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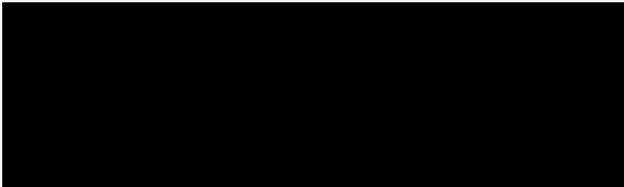
FILE: WAC 02 190 50833 Office: CALIFORNIA SERVICE CENTER

Date: JUN 03 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 printing shop. It seeks to employ the beneficiary permanently in the United States as a print shop manager. 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 asserts that the director erred in evaluating the petitioner's tax returns and that the evidence supports the petitioner's ability to pay the proffered salary.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$22.82 per hour, which amounts to \$47,465.60 per annum. On Part B of the ETA 750, signed by the beneficiary on April 20, 2001, the beneficiary claims that she has worked for the petitioner since 1998.

On Part 5 of the preference petition, the petitioner claims that it was established in 1983, and currently employs four workers.

The petitioner is structured as a sole proprietorship. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. The tax returns reflect the sole proprietor filed jointly with his spouse and claimed two dependents. The tax return also indicates that the sole proprietor reported an adjusted gross income of -\$6,192 including a net business income of \$0- reflected on Schedule C, Profit or Loss from Business. Schedule C also indicates that the petitioner declared gross income of \$347,654 and total expenses of \$347,654, including \$55,558 in wages.

On August 12, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested that the petitioner provide copies of the beneficiary's Wage and Tax Statement (W-2s), as well as copies of the petitioner's current business licenses.

In response, the petitioner, through counsel submitted a copy of the beneficiary's 2001 W-2. It shows that the petitioner paid her \$18,909 in wages, or \$28,556.60 less than the proffered annual salary as set forth on the labor certification. Counsel explained in a cover letter, dated November 5, 2002, that "the beneficiary was unable to locate her 2000 income tax return/W-2 and has requested a duplicate copy." In a subsequent letter, dated April 21, 2003, counsel states that the beneficiary erred by stating on the ETA 750-B that she had worked for the petitioner since 1998 and that she had actually not worked for the petitioner during 2000 since she had given birth to her son on July 1, 1999.

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 March 3, 2004, denied the petition.

On appeal, counsel resubmits a copy of the sole proprietor's 2001 tax return and additionally offers copies of his 2002 and 2003 individual tax returns. They reflect the following information:

	2002	2003
Petitioner's gross income (Schedule C)	\$293,260	\$312,930
Petitioner's wages paid (Schedule C)	\$ 38,085	\$ 46,797
Petitioner's total expenses (Schedule C)	\$246,229	\$302,505
Petitioner's net business income (Form 1040)	\$ 47,031	\$ 10,425
Proprietor's adjusted gross income (Form 1040)	\$ 80,056	\$ 42,498

Counsel also provides a letter, dated March 23, 2004, from the petitioner's accountant, [REDACTED] that the sole proprietor files his tax return on an accrual basis and pays tax on his accounts receivable. As such, Schedule C of the 2001 tax return a non-recurring bad debt deduction of \$63,648 was taken as a cumulative total representing several years of bad debt.

Counsel also asserts on appeal that the \$63,648 deduction represented several years of bad debts and that pursuant to the Internal Revenue Code, the petitioner may carry-back a net operating loss to each of the preceding taxable year of such loss. Counsel also notes that the petitioner reported \$12,000 as a depreciation expense, which as a non-cash deduction, should not be considered as representative of the petitioner's true financial position. Counsel further notes that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) supports the petitioner's position in that there is no evidence that the petitioner will not continue operation as an established business and continue to gainfully employ the beneficiary at the proffered salary.

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 may have 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 only first-hand evidence that the petitioner has actually employed the beneficiary is the 2001 W-2 contained in the record. As noted above,

it reflects that the petitioner employed the beneficiary at a rate that was \$28,556.60 less than the proffered salary. Although counsel claims on appeal that there is ample evidence to show that the beneficiary has been paid the proffered wage since April 27, 2001, other than the copy of the 2001 W-2, no other evidence has been submitted to corroborate the petitioner's employment and payment of wages to the beneficiary. As set forth above, Schedule C of the 2002 and 2003 individual tax returns reflect that the petitioner paid total wages amounting to less than the certified wage in each of those years.

Counsel suggestion that the sole proprietor's reported depreciation figures for each of the relevant years should be somehow considered apart from the sole proprietor's adjusted gross income in order to support the petitioner's ability to pay the proffered wage is not persuasive. No authority is cited for this proposition. In determining the petitioner's ability to pay the proffered wage, the CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). It is also noted that depreciation as the decreased value of the assets of a business is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

The petitioner is a sole proprietorship, a business in which an individual 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, even if counsel's assertion that the 2001 non-recurring debt charge-off deduction of \$63,648 should be factored into the consideration of the petitioner's ability to pay the \$28,556.60 shortfall between the actual wages paid in 2001 and the proffered salary, the evidence fails to demonstrate the petitioner's continuing ability to pay the proffered salary. The director failed to request a summary of the sole proprietor's monthly living expenses during the relevant period, so no firm conclusions can be drawn as to how much of the remaining funds could be applied to paying the proffered wage after deducting the sole

proprietor's household and living expenses. Conversely, it is likely that the petitioner could pay the proffered wage and still support himself and his family based on the 2002 adjusted gross income. The evidence provided relevant to 2003, however, certainly indicates that that it would be highly improbable that the sole proprietor could support himself and his family on what would remain for an entire year after reducing the adjusted gross income by the amount required to pay the proffered wage. The proffered wage of \$47,465.60 exceeds the sole proprietor's 2003 adjusted gross income of \$42,498 by \$4,967.60.

In the context of the financial information contained in the record, counsel asserts that the petitioner's 22-year history of operation supports its future prospects for success and establishes its ability to pay the proffered wage. It was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage in *Matter of Sonegawa, supra*. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, although the petitioner may have been operating since 1983, the evidence, consisting of three tax returns, does not establish a framework of profitable years sufficiently analogous to the *Sonegawa* petitioner to outweigh the data presented. The AAO cannot conclude that the petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.