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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE:

Office: TEXAS SERVICE CENTER

Date: **NOV 04 2010**

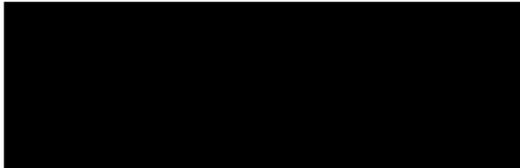
IN RE:

Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Perry Rhew  
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 sustained.

The petitioner is an individual who seeks to employ the beneficiary permanently in the United States as a live-in housekeeper. 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). 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 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 September 18, 2008 denial, 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)(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 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 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 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 was accepted for processing by any office within the employment system of the DOL. 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 750 was accepted for processing by the Department of Labor (DOL) on February 6, 2004. The rate of pay or the proffered wage specified on the approved Form ETA 750 labor certification is \$13.83 per hour or \$31,643.04 per year (based on a 44-hour work per week, as stated on

the labor certification).<sup>1</sup> Further, the Form ETA 750 states that the position requires a minimum of 3 months experience in the job offered.

The petitioner submitted copies of the following evidence to show that it has the ability to pay \$13.83/hour or \$31,643.04/year beginning on February 6, 2004:

- Individual tax returns of [REDACTED] and [REDACTED] filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2004 through 2007;
- A letter from [REDACTED] accountant, [REDACTED] who states that [REDACTED] owns and lives in a co-op apartment, worth at least \$1.2 million, and that she has investments of substantial value from which she draws salary and cash returns; and
- A list of monthly living expenses for June 2008.

The evidence in the record of proceeding shows that [REDACTED] is the petitioner. On the Form I-140 petition, she indicates that she is a real estate executive and that her annual income is over \$213,096.

Upon review of the evidence submitted, the director acknowledged that the petitioner had employed and paid the beneficiary \$15,600 in 2004, \$16,096 in 2005,<sup>2</sup> and \$28,600 in 2007. Nonetheless, the director determined that the petitioner did not have sufficient income to pay the beneficiary's wage. In his decision, the director pointed out that the petitioner's adjusted gross income less annual expenses in each year from 2004 was less than the beneficiary's wage of \$31,643.04.

On appeal, counsel for the petitioner submits copies of the following additional evidence:

- Forms W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner for the years 2004 through 2007; and

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<sup>1</sup> On appeal, counsel for the petitioner contends that the proffered wage approved by the DOL is \$28,766.40 per year, not \$31,643.04 per year. This amount is based on the assumption that the beneficiary works 40 hours a week at an hourly salary of \$13.83 per hour. However, the AAO will consider 44 hours per week at \$13.83 per hour as the basis for calculating the beneficiary's annual salary since the petitioner in the approved Form ETA 750 indicated that she would employ the beneficiary 44 hours per week. United States Citizenship and Immigration Services (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, Madany 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).

<sup>2</sup> The director erred in finding that the petitioner paid the beneficiary this amount in 2005; the correct figure is \$15,600.

- Various bank and investment statements issued to [REDACTED], the petitioner, and her husband and to their businesses between 2004 and 2007.<sup>3</sup>

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 this case, evidence of record establishes that the petitioner has employed and paid the beneficiary since the priority date. The beneficiary received the following wages between 2004 and 2007 from the petitioner:

- In 2004, the beneficiary received \$15,600 (\$16,043.04 less than the proffered wage).
- In 2005, the beneficiary received \$15,600 (\$16,043.04 less than the proffered wage).<sup>5</sup>
- In 2006, the beneficiary received \$23,400 (\$8,243.04 less than the proffered wage).

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<sup>3</sup> The AAO observes that many of these bank and investment statements were issued to the following companies: [REDACTED]

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>5</sup> The petitioner claimed to have spent \$16,096 for child and dependent care expenses in her 2005 tax return – Form 2441, Child and Dependent Care Expenses.

- In 2007, the beneficiary received \$28,600 (\$3,043.04 less than the proffered wage).

Based on the Forms W-2 submitted, the petitioner only needs to show that it can pay the difference between the proffered wage and the actual wages paid from 2004 to 2007, which, according to the information above, is \$16,043.04 in 2004 and 2005, \$8,243.04 in 2006, and \$3,043.04 in 2007. When the petitioner does not establish that it 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at \*6 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner, as noted above, is a real estate executive, a sole proprietor who seeks to employ the beneficiary as a live-in housekeeper. 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 (7<sup>th</sup> 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.

According to the tax returns in the record, the petitioner in this case is married with one dependent child in 2004, two dependent children in 2005 and 2006, and three dependent children in 2007. In a notice of intent to deny (NOID), the director advised the petitioner to submit a statement of monthly living expenses for the petitioner's family. This information, according to the director, is important to determine whether the petitioner can cover her individual expenses and sustain herself and her dependent children as well as pay the proffered wage out of her income.

In response [REDACTED] the petitioner, provided the director with a list of her monthly living expenses for June 2008.<sup>6</sup> In denying the petition, the director used the June 2008 figure to determine that the petitioner's annual expenses were \$134,700, and found that the petitioner did not have sufficient income to pay the beneficiary's wage in any of the salient years from the priority date.

While the statement of monthly expenses submitted by the petitioner in response to the director's NOID is only for June 2008, there is no other evidence of record of the petitioner's recurring monthly expenses. Thus, the director reasonably used the June 2008 figure to determine the petitioner's annual expenses.

A review of the petitioner's tax returns reveals the following information about the adjusted gross income:

Tax Year	Adjusted Gross Income (Loss) (AGI)	Net Operating Loss (NOL) Carryover	AGI without NOL Carryover – Modified AGI <sup>7</sup>
2004	(\$183,402)	\$0	(\$183,402)
2005	(\$213,096)	(\$208,605)	(\$4,491)
2006	(\$81,599)	(\$240,991)	\$159,392
2007	\$101,519	(\$153,913)	\$255,432

Based on the table above, the AAO notes that without further consideration, it would be improbable for the petitioner to support herself and her family on a deficit in 2004 and 2005, which is what remains after reducing the modified adjusted gross income by the amount required to pay the proffered wage in those years.

However, in 2006 the petitioner would have \$25,214 remaining after deducting the annual expenses. This amount is sufficient to make up the difference between the wages already paid to the beneficiary

<sup>6</sup> The list includes monthly maintenance on the co-op apartment; telephone, cable, and internet; food; education and classes; entertainment; clothes; charitable donations; and domestic help for a total of \$11,225 per month.

<sup>7</sup> The net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company and individual can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses. The AAO considers the modified AGI – that is AGI without NOL carryover – to be more reflective of the petitioner's gross income in 2004, 2005, 2006, and 2007.

in 2006 and the proffered wage, which is \$8,243.04. Similarly, in 2007 the petitioner would have \$120,732 remaining after deducting the petitioner's annual expenses, sufficient income to pay the remainder of the beneficiary's wage of \$3,043.04 in that year. Thus, for 2006 and 2007 the petitioner has the ability to pay the beneficiary's wage.

Referring to the various bank statements submitted, counsel indicates on appeal that the petitioner has an average balance of over \$500,000 in 2004, over \$8 million in 2005, over \$500,000 in 2006, and over \$400,000 in 2007.

In reviewing the various bank and investment statements herein submitted into the record, the AAO finds that many of these statements do not personally belong to the petitioner or her husband. As noted earlier, most of these statements were issued to various companies in which either the petitioner or her husband has an interest – entities such as [REDACTED]

[REDACTED] to name a few.

This office declines to accept any of the evidence issued to the companies stated above.<sup>8</sup> USCIS (legacy INS) has long held that corporations such as those mentioned above are separate and distinct legal entities from their owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Because of this distinctive character, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” In addition, the AAO finds no evidence that the funds as shown on those corporate accounts can be withdrawn freely by the petitioner or her husband to pay for the beneficiary's wage.

With respect to the accountant's statement about the value of the co-op apartment and the petitioner's income from her investment, the AAO agrees with the director that the accountant's statement by itself is not reliable and insufficient to demonstrate the ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Nevertheless, the petitioner submitted monthly personal bank statements of the petitioner and her husband for the years 2004 through 2007, which, upon review, demonstrate that the petitioner has, on average, ending balances in her personal bank account sufficient to pay the remainder of the beneficiary's wage of \$16,043 in both 2004 and 2005.

A closer look at the petitioner's personal bank statements reveals the amounts available in the petitioner's bank accounts and the average balances for the years 2004 and 2005, as shown in the tables below:

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<sup>8</sup> The record does not reflect who owns these companies or whether they are owned by the petitioner and her husband.

Ending balance for the month of:	Checking Account – Account [REDACTED]	Checking Account – Account [REDACTED]	Total Amount
January 2004	\$65,930.20	N/A	\$65,930.20
February 2004	N/A	N/A	N/A
March 2004	\$64,964.43	N/A	\$64,964.43
April 2004	N/A	N/A	N/A
May 2004	N/A	\$13,832.14	\$13,832.14
June 2004	\$66,711.74	\$20,813.91	\$87,525.65
July 2004	N/A	\$16,590.29	\$16,590.29
August 2004	\$61,549.85	\$5,029.23	\$66,579.08
September 2004	\$46,754.01	N/A	\$46,754.01
October 2004	N/A	N/A	N/A
November 2004	\$51,207.73	N/A	\$51,207.73
December 2004	\$68,573.80	N/A	\$68,573.80
Total ending balance for 2004	\$425,691.76	\$56,265.57	\$481,957.33
Average balance for 2004 (total ending balance divided by 12 months)	\$35,474.31	\$4,688.80	\$40,163.11

Ending balance for the month of:	Checking Account – Account [REDACTED]	Checking Account – Account [REDACTED]	Total Amount
January 2005	\$65,947.74	N/A	\$65,947.74
February 2005	\$59,769.17	N/A	\$59,769.17
March 2005	\$56,157.59	N/A	\$56,157.59
April 2005	\$49,570.41	N/A	\$49,570.41
May 2005	\$49,395.25	\$13,832.14	\$63,227.39
June 2005	\$47,911.95	\$20,813.91	\$68,725.86
July 2005	\$25,602.50	\$16,590.29	\$42,192.79
August 2005	\$42,433.52	\$5,029.23	\$47,462.75
September 2005	\$40,970.82	N/A	\$40,970.82
October 2005	\$28,594.95	N/A	\$28,594.95
November 2005	\$67,801.57	N/A	\$67,801.57
December 2005	\$62,605.93	N/A	\$62,605.93
Total ending balance for 2005	\$596,761.40	\$56,265.57	\$653,026.97
Average balance for 2005 (total ending balance divided by 12 months)	\$49,730.12	\$4,688.80	\$54,418.91

Further, a review of the petitioner's bank accounts for 2006 and 2007 also shows average ending balances greater than the amount needed to pay the remainder of the beneficiary's wage in both 2006 and 2007 - \$8,243.04 in 2006 and \$3,043.04 in 2007. The tables below reflect the amounts available in the petitioner's bank accounts and the average balances for the years 2006 and 2007.

Ending balance for the month of:	Checking Account - Account #	Bank of America Investment Services <sup>9</sup>	Bank of America Investment Services <sup>10</sup>	Total Amount
January 2006	\$273,508.62	N/A	N/A	\$273,508.62
February 2006	\$52,739.83	\$199,470.00	N/A	\$252,209.83
March 2006	\$245,925.45	N/A	N/A	\$245,925.45
April 2006	N/A	\$198,510.00	\$952,848.00	\$1,151,358.00
May 2006	\$35,163.19	N/A	N/A	\$35,163.19
June 2006	\$235,187.80	N/A	\$960,000.00	\$1,195,187.80
July 2006	N/A	\$98,070.00	\$686,827.48	\$784,897.48
August 2006	N/A	\$98,943.00	\$689,950.74	\$788,893.74
September 2006	\$113,777.72	N/A	N/A	\$113,777.72
October 2006	\$50,397.42	N/A	\$695,525.27	\$745,922.69
November 2006	\$84,619.13	N/A	\$698,333.53	\$782,952.66
December 2006	\$77,567.94	N/A	\$700,947.40	\$778,515.34
Total ending balance for 2006	\$1,168,887.10	\$594,993.00	\$5,384,432.42	\$7,148,312.52
Average balance for 2006 (total ending balance divided by 12 months)	\$97,407.26	\$49,582.75	\$448,702.70	\$595,692.71

Ending balance for the month of:	Checking Account - Account #	Checking Account - Account #	Bank of America Investment Services <sup>11</sup>	Bank of America Investment Services <sup>12</sup>	Total Amount
January 2007	\$82,686.06	\$11,694.60	\$48,807.00	\$703,798.66	\$846,986.32
February 2007	\$63,620.05	\$4,205.58	N/A	\$706,448.33	\$774,273.96
March 2007	\$13,762.90	N/A	\$49,030.00	\$709,283.91	\$772,076.81

<sup>9</sup> The account is under the names of both [redacted] and [redacted]

<sup>10</sup> The account is under the name of [redacted] only.

<sup>11</sup> The account is under the names of both [redacted]

<sup>12</sup> The account is under the name of [redacted] only.

April 2007	\$11,178.92	\$1,634.02	\$49,669.00	\$712,264.03	\$774,745.97
May 2007	\$8,134.94	\$7,991.77	N/A	\$715,222.00	\$731,348.71
June 2007	\$9,931.94	\$19,449.96	N/A	\$717,621.32	\$747,003.22
July 2007	\$6,974.07	\$18,917.82	N/A	\$720,502.21	\$746,394.10
August 2007	\$29,732.93	\$14,737.06	\$30,008.02	\$723,859.42	\$768,604.50
September 2007	\$18,511.43	\$843.70	\$30,104.93	\$776,125.78	\$825,585.84
October 2007	\$55,725.36	\$13,092.86	\$30,190.74	N/A	\$99,008.96
November 2007	N/A	\$2,215.66	N/A	N/A	\$2,215.66
December 2007	N/A	\$43,433.64	N/A	N/A	\$43,433.64
Total ending balance for 2007	\$270,525.67	\$138,216.67	\$237,809.69	\$6,485,125.66	\$7,131,677.69
Average balance for 2007 (total ending balance divided by 12 months)	\$22,543.81	\$11,518.06	\$19,817.47	\$540,427.14	<u>\$594,306.47</u>

Based on the tables above, it is concluded that the petitioner, as an individual, has sufficient assets to pay the beneficiary's wage from the priority date and continuing until the beneficiary receives legal permanent residence. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO finds that the petitioner has made a realistic job offer and has established by a preponderance of the evidence that it has the overall financial ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.