U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 3 0 2014 OFFICE: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based immigrant visa petition on October 17, 2001. After issuing the petitioner a notice of intent to revoke the approval of the petition, the director revoked the approval of the petition on March 23, 2009. The petitioner filed two motions to reconsider this decision and the director affirmed his prior decision on March 30, 2010 and again on September 8, 2010. The petitioner appealed the matter to the Administrative Appeals Office (AAO). On August 27, 2012, we issued the petitioner a notice of intent to dismiss and notice of derogatory information (NOID). On November 9, 2012, we dismissed the appeal as abandoned as we did not receive a response to the NOID. The petitioner filed a subsequent motion to reopen and reconsider this decision. On May 20, 2014, we reopened the matter and affirmed the previous decisions of the director. The petitioner has filed another motion to reopen and reconsider. The motions will be granted. The previous decision will be affirmed in part and withdrawn in part. The approval of the petition will remain revoked.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook of foreign specialty foods. The petitioner requests classification of the beneficiary as an skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988). The director's decision revoking the petition concludes that the evidence in the record did not reflect that the petitioner had the ability to pay the beneficiary's proffered wage. Our decision, dated May 20, 2014, concluded: (1) that the petitioner, [redacted] has not established that it is still in business or that [redacted] is its successor-in-interest; (2) that the petitioner had not established that it had the ability to pay the proffered wages of the instant beneficiary and its other sponsored workers in 2001; and (3) that the petitioner had not established that the beneficiary met the experience requirements of the labor certification.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.[2]

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[1] Section 203(b)(3)(A)(i) of 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.

[2] 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 or motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On motion, the petitioner has submitted the IRS Form 1040 for the petitioner's owner for 2013; Forms W-2, Wage and Tax Statements, for the petitioner's employees for 2013; the petitioner's financial statements and an accountant's compilation report as of March 31, 2014; and the petitioner's sales tax certification from the Commonwealth of Virginia, issued on February 14, 2014, stating a beginning liability date of August 2001. Therefore, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner has provided new facts with supporting documentation not previously submitted.

The issues on motion are: (1) whether the petitioner has established the ability to pay the proffered wage of the beneficiary and its other sponsored workers in 2001; and (2) whether the beneficiary meets the experience requirements of the labor certification.

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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 16, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour ($24,689.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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'l Comm'r 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 in 2001 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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'r 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. *See 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 petitioner 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 four. The proprietor's tax return for 2001 states adjusted gross income (Form 1040, line 33) of $59,433. The record reflects that the sole proprietor's monthly expenses for 2001 were $3,160.00 (or $37,920 per year). After subtracting the proprietor's yearly expenses from the adjusted gross income, the proprietor would have had $21,513.00 remaining to pay the beneficiary's proffered wage of $24,689.60. Therefore, the petitioner has not established that it had the ability to pay the beneficiary's proffered wage in 2001.

On motion, counsel asserts that the petitioner paid the beneficiary $23,777.00 as reflected on the beneficiary's Form 1040 for that year. However, the Form W-2 in the record states the name of the beneficiary's spouse as the one who was paid $23,777.13. Counsel asserts that although this amount was paid to the beneficiary's husband, this wage was directed toward the beneficiary. The petitioner has not provided any evidence in the record demonstrating that the petitioner paid the beneficiary this amount in 2001. 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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition, the director noted that between 2000 and 2001, the petitioner had filed Form I-140 petitions for 11 other workers with priority dates of 1999, 2000, and 2001, and that it had not demonstrated its ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, the proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The director addressed this issue in his decisions of March 30, 2010 and September 8, 2010 in reconsidering and ultimately affirming the previous decision revoking the approval of the Form I-140.

The petitioner has not provided any additional evidence to establish that it had the ability to pay the beneficiary's proffered wage and the wages of these 11 other sponsored workers. The record reflects that Virginia, petitioned for nine of these workers and petitioned for the other two workers. Although the record contains a Form 941, Employer's Quarterly Federal Tax Return, stating that paid its employees wages of $50,498.85 in 2001, it is unclear what number of employees received wages from this amount. The affidavit in the record from the petitioner's owner states that opened in the summer of 2001 and that half of the employees from were transferred to the location. Without evidence demonstrating how many employees were transferred to the location, it is unclear whether the $50,498.85 would have been sufficient to pay the proffered wages of the petitioner's employees and what amount of wages were paid at the location. Further, the Form 1040, Schedule C, for 2001 from states that it paid wages of $102,839.00, whereas the Form 941 for 2001 from states that it paid its employees wages of $50,498.85. It is unclear why the location would have paid more than twice the amount of wages for that year, if, as the petitioner asserts, half of its employees were transferred to the Annandale location. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Id. Thus, the petitioner has not established its continuing ability to pay the proffered wages to the beneficiary and the other sponsored workers.

In addition, the petitioner has not established that it had the ability to pay the applicable proffered wages in the totality of the circumstances. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As stated above, the petitioner has not provided evidence of its other sponsored workers[3] with priority dates in 1999, 2000 and 2001, including their proffered wages, or the wages paid to them at both the [redacted] locations. The petitioner has not provided evidence to demonstrate the existence of any unexpected business expenses in 2001. The petitioner has not established that the wages paid to the beneficiary's spouse in 2001 represent wages that the beneficiary earned. Therefore, the petitioner has not established that it had the ability to pay the proffered wage of the instant beneficiary and its other sponsored workers from 2001 onward.

In response to our previous decision, the petitioner addressed whether it is a successor-in-interest to the original entity stated on the Form ETA 750 and the Form I-140, [redacted] Virginia (which the record reflects has been renamed to [redacted]. The evidence in the record demonstrates that in 2001 the beneficiary was transferred to [redacted] Virginia, which was owned by the same sole proprietors who own the petitioner, [redacted] The record reflects that both entities are still in business, and that although there has been a restructuring within these businesses, they have retained the same ownership.

On motion, the petitioner has established that the beneficiary meets the experience requirements of the labor certification. Therefore, this portion of our prior decision is withdrawn.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motions to reopen and reconsider are granted. Our previous decision, dated May 20, 2014, is affirmed with respect to the petitioner's ability to pay the proffered wage and withdrawn with respect to the beneficiary's qualifications.

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[3] USCIS records indicate that the receipt numbers for these 11 petitions are as follows:

Receipt date	Receipt Number
January 21, 2000	[redacted]
December 12, 2000	
February 13, 2001	
July 20, 2001	
July 25, 2001	
October 10, 2001	
October 23, 2001	
January14, 2002	
January 2, 2003	
January 3, 2003	
March 19, 2003	

[4] The owners of the petitioner also refer to [redacted] Virginia, as [redacted] and assert that the names are identical in the Korean language.