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JUN 03 2005

FILE: WAC-00-197-53885 Office: CALIFORNIA SERVICE CENTER Date: JUN 02 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.

Michael Valdes
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition twice after a series of motions, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion will be granted. The prior decision of the AAO will be affirmed. The appeal will remain dismissed and the petition will remain denied.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. 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. The AAO summarily dismissed a subsequent appeal since the petitioner's former counsel failed to provide any argument or evidence.

On appeal, the petitioner retained new counsel and submits new arguments for consideration.

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 2, 1996. The proffered wage as stated on the Form ETA 750 is \$1,500 per month, which amounts to \$18,000 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its Schedule C, Profit or Loss from Business Statement for 2001 and the sole proprietor's automatic extension request to file his 1999 tax return.

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, 2000, the director issued a notice of intent to deny. In accordance with 8 C.F.R. § 204.5(g)(2), the director noted that the petitioner's tax returns reflected a profit of only \$7,764 and payment of \$5,502 in wages, and payment of the beneficiary's wage would result in a loss by further reducing the petitioner's profit.

In response, the petitioner's former counsel stated that the beneficiary would generate revenue for the petitioner. The petitioner submitted its sole proprietor's 1999 Form 1040, U.S. Individual Income Tax

Return, with accompanying Schedule C, Profit or Loss from Business, bank statements, and compiled but unaudited financial statements.

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 December 26, 2000, denied the petition. The director reiterated her observations from her notice of intent to deny and stated that the petitioner cannot rely upon the beneficiary's ability to generate income.

On or about January 19, 2001¹, the petitioner filed its first appellate pleading in the form of a motion to reconsider the director's decision. Because the petitioner's former counsel failed to submit the filing fee, the motion was rejected by the director on February 8, 2001². The petitioner resubmitted the same motion on or about February 20, 2001 and March 19, 2001³. Attached to those motions were copies of checks issued to the beneficiary from the petitioner and a 1099 form issued to the beneficiary from the beneficiary in the year 2000. The 1099 form reflects that the petitioner employed and paid the beneficiary \$6,512 in 2000. All of the checks were dated in 2000 so presumably they were incorporated into the total amount reported by the petitioner on the 1099 form.

On May 7, 2001, the director dismissed the petitioner's motion because it was late. On May 11, 2001, the petitioner filed an additional motion to reconsider with a copy of its prior filing. On November 14, 2002, the director issued a notice stating that the petitioner overcame the grounds for abandonment but still determined that the petitioner had failed to provide sufficient evidence that it had the continuing ability to pay the proffered wage beginning on the priority date. The director provided the petitioner with additional time to submit additional evidence and specifically sought the petitioner's complete tax returns for 1996, 1997, 1998, 1999, 2000, and 2001, as well as a payroll summary.

In response to the director's November 14, 2002 notice, the petitioner submitted copies of previously submitted evidence as well as the sole proprietor's individual income tax returns with accompanying Schedules C, reporting the petitioner's profit or loss, for 1995 through 2001, excluding 1997. The director issued a decision on March 28, 2003 determining that the petitioner could not establish its continuing ability to pay the proffered wage because its sole proprietor's adjusted gross income was too low in each year to support the proffered wage and the sole proprietor's 2-3 family members. The director also noted that unaudited financial statements are not admissible evidence and that the petitioner's bank records were not persuasive evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner's former counsel failed to submit a rationale for appeal or any evidence and the AAO summarily dismissed it. On motion to reconsider, the petitioner's new counsel states that the petitioner did not realize its former counsel failed to make any arguments on its behalf with the prior appeal. Counsel also states that the director's decision was erroneous because it considered the sole proprietor's adjusted gross income instead of "all aspects of a prospective employer's ability to pay," including the petitioner's gross business income and the beneficiary's "positive contributions to [the petitioner]'s gross profit." Counsel also states that there is no precedent permitting Citizenship and Immigration Services (CIS) to rely upon the sole proprietor's adjusted gross income and that doing so impermissibly allows CIS to engage in rule making

¹ There are no date stamps to verify the filing date.

² An additional rejection notice on March 13, 2001 requested the petitioner to submit a copy of the decision to which the motion pertained.

³ See note 1, *supra*.

through adjudication. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of his arguments. New evidence submitted on motion is the sole proprietor's Form 1040 individual income tax returns with accompanying Schedules C, Profit or loss from business statements, for 1997 and 2002, and a letter from the petitioner's accountant, stating that audited financial statements are not undertaken by small businesses and that the petitioner has sufficient net income to pay the proffered wage.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Thus, since the petitioner submits new evidence and counsel states new facts to be proved, namely, the petitioner's continuing ability to pay the proffered wage as reflected on its tax returns, the motion qualifies as a motion to reopen. A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The petitioner cited precedent to support his assertions that CIS incorrectly applied law or policy, and thus, the petitioner's motion also qualifies as a motion to reconsider.

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

	<u>1996</u>	<u>1997</u>	<u>1998</u>
Proprietor's adjusted gross income (Form 1040)	\$22,281	\$36,063	\$39,352
Petitioner's gross receipts or sales (Schedule C)	\$39,662	\$n/a	\$53,311
Petitioner's wages paid (Schedule C)	\$0	\$n/a	\$5,502
Petitioner's cost of labor (Schedule C)	\$0	\$n/a	\$0
Petitioner's net profit from business (Schedule C)	\$4,253	\$13,292	\$7,764
	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$39,410	\$10,010	\$11,436
Petitioner's gross receipts or sales (Schedule C)	\$51,128	\$56,301	\$73,749
Petitioner's wages paid (Schedule C)	\$1,598	\$0	\$0
Petitioner's cost of labor (Schedule C)	\$0	\$0	\$0
Petitioner's net profit from business (Schedule C)	\$13,292	\$10,010	\$13,622
	<u>2002</u>		
Proprietor's adjusted gross income (Form 1040)	\$15,014		
Petitioner's gross receipts or sales (Schedule C)	\$81,865		
Petitioner's wages paid (Schedule C)	\$0		
Petitioner's cost of labor (Schedule C)	\$0		
Petitioner's net profit from business (Schedule C)	\$17,313		

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. In the instant case, the petitioner established that it employed and paid the beneficiary \$6,512 in 2000. Since the proffered wage is \$18,000, the petitioner must illustrate that it can pay the remainder of the proffered wage

for 2000, which is \$11,488. The petitioner has not established that it has employed and paid the beneficiary any wages in 1996, 1997, 1998, 1999, 2001, or 2002 and thus must illustrate that it can pay the full proffered wage in those years.

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).

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. The regulation does not reference the size of a petitioning entity, and thus, the petitioner's accountant's argument on motion that it would be irregular for a small business to have its financial statements audited is irrelevant.

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. Contrary to counsel's assertion, precedent establishes that 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 two in 1997, 1998, 1999, 2000, 2001, and 2002, and a family of three in 1996. In 1996, the sole proprietorship's adjusted gross income of \$22,281 barely covers the proffered wage of \$18,000. It is improbable that the sole proprietor could support himself and his two dependents on \$4,281 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 1997, the sole proprietorship's adjusted gross income of \$36,063 covers the proffered wage of \$18,000. It is possible that the sole proprietor could support himself and his family on \$18,063 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage,

but the record of proceeding does not contain evidence of the sole proprietor's living expenses to determine if \$18,063 covers the family's living expenses.

In 1998, the sole proprietorship's adjusted gross income of \$39,352 covers the proffered wage of \$18,000. It is possible that the sole proprietor could support himself and his family on \$21,352 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, but the record of proceeding does not contain evidence of the sole proprietor's living expenses to determine if \$21,352 covers the family's living expenses.

In 1999, the sole proprietorship's adjusted gross income of \$39,410 covers the proffered wage of \$18,000. It is possible that the sole proprietor could support himself and his family on \$21,410 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, but the record of proceeding does not contain evidence of the sole proprietor's living expenses to determine if \$21,410 covers the family's living expenses.

In 2000, the sole proprietorship's adjusted gross income of \$10,010 does not even cover the remaining proffered wage of \$11,488. It is impossible that the sole proprietor could support himself and his family on and pay the proffered wage.

In 2001, the sole proprietorship's adjusted gross income of \$11,436 does not even cover the proffered wage of \$18,000. It is impossible that the sole proprietor could support himself and his family and pay the proffered wage.

In 2002, the sole proprietorship's adjusted gross income of \$15,014 does not even cover the proffered wage of \$18,000. It is impossible that the sole proprietor could support himself and his family and pay the proffered wage.

Finally, the petitioner reported an ending balance of approximately \$500-\$900 in a checking account held by Bank of America for a few months in 2000. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balance is not substantial enough to cover the proffered wage and merely shows the amount in an account on a given date without illustrating a sustainable ability to pay the proffered wage.

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. at 612 in support of his motion arguments that the petitioner's totality of circumstances illustrate its continuing ability to pay the proffered wage. *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 *Sonegawa*, nor has it been established that 1996, 2000, 2001, or 2002 were uncharacteristically unprofitable years for the petitioner.

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. Counsel asserts that the beneficiary has already positively impacted the petitioner's business, but does not provide any corroborating evidence of such. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Considering the totality of circumstances, the petitioner's net profits decreased in the past three years, and in every year shows modest gross revenues. The petitioner has simply not produced sufficient evidence to demonstrate that it is a financially viable entity capable of paying the proffered wage from 1996 to the present. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1996, 2000, 2001, or 2002, and it is unclear if the petitioner could pay the proffered wage in 1997, 1998, or 1999. 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 motion will be granted. The prior decision of the AAO will be withdrawn and substituted with the foregoing substantive decision. The appeal is dismissed. The petition is denied.