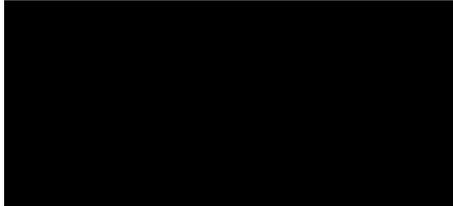


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FILE: WAC-02-173-53584 Office: CALIFORNIA SERVICE CENTER Date: JUL 19 2005

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:



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, 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 wholesaler of tobacco and Arabian gifts. It seeks to employ the beneficiary permanently in the United States as a marketing director. 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$23.33 per hour, which amounts to \$48,526.40 annually.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner represented that the business began in June 1996, currently has 3 employees, and a gross annual income of \$253,657.00. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, for 2000 and 2001, with accompanying Schedules C, Profit or Loss from Business statements.

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 July 22, 2002, 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 the sole proprietor's tax returns for 1998 and 1999.

In response, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, for 1998 and 1999, with accompanying Schedules C, Profit or Loss from Business statements.

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

	<u>1998</u>	<u>1999</u>		
Proprietor's adjusted gross income (Form 1040)	-\$7,928	\$31,905		
Petitioner's gross receipts or sales (Schedule C)	\$487,734	\$752,010		
Petitioner's wages paid (Schedule C)	\$0	\$0		
Petitioner's cost of labor (Schedule C)	\$0	\$0		
Petitioner's net profit from business (Schedule C)	-\$7,955	\$34,306		
	<u>2000</u>	<u>2001</u>	<u>2002</u>	
Proprietor's adjusted gross income (Form 1040)	\$44,654	\$77,735	\$96,275	
Petitioner's gross receipts or sales (Schedule C)	\$1,089,371	\$1,557,133	\$1,736,301	
Petitioner's wages paid (Schedule C)	\$10,320	\$14,040	\$14,600	
Petitioner's cost of labor (Schedule C)	\$0	\$0	\$0	
Petitioner's net profit from business (Schedule C)	\$48,049	\$83,644	\$91,060	

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 20, 2002, the director again 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 complete tax returns, IRS-generated tax returns, and copies of any W-2 forms issued to the beneficiary.

In response, the petitioner resubmitted previously submitted evidence and stated, through counsel, that the beneficiary has not actually worked for the petitioner and has not filed any tax returns with the IRS. No IRS-generated copies of the sole proprietor's tax returns were submitted.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 30, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested IRS computer generated printouts of the petitioner's tax returns for 2002 in lieu of stamped copies.

In response, the petitioner resubmitted its sole proprietor's 2002 tax return without an IRS-generated copy.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 22, 2003, the director again requested additional evidence pertinent to that ability. The director specifically requested an itemized list of the sole proprietor's monthly living expenses.

In response, counsel stated that the petitioner objected to providing such information as "irrelevant, argumentative, asserting facts not in evidence, ambiguous and in brief, does not lead to admissible evidence." Despite their objections, the petitioner submitted a handwritten list of the sole proprietor's expenses, which included a home mortgage; food; clothing; car lease; home, car and health insurance; and utilities. The sole proprietor's total monthly expenses are \$6,559. The petitioner also submitted copies of some of the sole proprietor's bills to corroborate the amount of expenses represented.

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 9, 2004, denied the petition.

On appeal, counsel asserts that many of the sole proprietor's living expenses did not commence until 2002 and many were reflected as expenses on his tax return. She also states that depreciation should be added to the sole proprietor's net income "according to the general principles of accounting." Counsel also asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applies to the facts of the case since the petitioner's business "was a new business at the time of filing of the labor certification application on behalf of the beneficiary [and a]s any new business, the petitioner did not produce substantial income at its inception." However, counsel states, at present, the petitioner has enough income to pay the proffered wage. Finally, counsel also asserts that the beneficiary's ability to generate income should not be overlooked.

Counsel specifically states on appeal that the sole proprietor's mortgage payments and homeowners insurance did not happen until 2002 and his rent payments were \$1,200 per month prior to that. Additionally, counsel asserts that the sole proprietor's car lease, health insurance and car insurance were all itemized as insurance deductions on his individual income tax return. Thus, counsel recalculated the sole proprietor's personal expenses and claims them to be \$33,540 per year from 1998 to 2001 and \$63,420 per year from 2002 onwards. The petitioner also submits evidence of real estate closing documentation and the car lease agreement to corroborate the assertions made on appeal.

The AAO notes at the outset that 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). However, despite the petitioner's failure to provide its own amendment of the sole proprietor's personal expenses, the AAO notes that the sole proprietor's individual income tax returns do contain the personal expense deductions referenced by counsel and will accept counsel's figures as the petitioner's representation.

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. In the instant case, the petitioner has not established that it has previously employed the beneficiary.

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 appellate assertion¹. 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).

¹ Counsel did not cite to the Internal Revenue Code or other source of legal authority for her premise that according to general principles of accounting, depreciation should be added back to the petitioner's net income to illustrate its continuing ability to pay the proffered wage beginning on the priority date.

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. 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 four. In 1998, the sole proprietorship's adjusted gross income is negative and thus it would be impossible for the petitioner to pay the proffered wage out of it, especially since the sole proprietor would have to pay his additional living expenses of \$33,540 in that year.

In 1999, the sole proprietor's adjusted gross income of \$31,905 fails to cover the proffered wage of \$48,526.40. Thus, it is impossible that the petitioner could pay the proffered wage since the sole proprietor's adjusted gross income would be further reduced by his living expenses of \$33,540 for that year, leaving him with a deficit and the inability to pay the proffered wage.

In 2000, the sole proprietor's adjusted gross income of \$44,654 fails to cover the proffered wage of \$48,526.40. Thus, it is impossible that the petitioner could pay the proffered wage since the sole proprietor's adjusted gross income would be further reduced by his living expenses of \$33,540 for that year, leaving him with a deficit and the inability to pay the proffered wage.

In 2001, the sole proprietor's adjusted gross income of \$77,735 covers the proffered wage of \$48,526.40. It is improbable that the sole proprietor could support himself and his family on \$29,208.60 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor's adjusted gross income would be further reduced by his living expenses of \$33,540 for that year, leaving him with a deficit and the inability to pay the proffered wage.

In 2002, the sole proprietor's adjusted gross income of \$96,275 covers the proffered wage of \$48,526.40. It is improbable that the sole proprietor could support himself and his family on \$47,748.60 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially since the sole proprietor's adjusted gross income would be further reduced by his living expenses of \$63,420 for that year, leaving him with a deficit and the inability to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in any relevant year. Contrary to counsel's assertions, *Matter of Sonogawa*, 12 I&N Dec. at 612 does not make the petitioner's case more favorable. *Matter of Sonogawa* 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 *Sonegawa* 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 *Sonegawa*, nor has it been established that any year was an uncharacteristically unprofitable year for the petitioner. While the petitioner's gross revenues have risen impressively since its inception, even counsel concedes that the petitioner, as a new business, "did not produce substantial income at its inception." The AAO notes that a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). And despite the petitioner's revenue increases, the sole proprietor's adjusted gross income still fails to cover the proffered wage and his living expenses, as analyzed above.

Counsel also argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record of proceeding contains insufficient evidence pertaining to the beneficiary's qualifications. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 14, 1998. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of marketing director. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

Grade School	YR
High School	YR
College	-
College Degree Required	-
Major Field of Study	-

The applicant must also have four years of experience in order to perform the job duties listed in Item 13, which is contained in the public record of proceeding and will not be recited in this decision.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that he worked for [REDACTED] in Dameshgh, Syria, as a marketing director, from July 1983 to August 1988. With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on July 22, 2002. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week.

In response to the director's request for evidence, the petitioner submitted a letter in Arabic with a certified English translation, from the [REDACTED], stating that the beneficiary worked at the shop of [REDACTED], a member of the [REDACTED], and that the beneficiary worked "in the profession of mosaic fabrication for a period of five years." The letter did not indicate the commencement or termination dates of her employment.

The director again requested additional evidence concerning the evidence of the beneficiary's qualifications on November 20, 2002. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week.

In response, the petitioner submitted a letter from the same English translation service, in English only without an accompanying Arabic version, with a heading from [REDACTED] claiming that the beneficiary worked as a marketing manager for five years from July 1983 to August 1988 and recited the same description of duties detailed on the Form ETA 750B. The letter was signed "Very truly yours. Owner," without a signature or identification of the owner. There is also no contact information for the business other than "C.R. 53-L.R. 67."

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements

for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The first letter submitted on the beneficiary's behalf raises suspicion since it indicated that the beneficiary worked as a mosaic fabricator for five years. The letter was provided without explanation and it does not match the description of employment experience the beneficiary provided on the Form ETA 750B under penalty of perjury. Additionally, the second letter fails to conform to the regulatory requirements since the letter does not provide the name, address, and title of the trainer or employer. Thus, the record of proceeding does not contain competent and probative evidence of the beneficiary's qualifications.

The inconsistencies concerning the beneficiary's qualifications cannot lead to a conclusion that she is qualified for the proffered position. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, 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) also states: "It is incumbent on 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."

On a final note, in any additional proceedings, the AAO would expect additional information or clarification as to how a small business with 3 employees would require a director of marketing, since the U.S. Department of Labor's *Occupational Outlook Handbook* indicates that most marketing directors are employed at marketing, advertising, or public relations firms and it is doubtful that a small business would create such a position instead of outsourcing that service. Additionally, the AAO notes that the petitioner represented its gross annual income as \$253,657 when it filed the petition in 2002, but a review of its tax returns reflect that it never grossed that amount but much higher each year since 1998. Finally, the AAO notes that the petitioner never submitted IRS-generated tax returns as requested by the director so the figures contained in those returns cannot be verified as what was actually reported to the IRS.

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.