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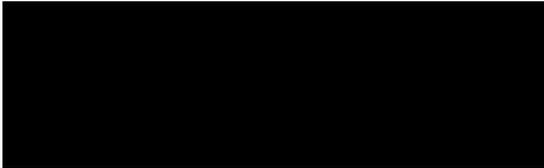


U.S. Citizenship
and Immigration
Services

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MAR 03 2005



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-054-52437

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.

Robert P. Wiemann
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 beauty pageant organizer. It seeks to employ the beneficiary permanently in the United States as a recruiter. 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 October 19, 1999. The proffered wage as stated on the Form ETA 750 is \$4,605.40 per month, which amounts to \$55,264.80 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with the petitioner's accompanying Schedules C, Profit or Loss From Business statement, for the years 1998¹, 1999, 2000, and 2001.

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

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$282	-\$1,040	\$2,513
Petitioner's gross receipts or sales (Schedule C)	\$24,399	\$22,401	\$24,983

¹ Financial information preceding the priority date in 1999 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Petitioner's wages paid (Schedule C)	\$9,600	\$0	\$0
Petitioner's net profit from business (Schedule C)	\$282	-\$1,040	\$2,704

The petitioner's accompanying cover letter stated that it is a northern California-based franchise and the "biggest and most prestigious pageant in the Asian Community of the United States." The petitioner stated that its profits are "largely earned from the pledges of private companies and sponsors," and that it "maintains numerous sponsors pledging reasonable amounts for the organization." The petitioner provided a list of its sponsors for its 15th annual pageant, which included fourteen merchants contributing \$5,000; six merchants contributing \$10,000; and miscellaneous sources of income including \$60,000 from ticket sales, \$22,000 from souvenir book advertisements, and \$10,000 from souvenir book sales.

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 March 13, 2003, the director issued a notice of intent to deny pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated that the evidence the petitioner submitted with its initial petition failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner re-submitted its sole proprietor's tax returns and proof that the sole proprietor sought an extension to file his 2002 tax return. The petitioner resubmitted previously submitted evidence as well as new evidence such as pageant souvenir books from 1999, 2000, and 2001, and news articles about various pageant years.

Counsel's accompanying letter cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the premise that the petitioner's failure to show net income that is greater than the proffered wage does not indicate its incapacity to pay the proffered wage. Additionally, counsel stated that the petitioner has been in business for 13 years and has been "making a living for itself . . . without any evidence of financial difficulties" aside from 2001 when the "September 11 terrorist attack resulted in a decrease in sponsorships for the pageant." Counsel states that as the years go by, the petitioner's beauty pageants have become more sophisticated and publicized but in 1998 and 1999 its costs "rocketed because of the costs of their efforts in witching to mainstream beauty pageants." Counsel stated that the petitioner does not report its monetary pledges from private companies and sponsors to the Internal Revenue Service (IRS), which is the source of revenue for the petitioner's employees' salaries.² Counsel stated that the petitioner expects a total volume of between \$150,000 to \$175,000 from sponsors for "this year's" 15th annual pageant, and that a negotiated television broadcast will bring outstanding pledges of \$250,000 for expansion.

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 August 6, 2003, denied the petition. The director noted the petitioner's reported income on its tax returns as insufficient to cover the proffered wage and stated that the petitioner's pledges are a promise to pay but not a guarantee of payment.

² Counsel stated:

Salary paid to individuals who worked for the pageant is taken out from the monetary pledges, which are not reflected on the tax returns. Tax returns do not reflect the pledges from sponsors and sales of other [of the petitioner's] activities but only the sales of souvenir items of their pageants.

(Emphasis in original).

On appeal, counsel reiterates arguments made in response to the director's notice of intent to deny the petition and states that the petitioner's hiring of a recruiter will increase its business "not only in the actual number of sponsors but also in the actual number of people who are patronizing the pageants." Counsel states that the pledges made to the petitioner from private companies and sponsors are guaranteed because a legal contract exists. Counsel states that the petitioner met its burden of proof since the evidence establishes that it has shown by a preponderance of evidence that it is "probably" true that the petitioner has the continuing ability to pay the proffered wage. Finally, counsel states that denying the petition would result in hardship to the petitioner since it tried to find a qualified U.S. worker for the position but no one applied, and extreme hardship to the beneficiary whose family has attempted to legalize their immigration statuses for the past sixteen years. The petitioner resubmits previously submitted evidence as well as new evidence in the form of documents submitted in connection with its Form ETA 750 application for labor certification application to the U.S. Department of Labor (DOL).

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 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. 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)³ (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-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).

³ Contrary to counsel's assertions, *Elatos Restaurant Corp. v. Sava* does apply to the instant case for the premise that CIS may examine income tax returns as part of its evaluation of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 one. In 1999, the sole proprietorship's adjusted gross income of \$282 cannot cover the annual proffered wage of \$55,264.80. It is impossible that the sole proprietor could support himself for an entire year on \$282 and pay the proffered wage. Likewise, in 2000 and 2001, the sole proprietorship's adjusted gross incomes of -\$1,040 and \$2,513, respectively, cannot cover the annual proffered wage of \$55,264.80 and it is impossible that the sole proprietor could support himself for an entire year on -\$1,040 or \$2,513 and pay the proffered wage in each respective year.

No evidence was provided concerning the contracts underlying the pledges purportedly made in support of the petitioner's 15th pageant. The date of the 15th pageant has not been established. A list of private companies and amounts of money do not indicate that these monies were actually received by the petitioner or are obligated to be paid to the petitioner. It was not explained why certain funds are omitted from the petitioner's tax returns. The only broad assertions made on these points have come from counsel, not the petitioner or sole proprietor, and no specific corroborative independent evidence has been submitted to bolster the assertions. 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). 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).

Additionally, the list of pledges for the 15th pageant is unaudited, which is 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.

Counsel states that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applies to the instant case. *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.

Although there have been fourteen previous pageants, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1999, 2000, or 2001 were uncharacteristically unprofitable years for the petitioner. The petitioner's tax returns show that each year resulted in similar gross receipts for the petitioner and adjusted gross income for the sole proprietor. No

evidence was provided concerning the expansion and sophistication or mainstreaming of the petitioner's pageants other than voluminous news articles and souvenir brochures about its pageant winners. Typically expansions involve business plans or other evidence of clear business activity and direction undertaken to achieve a projected goal typically advised or supervised by financial management⁴. A volume of newspaper articles and souvenir brochures about pageants illustrates that the petitioner holds pageants, but not that it has expanded its business, altered its revenues and operating costs, and has met detailed goals.

Counsel 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.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The AAO has examined the record of proceeding in detail and in its entirety. The documentation provided fails to demonstrate that it is probably true that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reference to the petitioner's and the beneficiary's potential and speculative hardship and its process undertaken with DOL has no relevance in these proceedings. Counsel fails to cite legal authority for the relevant of such points to a determination concerning the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 1999, 2000, or 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, or 2001. 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.

⁴ Such evidence could include, but is not limited to, business plans, invoices, audited financial reports projecting earnings, hiring plans, marketing and advertising plans and customer receipts, etc.