following information for these tax years:

	2002	2003	2004
Proprietor's adjusted gross income (Form 1040)	\$ -5,607	\$ -40,471	\$ -68,949
Petitioner's gross receipts or sales (Schedule C)	\$ 224,664	\$ 108,639	\$ 123,690
Petitioner's wages paid (Schedule C)	\$ 0	\$ 0	\$ 0
Petitioner's net profit from business (Schedule C)	\$ -6,094	\$ -41,161	\$ -28,349

	2005
Proprietor's adjusted gross income (Form 1040)	\$ -80,088
Petitioner's gross receipts or sales (Schedule C)	\$ 128,012
Petitioner's wages paid (Schedule C)	\$ 0
Petitioner's net profit from business (Schedule C)	\$ -10,904

As previously stated, the record reflects no evidence with regard to the sole proprietor's ability to pay the proffered wage in the 1998 priority date year, or during tax years 1999 or 2000. In addition, the record contains no evidence with regard to the sole proprietor's yearly household expenses as of the 1998 priority date year and through tax year 2005. In all of the tax years for which the sole proprietor submitted its tax returns, the sole proprietor has negative adjusted gross income. Such figures cannot establish the sole proprietor's ability to pay the difference between the beneficiary's actual wages in 2001, 2002, 2003, and 2005 and the proffered wage, or the petitioner's ability to pay the entire proffered wage in tax year 2004. Further, the record reflects no further evidence of any additional financial resources that the sole proprietor could utilize to both pay the beneficiary's wages and pay its household yearly expenses for the years in question.

Therefore, from the 1998 date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met

ORDER: The appeal is dismissed.