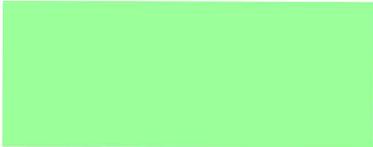




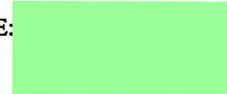
U.S. Citizenship  
and Immigration  
Services

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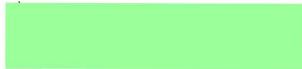


DATE: OFFICE: TEXAS SERVICE CENTER FILE:

MAR 18 2013



IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on December 21, 2011, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be approved. The appeal remains dismissed and the petition remains denied. The AAO's decision of December 21, 2011 will be affirmed.

The petitioner is a retail store.<sup>1</sup> It seeks to employ the beneficiary permanently<sup>2</sup> in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established the continuing financial ability to pay the proffered wage and denied the petition accordingly.

The petitioner filed an appeal.<sup>3</sup> The AAO dismissed the appeal on December 21, 2011. Following an examination of the record, the AAO concluded that the petition could not be approved because the petitioner failed to establish its continuing ability to pay the proffered wage of \$39,500 per year from the March 24, 2005 priority date onward.

Through counsel, the petitioner submits a motion to reopen<sup>4</sup> accompanied by some additional documentation. Even if properly considered as a motion to reopen, counsel's filing does not overcome the basis of the AAO's dismissal of the appeal on December 21, 2011, for the reasons set forth below.

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.

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<sup>1</sup> The petitioner's tax returns describe the business as a convenience store.

<sup>2</sup> 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.

<sup>3</sup> The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

<sup>4</sup> A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

As discussed in the AAO's previous decision, a petitioner's continuing financial ability to pay the proffered wage includes a review of whether the petitioner has employed and paid compensation to the beneficiary, as well as an examination of the petitioner's net income and net current assets. The AAO proceeded to review the petitioner's status as a sole proprietor<sup>5</sup> and the evidence presented to establish his ability to pay the proffered wage, including an examination of figures shown on his federal income tax returns for 2005 and 2006. Other documentation was also reviewed and found to be insufficient. The AAO noted that the petitioner had not submitted personal checking, savings, money market, or certificates of deposit (CDs)<sup>6</sup> that reflect an end-of-year balance for 2005 and 2006. The AAO found that the sole proprietor's adjusted gross income of reflected on the 2005 and 2006 individual income tax return was insufficient to pay the proffered wage after covering household expenses, which amounted to \$1,475 per month.

On motion, counsel contends that the petitioner's personal financial statements establish that his net worth was sufficient to cover any deficiencies of the sole proprietorship's ability to pay the proffered wage. The 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). With the motion, counsel submits copies of personal financial statements dated December 31, 2005 and December 31, 2006, respectively, which appear to be prepared by and signed by the sole proprietor. First-hand evidence of such assets as claimed in these years has not been submitted. 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)).

The AAO finds that the petitioner has not met its burden in establishing that it has had the continuing financial ability to pay the proffered wage. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The prior decision of the AAO on December 21, 2011, dismissing the appeal is affirmed. The petition remains denied.

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<sup>5</sup> 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). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

<sup>6</sup> The CD evidence submitted shows that it was only opened May 12, 2008, and would not establish the petitioner's ability to pay the proffered wage in 2005 or 2006.