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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

[REDACTED]
EAC 05 003 52819

Office: VERMONT SERVICE CENTER

Date:

OCT 17 2007

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director of the Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner runs a private horse farm. It seeks to employ the beneficiary permanently in the United States as a horse trainer. 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).¹ 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 January 5, 2006 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)(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:

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 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, Application for Alien Employment Certification, 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).

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED] Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Here, the Form ETA 750 was accepted on October 16, 1995.² The proffered wage as stated on the Form ETA 750 is \$325.00 per week (\$16,900.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 appeal.³ On appeal, counsel submits a brief, IRS Form 1040, U.S. Individual Income Tax Return, for [REDACTED] for tax year 1995, IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] for tax years 1997 and 1999, IRS Form 1040, U.S. Individual Income Tax Return, for [REDACTED] for tax year 2001, IRS Form 1040, U.S. Individual Income Tax Return, for [REDACTED] for tax year 2001, IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] for tax years 2003 and 2004, and IRS Forms W-2, Wage and Tax Statements, issued to the beneficiary by Baxter House, LLC for tax years 2003, 2004 and 2005. Other relevant evidence in the record includes a letter dated May 26, 1999 from the petitioner's accountant regarding the petitioner's ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel states that the petitioner is an individual and sole proprietor and therefore, Citizenship and Immigration Services (CIS) must look to the employer's personal assets to determine its ability to pay the proffered wage. Counsel asserts that [REDACTED] that [REDACTED] has assets exceeding [REDACTED] in investments and properties that are readily convertible to cash to pay the proffered wage, that [REDACTED] is the sole member of Baxter House, LLC and that the beneficiary was paid a salary through Baxter House, LLC in 2003, 2004 and 2005, that payments made by Baxter House, LLC to the beneficiary should be credited to the petitioner, that [REDACTED] bad debt write-off of over \$200,000.00 in 2003 was incurred in a previous year and did not reduce her cash situation in 2003, that [REDACTED] had net operating loss (NOL) carryovers of over \$670,000.00 in 1999 and over \$1,379,000 in 1995 and that the carryovers were accounting adjustments from previous years that did not affect the petitioner's cash and assets to pay the proffered wage.

The director issued a request for evidence (RFE) to the petitioner on August 1, 2005. The director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date on October 16, 1995 and continuing to the present. Specifically, the director requested, in part, the petitioner's 1995, 1997, 1999, 2001, 2003 and 2004 United States federal income tax returns, with all schedules and attachments, and copies of the beneficiary's Forms W-2 if the beneficiary was employed by the petitioner. The RFE stated that the petitioner's response "MUST BE RECEIVED IN THIS OFFICE ON OR BEFORE OCTOBER 27, 2005" and that the petitioner "MAY NOT RECEIVE AN EXTENSION OF TIME IN ORDER TO SUBMIT THE REQUESTED DOCUMENTATION." In an untimely response to the RFE, counsel provided a letter initially submitted with the petition dated May 26, 1999 from the petitioner's

² The applicant listed on Form ETA 750 is [REDACTED]. The petitioner listed on Form I-140 is [REDACTED].

³ 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).

accountant stating that in 1995, [REDACTED] income was in excess of \$500,000.00 and has been over \$500,000.00 since that time. The accountant stated that the petitioner can afford to pay the proffered wage. Counsel also stated in response to the RFE that [REDACTED] died in 2001, that the petitioner's CPA was getting the petitioner's tax records from storage and that the petitioner did not expect to have them before mid-December. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On January 5, 2006, the director denied the petition, noting that the petitioner's response to the RFE was nearly a month late and that the record does not establish that the petitioner had the ability to pay the proffered wage at the time of filing. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* The petitioner has provided no explanation as to why it would take the petitioner's CPA over four months to pull the petitioner's tax records from storage, why the petitioner did not retain copies of her personal tax returns,⁴ or why the petitioner did not request copies of its tax returns from the IRS in the time allotted by the director.⁵ Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. The accountant's letter does not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date. However, as discussed further herein, even if the AAO accepted the petitioner's evidence on appeal, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date.

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, CIS 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, CIS 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. On the Form ETA 750B, signed by the beneficiary on August 24, 2004, the beneficiary did not claim to have worked for the petitioner. In the instant case, counsel asserts on appeal that [REDACTED] is the sole member of

⁴ This office notes that the Internal Revenue Service (IRS) requires taxpayers to keep tax records as long as they may be needed for the administration of any provision of the Internal Revenue Code. See <http://www.irs.gov/publications/p552/ar02.html> (accessed August 6, 2007).

⁵ This office notes that a taxpayer can request a copy of a tax return and all attachments from the IRS by using Form 4506, Request for Copy of Tax Return. See <http://www.irs.gov/pub/irs-pdf/f4506.pdf> (accessed August 6, 2007).

Baxter House, LLC, that the beneficiary was paid a salary through Baxter House, LLC in 2003, 2004 and 2005, and that payments made by Baxter House, LLC to the beneficiary should be credited to the petitioner. A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. In the instant case, the petitioner's tax returns indicate that Baxter House, LLC was taxed as a sole proprietorship in 2003 and 2004. Therefore, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2004, and it has established that it paid partial wages of \$10,441.96 in 2003, and \$11,266.58 in 2005. Since the proffered wage is \$16,900.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$6,458.04 in 2003 and \$5,633.42 in 2005, respectively.

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, CIS 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).

On appeal, counsel states that the petitioner is an individual and sole proprietor. A sole proprietorship is 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 petitioner's tax returns do not indicate that she operated a horse farm as a sole proprietorship until 2003. Therefore, the petitioner is considered an individual petitioner until 2003. The petitioner's tax returns reflect that her adjusted gross income was -\$889,244.00 in 1995,⁶ -\$6,784.00 in 1997, -\$276,763.00 in 1999, \$66.00 in 2001,⁷ -\$21,885.00 in 2003⁸ and \$54,304.00 in 2004.

⁶ In 1995, 1997 and 1999, the petitioner, [REDACTED] and her husband, [REDACTED] filed joint tax

In 1995, 1997 and 1999, the petitioner's adjusted gross income fails to cover the proffered wage of \$16,900.00. It is improbable that the petitioner could support herself and her husband on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 2001, the petitioner's husband's adjusted gross income was sufficient to cover the proffered wage. In 2003, the petitioner's adjusted gross income fails to cover the difference between wages paid to the beneficiary and the proffered wage. It is improbable that the petitioner could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the difference between wages paid to the beneficiary and the proffered wage. As previously noted, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2004.

On appeal, counsel asserts that [REDACTED] had a net operating loss (NOL) carryovers of over \$670,000.00 in 1999 and over \$1,379,000.00 in 1995, and that the carryovers were accounting adjustments from previous years that did not affect the petitioner's cash and assets to pay the proffered wage. If an individual taxpayer's deductions for the year are more than its income for the year, the taxpayer may have a net operating loss (NOL). 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. If a taxpayer is carrying forward an NOL, it shows the carryforward amount as a negative figure on the "Other Income" line of IRS Form 1040. However, because a petitioner's NOL is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. Therefore, this office rejects counsel's argument regarding the petitioner's NOL carryovers.

In addition, on appeal, counsel asserts that the petitioner's bad debt write-off of over \$200,000 in 2003 was incurred in a previous year and did not reduce her cash situation in 2003. Like the NOL carryforward, the petitioner's bad debt write-off is shown on the "Other Income" line of IRS Form 1040.⁹ And like the NOL, because a petitioner's bad debt write-off is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year.

Further, on appeal, counsel asserts that [REDACTED] has assets exceeding \$3,000,000.00 in investments and properties that are readily convertible to cash to pay the proffered wage. In support of this assertion, counsel submits a statement issued by [REDACTED] on May 31, 2006.¹⁰ As previously noted, the petitioner's tax [REDACTED] was taxed as a sole proprietorship in 2003 and 2004, with the petitioner as the sole member. However, the petitioner submitted no documentation to establish that [REDACTED] remained a sole proprietorship or that the petitioner

returns. They had no dependents in any of those years.

⁷ The petitioner, [REDACTED], filed separate tax returns in 2001. [REDACTED] adjusted gross income in 2001 was \$535,623.00. [REDACTED] had no dependents that year.

⁸ The petitioner, [REDACTED] filed tax returns as a single individual in 2003 and 2004. She had no dependents either year.

⁹ In the instant case, the petitioner's bad debt write-off is offset by consultant fees earned by the petitioner.

¹⁰ There is no evidence of the petitioner's expenses for any relevant year. Even if the petitioner has significant cash assets, as asserted by counsel, the record does not illustrate what type of encumbrances and debts may limit the availability of those funds. Further, even if the petitioner had submitted evidence of her real estate holdings, they are not the type of personal assets typically liquefied in order to pay the proffered wage.

was its sole member in 2006. Further, the petitioner submitted no bank or brokerage statements for years prior to 2006. Therefore, the petitioner has not established that it had sufficient personal assets to pay the proffered wage.

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 appeal is dismissed.