

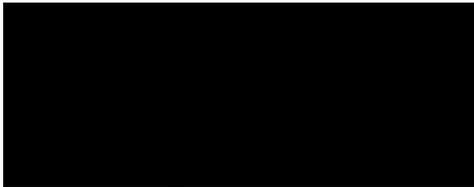
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 04 2005**

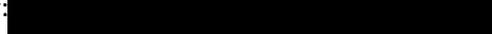
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IN RE:

Petitioner:

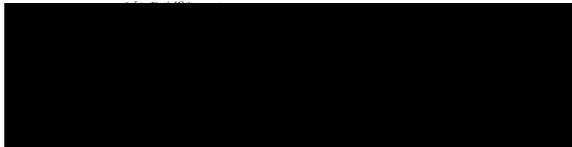


Beneficiary:



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:



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 an automotive body repair firm. It seeks to employ the beneficiary permanently in the United States as an automotive body repairer. 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, the petitioner, through counsel, asserts that the director misinterpreted the evidence and should have approved the petition.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$18.63 per hour, which amounts to \$38,750.40 annually. The ETA 750B, signed by the beneficiary on October 1, 1997 and subsequently amended in October 1998, does not indicate that the petitioner has employed him.

On Part 5 of the visa petition, the petitioner claims that it was established 1991 and currently has one employee. The petitioner is structured as a sole proprietorship.

In support of its continuing financial ability to pay the proposed wage offer of \$38,750.40 per year, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. It shows that the sole proprietor files as a single person. Schedule C, Profit or Loss from Business,

reflects the financial data of the sole proprietor's business operations. It also states that the petitioner's principal business is "used auto wrecking." Line 31 of Schedule C shows the net profit of an individual business. Any cumulative business income is carried forward to page 1 of the return and is reflected as a combined total on line 12 and included in the calculation of the sole proprietor's adjusted gross income. The sole proprietor reported a net business profit of \$41,246 in 2001. This includes gross receipts or sales of \$321,024, cost of goods sold of \$211,552, and total expenses of \$66,106. Expenses include \$2,920 in wages paid. For 2001, the sole proprietor declared an adjusted gross income of \$38,332.

On March 25, 2003, the director requested additional evidence from the petitioner in support of its ability to pay the proffered salary. The director requested copies of the petitioner's Internal Revenue Service (IRS) original computer printouts of the tax returns filed for the years 1997 to the present. The director also advised the petitioner that it could submit annual reports or audited financial statements for the same years.

In response, the petitioner submitted the requested federal tax return information. The 1997 and 1998 printouts did not include specific data from Schedule C. The IRS tax return printouts reflect the following information for the following years:

	1997	1998	1999	2000	2002
Adj. gross income (Form 1040)	\$25,128	\$32,306	\$ 13,022	\$ 22,242	\$ 34,265
Business gross receipts or sales (Sched. C)	n/a	n/a	\$213,931	\$293,506	\$314,450
Business cost of goods sold	n/a	n/a	\$137,312	\$199,601	\$220,457
Business wages paid (Sched. C)	n/a	n/a	\$ 10,700	\$ 12,190	-0-
Business total expenses (Sched. C)	n/a	n/a	\$ 62,625	\$ 67,191	\$ 58,443
Business net business income (Form 1040)	n/a	n/a	\$ 13,994	\$ 23,914	\$ 34,650

The petitioner also provided six photographs of wrecked automobiles. Counsel's transmittal letter asserts that these photos represent an additional \$246,000 to \$400,000 worth of inventory available to pay the proffered wage.

On June 23, 2003, the director requested additional evidence from the petitioner related to its ability to pay the beneficiary's wage offer. The director advised the petitioner that the tax return information previously submitted for 1997 and 1998 was incomplete and that he would require more complete data. He also instructed the petitioner that it could submit audited financial statements or annual reports. The director informed the petitioner that the previously submitted photographs did not establish the ownership or value of such vehicles.

In response, the petitioner, through counsel, indicated that it could not provide complete IRS printouts for 1997 and 1998 because the IRS only retained three years of tax returns in its database. A letter from the IRS was also submitted verifying this information, also indicating that it would take six to eight weeks to provide copies of the original returns.

The petitioner did supply two more photographs of damaged automobiles along with a copy of a January 1997 letter from Farmer's Insurance Company acknowledging receipt of a claim from the sole proprietor against its insured. Another attachment of a summary of damage to twenty vehicles in January 1997 was also provided. Its introductory paragraph reflected that the itemized list represented damages to automobile parts

that were sustained by the sole proprietor. The cumulative damage totals \$16,335. Counsel's cover letter indicates that this claim occurred as a result of a windstorm and is additional corroboration of the value of the petitioner's inventory.

In response to the director's request for evidence, the petitioner also offered a copy of its current state vehicle dismantler license and copies of its purchasing and dismantling ledger showing the date of purchase and disposition of various vehicles it has acquired since 1997. Counsel asserts in his cover letter that the petitioner's 577 damaged cars purchased since 1996, if valued individually as car parts, are worth between \$250,000 and \$500,000.

The director denied the petition on October 22, 2003. The director concluded that the adjusted gross income shown on the tax returns was not sufficient to pay the proffered wage and that the other evidence in the record also failed to demonstrate adequate other resources to cover the certified wage of \$38,750.40 per year. The director observed that the purchasing and dismantling record did not establish value of the petitioner's inventory as separate car parts and noted that the petitioner's inventory itemized on the tax returns was the only evidence in the record presented as dollar values.

On appeal, counsel asserts the claims previously submitted in response to the director's request for additional evidence. He reiterates that the 577 vehicles itemized by the petitioner's purchasing and dismantling record, which documents the dates of acquisition of the damaged vehicles, plus the photographs contained in the record, establish a reasonable minimum value of the petitioner's inventory at between \$250,000 and \$500,000. Counsel asserts that the director erred in failing to consider this evidence.

Counsel's reliance on the petitioner's purchasing and dismantling record is misplaced. The director discussed the petitioner's purchasing and dismantling ledger and concluded that it failed to show the petitioner's ability to pay the proffered wage. As affirmed by counsel, the only values stated in this record are values of automobiles sold as whole units, not "parted out." The ledger indicates that over a six to seven year period, forty-three vehicles, or approximately 7% are listed with dollar values. Other than the petitioner's tax returns and the 1997 insurance claim for damages to twenty vehicles, this is the only definitive evidence contained in the record of the value of any of the petitioner's inventory. Counsel's hypothesis of the value of such inventory does not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Moreover, no evidence was submitted to demonstrate why the petitioner's inventory reported on this purchasing and dismantling record somehow represents additional available assets that were not reflected as inventory on Part III of Schedule C of the tax returns. This section summarizes the items composing the "cost of goods sold" in a given year, which is already factored into the business net income after deducting expenses. Further, as noted by the director, even if viewed as a relevant asset, until 2002, each available figure given for the value of the petitioner's inventory at the end of the year did not exceed the proffered wage of \$38,750.40. No persuasive rationale is contained in this record of proceeding that shows why such an inventory of damaged vehicles should be viewed apart from the figures reflected as inventory on the petitioner's tax returns. It is noted that while 8 C.F.R. § 204.5(g)(2), allows additional material "in appropriate cases," the petitioner in this case has not convincingly demonstrated why the documentation, such as federal tax returns or audited financial statements, specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise represents an inaccurate financial profile of the petitioning business.

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 may have 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, although counsel claims that the petitioner has employed and paid cash compensation to the beneficiary, no credible documentation is contained in the record to reflect such payment or to identify exactly who received the wages of \$10,700 in 1999, \$12,190 in 2000, and \$2,920 in 2001, as shown by the pertinent tax returns.¹ As stated above, assertions of counsel relevant to this issue cannot be considered as evidence. See *Matter of Obaigbena, supra*.

Similarly, counsel also urges the consideration of the beneficiary's proposed employment as an indicator that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of an alien beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. In this instance, other than counsel's assertion presented on appeal, no detail or documentation has been provided to explain how the beneficiary's employment as an automotive repairer will significantly increase net profits for the petitioner. See *Matter of Obaigbena, supra*.

If the petitioner does not establish that it may have 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner in this case 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. As noted above, 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).

¹ Additionally, no labor costs have been claimed on any of the submitted tax returns.

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 certified wage offer is \$38,750.40 per year. Although the sole proprietor files as a single person and declares no dependents, even without considering any living expenses, the proffered wage exceeded the sole proprietor's adjusted gross income by \$13,622.40 in 1997, \$6,444.40 in 1998, \$25,728.40 in 1999, \$16,508.40 in 2000, \$418.40 in 2001, and by \$4,485.40 in 2002. Based on these consistent shortfalls, it cannot be concluded that the sole proprietor's adjusted gross income demonstrates a sustainable ability to pay the proffered wage in any of the pertinent years.

Counsel also argues that the petitioner's record of earning a profit bodes well for its future prospects of success and establishes its ability to pay the proffered wage. Similar principles were enumerated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. 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, as noted above, 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. Based on the evidence submitted to the record, the AAO cannot conclude that the petitioner has demonstrated that such unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary 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.