U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

invasion of personal privacy

U.S. Citizenship and Immigration Services

UBLIC COPY

[redacted]

MAR 0 3 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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, 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 remanded for further consideration.

The petitioner is in the construction business. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager, construction trades. 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 that the petitioner had not established that the beneficiary met the experience requirements as stated on the Form ETA 750. The director 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 5, 2001. The proffered wage as stated on the Form ETA 750 is $31.15 per hour or $64,792 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner from 1996 until the present.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted copies of the owner's 1998 through 2000 Forms Schedule C, Profit or Loss From Business, from the petitioner's Forms 1040, U.S. Individual Income Tax Returns. Counsel also submitted a letter, dated October 10, 2002, from [redacted] President/Builder, of [redacted] Inc. stating that the beneficiary was employed by his company under his framing subcontractor, [redacted] Construction, from October 1995 through March 1998. The 1998 Schedule C reflected gross receipts of $439,909, wages paid of

$0, net profit of $33,132, and cost of labor of $111,423. The 1999 Schedule C reflected gross receipts of $290,118, wages paid of $70,148, net profit of $32,958, and cost of labor of $1,960. The 2000 Schedule C reflected gross receipts of $502,386, wages paid of $0, net profit of $64,685, and cost of labor of $120,728.

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 January 7, 2003, the director requested additional evidence pertinent to that ability and requested additional evidence pertinent to the beneficiary's experience. 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 of March 5, 2001 and continuing to the present. The director also specifically requested that the petitioner provide all schedules and tables that accompany the submitted tax return. The director further requested that the petitioner provide copies of its Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that he may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc. With regard to the beneficiary's experience, the director requested that the petitioner submit a letter from [redacted], Inc. or [redacted] stating the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week. The director also requested that the petitioner submit Forms W-2, Wage and Tax Statements, for the beneficiary from [redacted] Inc. The director informed the petitioner that the letter should be on the previous employer's letterhead showing the name and title of the person verifying the information.

In response, the petitioner submitted a letter from [redacted] President/Contractor, of [redacted] Inc., a complete copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, copies of Forms DE-6, Quarterly Wage Reports, for the year 2002, and the beneficiary's 1999 through 2001 Forms W-2, Wage and Tax Statements, from the petitioner and [redacted] Inc. The 2001 tax return reflected an adjusted gross income of $59,814, and the 2001 Schedule C reflected gross receipts of $449,967, wages paid of $0, net profit of $69,664, and cost of labor of $92,127. The beneficiary's 1999 through 2001 Forms W-2 from the petitioner reflected wages earned of $27,060, $31,218, and $33,652.50, respectively. The beneficiary's 1999 through 2001 forms W-2 from [redacted] Inc. reflected wages earned of $3,156, $1,280, and $1,200, respectively. The petitioner's Forms DE-6 for the year 2002 reflected wages paid to the beneficiary of $43,779.50. The letter from [redacted] states:

> I, [redacted] President of [redacted] Inc., write this letter on behalf of [redacted] to verify that he has done work for [redacted] Inc. as a Supervisor/Carpenter and his duties were to supervised [sic] the activities of workers engaged in framing construction, installing and repairing of wooden structures. Selected materials. Examined the blueprint to determine the dimensions of the structure. Determined the sequenced [sic] of activities concerning the erection of structure. [redacted] worked for this company from 03/1990 thru 10/1995. He used to work 40 hours per week. He was a good worker and very punctual.

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 or that the beneficiary met the experience requirements as stated on the Form ETA 750, and, on April 18, 2003, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation, copies of payroll records for the beneficiary from November 11, 2000 through May 31, 2003, a copy of the beneficiary's 1996 and 2002 Forms W-2, Wage and Tax Statements, and copies of check stubs for the beneficiary from approximately February 10, 1996 through October 7, 2000. The check stubs are not for the complete period, but do cover the majority of it. The beneficiary's 1996 and 2002 Forms W-2 reflect wages earned of $7,236 and $43,779.50, respectively.

Counsel states:

> When determining Petitioner's true ability to pay the proffered wage, all applicable accounting principles must be taken into consideration. For example, the depreciation deduction is an amount allowed by the Internal Revenue Service in the calculation of taxable income. Such amount does not represent an actual loss of funds. In Petition's case, **substantial deductions have been claimed for advertising, insurance, office expenses, equipment, costs of other business property, repairs, supplies, taxes and licenses, and various other expenses.** As with most businesses, income generated is used for spending on other items to legally reduce the total amount of income that must be declared as taxable income. These expenditures do not indicate a lack of available funds.
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> The Board of Immigration Appeals has held that net profit figures alone are not determinative of a Petitioner's ability to pay. Rather, an important consideration is Petitioner's expectations of continued increase in business and profits. See *Matter of Sonegawa,* 12 I&N Dec. 612, Interim Decision (BIA) 1935 (1967). A careful examination of Petitioner's taxes for the years 1998 to 2000 clearly show that **Petitioner has an expectation of both increased business and profits.** To illustrate, Petitioner has shown **an increase in profit from $439,909.00 in 1998 to $449,967.00 in 2001.** Petitioner has shown that the business has remained relatively consistent though [sic] the past four years in addition to showing an increase in profit. There is no reason to determine that Petitioner will not continue to maintain this profit level.
>
> More importantly, the wage paid by Petitioner to the Beneficiary has steadily increased since 1996. For the past year, [redacted] has been paid at a rate of $25.00 per hour, up from $22.00 per hour previously. As discussed in further detail below, at present Mr. Reyes-Arroyo is being paid the prevailing wage of $31.15 per hour.

* * *

Petitioner also submits check stubs from February of 1996 to October of 2000 that evidence money paid to him for reimbursements on equipment usage. Please see Exhibit H. Additionally, the Petitioner reimburses for any other employment related expenses he may incur.

Finally, other than to show evidence of ability to pay the proffered wage, the Petitioner is under no legal duty to pay $31.15 per hour until receives certified employment under lawful permanent resident status. In fact, an application cannot be denied on the basis that a lower wage was paid prior to granting status. See *Matter of Maysa, Inc.*, 98-INA-259 (BALCA) May 21, 1999). However, in a good faith effort to show ability and willingness to pay this amount, as noted above, has begun paying the prevailing wage even though has been unable to adjust status as of this time. See Exhibit D.

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 established that it employed and paid the beneficiary $27,060 in 1999, $31,218 in 2000, $33,652.50 in 2001, and $43,779.50 in 2002[1]. Since the proffered wage is $64,792, the petitioner must illustrate that it can pay the remainder of the proffered wage for each relevant year, which is $31,139.50 in 2001 and $21,012.50 in 2002.

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 the assertions of counsel, 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 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-

[1] Since the priority date of the petition is March 5, 2001, the tax returns for 1999 and 2000 are not relevant to determining the petitioner's ability to pay the proffered wage in 2001 and will not be considered as evidence of the petitioner's ability to pay the proffered wage.

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 supported a family of four. In 2001, after paying the remainder of the beneficiary's salary ($31,139.50) the petitioner would have had $28,674.50 remaining to support a family of four. Since the petitioner's 2002 tax returns had not been filed at the time of appeal, it is impossible to determine what amount was left after subtracting the remainder of the beneficiary's salary ($21,012.50) to support the owner's family of four. As the petitioner failed to provide a statement of monthly expenses for the years 2001 through 2002 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining incomes.

Counsel cites *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) as proof that the petitioner has the ability to pay the proffered wage from the priority date and continuing to the present. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel also mentions that the petitioner has reimbursed the beneficiary for equipment usage. Counsel does not, however, explain how this fact establishes the petitioner's ability to pay the proffered wage. In addition, counsel contends that the petitioner is not obligated to pay the proffered wage until the beneficiary obtains work authorization or lawful permanent residency. While this may be true, the petitioner is obligated to establish that it has the ability to pay the proffered wage from the priority date and continuing until the

beneficiary obtains lawful permanent residency. *See* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not established that it paid the beneficiary the proffered wage or that it could pay the beneficiary from its adjusted gross income and still support a family of four.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 2001 and continuing to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The remaining issue in this case is whether the beneficiary meets the experience requirements as stated on the Form ETA-750.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (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.
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> (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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 5, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education	College Degree Required	
N/A	N/A	
Experience Job Offered	Related Occupation	Related Occupation
3Yrs.	0 Yrs.	0 Yrs

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of first line supervisor/manager, construction trades must have three years of experience as a first line supervisor/manager, construction trades.

On appeal, counsel states:

> The Service disregarded the previously submitted evidence regarding job experience on two grounds. First, the Service stated that the experience letter dated October 10, 2002, signed by Inc., only referred to experience gained during the Beneficiary's employment with the Petitioner. The Petitioner recognizes that experience gained during employment with the Petitioning company will not be considered for purposes of showing that the Beneficiary possesses the required experience for the instant petition. However, the Petitioner also submitted a letter dated March 19, 2003, signed by of , Inc., that states the Beneficiary performed work as a Supervisor/Carpenter from March 1990 through until [sic] October, 1995. This letter clearly covers a 5 year time period in which the Beneficiary gained experience as a Supervisor/Carpenter. As the required job experience for the instant petition is only 3 years, this letter alone qualifies the Beneficiary.
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> The Service rejected the validity of this letter, based on other evidence submitted. Specifically, the Service concluded that based on the wages earned during that time, that the Beneficiary could not have been performing the job duties of a Supervisor/Carpenter. The Service stated: "These earnings are significantly less than what a Supervisor would earn. The Petitioner failed to provide convincing evidence to support or substantiate the experience."
>
> The Service erred in making it's determination of past job experience based on the wages earned. Rather, the Service is required to consider the duties performed at the previous employment in determining whether the Beneficiary holds the requisite experience. See *Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991) (*en banc*). As the letter provided by Cresta Construction, Inc., explained that the Beneficiary performed the duties of a Supervisor/Carpenter, this letter must be given proper consideration in determining whether the Beneficiary holds the experience required for the instant position because the Beneficiary clearly performed the duties of a Supervisor/Carpenter.

Counsel is correct in part. The director should have looked beyond the wages paid to the beneficiary by Inc., as those wages were for the years 1999 through 2001. According to the Form ETA 750, the beneficiary was already working for the petitioner at that time, and it appears that the beneficiary was supplementing his income by working for Inc. on a part-time basis. However, the letter submitted by does not clearly indicate that the beneficiary worked for Inc. in a full-time capacity during the years 1990 through 1995. Instead, the letter states that the beneficiary "used to work 40 hours per week." This statement is not sufficient evidence of the beneficiary's prior experience in that there is no indication that the beneficiary worked the entire five years in a full-time

capacity (or at least the required three years), and there is no indication when the beneficiary switched to working on a part-time basis. Since the beneficiary continues to be employed by , Inc. on a part-time basis, a letter from must clearly indicate the number of years worked on a full-time basis.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioning owners' household expenses, to provide its 2002 Form 1040, U.S. Individual Income Tax Return, additional resources with which to pay the proffered wage such as bank accounts, CDs, etc., a letter from , Inc. stating the exact number of years the beneficiary was employed in a full-time position by , Inc., and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 18, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.