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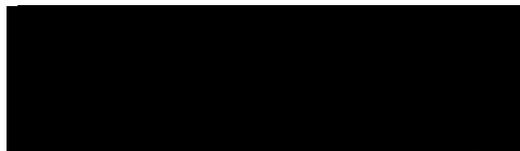
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:

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Office: TEXAS SERVICE CENTER

Date: JAN 28 2009

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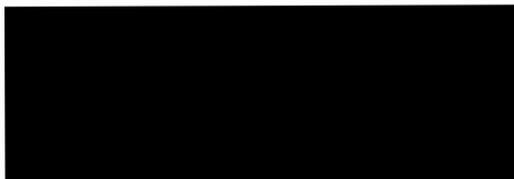
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center denied the preference visa petition on September 10, 2007 and a subsequent appeal was remanded by the Administrative Appeals Office (AAO) to the director. The director certified his subsequent decision dated June 16, 2008 to the AAO. The director's decision will be affirmed. The petition will remain denied.

The petitioner is an import/export business. It seeks to employ the beneficiary permanently in the United States as an order clerk. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's June 16, 2008 decision, 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 petitioner did not submit a brief or additional evidence in connection with the director's certification to the AAO.

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

The AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. 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 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 either 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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$320.00 per week (\$16,640.00 per year).

Relevant evidence in the record includes copies of the petitioner's 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns with Schedules C, Profit or Loss From Business, a copy of a bank statement dated August 31, 2007 from Chase Bank for the petitioner's owner showing a business line of credit of \$65,000 with \$6,375.44 usable, a copy of a bank statement dated March 14, 2008 from Chase Bank for the petitioner's owner showing a business line of credit of \$100,000 with \$45,026.85 usable, a letter from the petitioner's owner dated October 3, 2007, an accounts receivable report dated September 20, 2007, a bank statement for the petitioner's owner from Citibank for the period August 14, 2007 through September 16, 2007 showing a regular checking balance of \$1,300 and a super yield money market account of \$25,220.59, a bank statement for the petitioner's owner from Citibank for the period February 14, 2008 through March 13, 2008 showing a regular checking balance of \$1,300 and a super yield money market account of \$25,449.41, a statement from the Vanguard Group as of June 30, 2007 reflecting a total of \$41,256.87 in a retirement fund for the petitioner's owner, a statement from the Vanguard Group as of December 31, 2007 reflecting a total of \$40,473.85 in a retirement fund for the petitioner's owner, a statement from UBS Financial Services, Inc. for the period April 2007 through June 2007 for the petitioner's owner reflecting a balance of \$16,178.33, a statement from UBS Financial Services, Inc. for the period October 2007 through December 2007 for the petitioner's owner reflecting a balance of \$16,104.56, a statement from Citigroup Global Mkts Inc. for the period April 1, 2007 through June 30, 2007 for the petitioner's owner reflecting a value of \$6,112.98, a statement from Citigroup Global Mkts Inc. for the period October 1, 2007 through December 31, 2007 for the petitioner's owner reflecting a value of \$6,184.93, a statement from Morgan Stanley as of the month ending June 30, 2007, for the petitioner's owner reflecting a value of \$11,299.47, a statement from Morgan Stanley as of the month ending February 29, 2008, for the petitioner's owner reflecting a value of \$10,263.75, a list of inventories by manufacturers as of September 30, 2007, a catalog listing the petitioner's products for the fall and winter of 2007 and 2008, a history of the petitioner, a list of the petitioner's payables for April 2008, invoices for the petitioner's payables for various periods in March and April 2008, and several ads showing the petitioner's products in various national magazines and catalogs. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered 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 1989, to have a gross annual income of \$687,354.00, and to currently employ 1 worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

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, United States Citizenship and Immigration Services (USCIS) 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).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onward.

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).

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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports herself. The sole proprietor's tax returns reflect the following information for the following years:

	2001	2002	2003	2004	2005	2006
Proprietor's adjusted gross income	\$24,470	\$14,373	\$22,334	\$15,126	\$9,914	\$22,981

The proprietor's adjusted gross income is not sufficient to pay the proffered wage in 2002, 2004 and 2005. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The AAO is unable to determine if the sole proprietor could pay the proffered wage of \$16,640 and her monthly recurring expenses in 2001, 2003, and 2006 from the sole proprietor's adjusted gross income. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although requested by the director, the petitioner declined to provide evidence of its expenses for the entire relevant period including, but not limited to, lease payments, mortgage payments, vehicle payments, insurance payments, utility payments, child care expenses, etc. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, while the petitioner established cash assets in its various bank and brokerage accounts for various periods in 2007 and 2008, without a detailed listing of the petitioner's assets and personal liabilities for each relevant year from 2001 onward, the petitioner cannot establish its continuing ability to pay the proffered wage.¹

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 director's decision dated June 16, 2008 is affirmed. The petition remains denied.

¹ A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).