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FEB 14 2005

[Redacted]

FILE: [Redacted]
WAC-03-144-51105

Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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.


for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a dry cleaner. It seeks to employ the beneficiary permanently in the United States as a tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 19, 2001. The proffered wage as stated on the Form ETA 750 is \$14.35 per hour, which amounts to \$29,848 annually.

The petitioner was structured as a sole proprietorship in 2001 but incorporated in 2002. With the petition, the petitioner submitted its form 1120, U.S. Corporation Income Tax Return, for 2002, and its sole proprietor's Form 1040, U.S. Individual Income Tax Return, for 2001, with accompanying Schedule C, Profit or Loss from Business statement. The petitioner also submitted copies of its state quarterly wage reports; federal quarterly tax returns for the four quarters in 2002; forms W-2 and W-3; and bank statements.

The tax returns reflect the following information for the following years:

	<u>2002</u>
Net income ¹	-\$2,886
Current Assets	\$7,486
Current Liabilities	\$4,692

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Net current assets \$2,794

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$60,129
Petitioner's gross receipts or sales (Schedule C)	\$309,114
Petitioner's wages paid (Schedule C)	\$63,194
Petitioner's net profit from business (Schedule C)	\$71,181

The petitioner highlighted the names [REDACTED] from its quarterly wage reports, as well as a W-2, Wage and Tax Statement, issued to [REDACTED] in 2002 evidencing wages paid to this individual in the amount of \$10,400.00 and a W-2 issued to the beneficiary in 2001 evidencing wages paid to this individual in the amount of \$6,814.00. The W-2 issued to [REDACTED] in 2002 has the employer's identification number as 26-0048450 and [REDACTED] social security number as 621-04-0100. The W-2 issued to the beneficiary in 2001 has the employer's identification number (EIN) as 95-3359672 and the beneficiary's social security number as 147-70-6597. Both W-2 forms list the same address for the employers issuing the forms. The petitioner's bank statements provide ending balance information on the petitioner's checking account for the year 2002.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 18, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence to clarify that the beneficiary and [REDACTED] are the same person and noted the different social security numbers, and sought a list of the sole proprietor's monthly expenses.

In response, the petitioner submitted a letter, dated December 3, 2003, from Kenneth C. Han, CPA of Cho, Han & Son, Certified Public Accountants, stating the following:

RE: [the beneficiary]

I write this letter to clarify a confusion caused by using an incorrect social security number of the person stated above.

The social security number previously reported (#147-70-6597) was used by a mistake. Her correct social security is #621-04-0100.

I amended and filed the corrected corresponding tax forms to both social security administration and California Employment Development Department for the year 2001 (see the forms enclosed).

Copies of W-2c, Corrected Wage and Tax Statement, and an adjusted state wage report are also enclosed reflecting the change to the beneficiary's social security number. The petitioner provided the beneficiary's individual income tax returns for 1998, 1999, and 2000, filed in August 2003 with the correct social security number. Finally, the petitioner submitted a list of Young H. and Grace Han's, the sole proprietors, monthly living expenses. The monthly expenses include a mortgage, automobile and health insurance, utilities, cable

and Internet, food and clothing in the amount of \$2,330, which totals \$27,960 annually. An unsigned blank page with a heading "Name difference: [REDACTED] maiden name was [REDACTED] was also submitted into the record of proceeding with another statement that the incorrect social security number was used by mistake.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 27, 2004, denied the petition. The director noted that no evidence was presented to clarify that the beneficiary also used the name [REDACTED] but that regardless of attributing partial wages actually paid to the beneficiary if the identities of employees [REDACTED] and the beneficiary were clarified, the petitioner's net income and net current assets in 2002 were insufficient to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that a family register submitted with a concurrently filed application to adjust status to lawful permanent resident and the accountant's letter submitted in response to the director's request for evidence were sufficient proof that the beneficiary's maiden name was [REDACTED] and that employee's name is the same as the beneficiary. Counsel also asserts that the petitioner's financial situation was strengthened in 2002 by rental income received as a result of the petitioner's acquisition of the commercial building it uses for its business; that the position is not new; that California Service Center policy requires gross income and wages paid to be considered for a petitioning entity's continuing ability to pay a proffered wage; that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applies to the instant petition; and that the petitioner's inventory and assets should be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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.

The accountant's letter did not provide sufficient resolution of the beneficiary's identity issue. While the accountant's letter submitted in response to the director's request for evidence discusses erroneous use of social security numbers, it does not clarify the identify of [REDACTED]. The amended forms to the IRS and state workforce agency merely correct the beneficiary's social security number. However, on appeal, a copy of a "Family Census Register" includes the name of [REDACTED] wife as [REDACTED] in Korean with a certified English translation. Additionally, the record of proceeding contains a Form G-325, Biographic Information, filed in connection with the beneficiary's application for adjustment of status to lawful permanent resident. On that form G-325, the beneficiary indicated that she had also used the name [REDACTED] and indicated that her father's family name was [REDACTED]. The beneficiary signed that Form G-325 above a penalty warning about knowingly and willfully falsifying or concealing a material fact. Thus, the AAO determines that [REDACTED] are the same person.

In the instant case, the petitioner established that it employed and paid the beneficiary \$10,400.00 in 2002 and \$6,814.00 in 2001. Since the proffered wage is \$29,848, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$19,448 in 2002 and \$23,034 in 2001.

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 contrary to counsel's assertion. 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 was a sole proprietorship in 2001, 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 sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of \$60,129 covers the remaining proffered wage of \$23,034, even after reducing it by the sole proprietor's annual expenses of \$27,960. Thus, the petitioner has established that it has the ability to pay the proffered wage in 2001 when it was structured as a sole proprietorship.

In 2002, the petitioner is structured as a corporation. As noted above, 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). 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Thus, contrary to counsel's assertion, the petitioner's gross receipts and wages paid are unacceptable evidence of its continuing ability to pay the proffered wage beginning on the priority date.² Additionally, the petitioner's rental income will not be

² Counsel asserts that the California Service Center set forth a different policy in a teleconference with the American Immigration Lawyer's Association. Counsel's reliance upon the teleconference notes is misplaced. Counsel does not provide a published citation relating to the use of gross receipts or wages paid. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

considered since the deed on the property is issued to [REDACTED] as joint tenants, who are the owners of the petitioner. As noted above, 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).³

The petitioner's net income in 2002 was -\$2,886 and cannot cover the remaining proffered wage of \$19,448. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved immigrant petitions on erroneous application of law or policy, the AAO would not be bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*. 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

³ CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its 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). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2002, however, were only \$2,794. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in 2002.

Counsel urges the AAO to consider the application of *Matter of Sonogawa*. *Matter of Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2002. While counsel stated that the petitioner's proffered position is not new, he does not state why that adds any additional consideration for the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.⁵

Despite the petitioner's proof of its ability to pay the proffered wage in 2001, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it 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.

⁵ For example, the record does not name prior workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).