

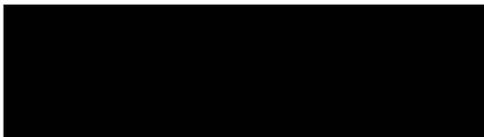
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**U.S. Citizenship
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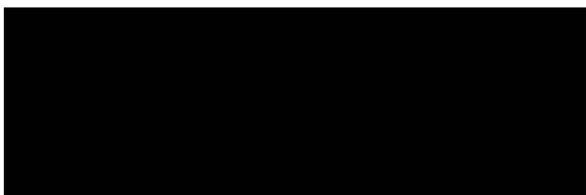
Date: **AUG 09 2006**

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for investigation and entry of a new decision.

The petitioner is a painting firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$940 per week, which amounts to \$48,880 annually. The ETA 750B, signed by the alien beneficiary on February 14, 2001, indicates that the alien has not worked for the petitioner.

The petitioner is structured as a sole proprietorship. On Part 5 of the visa petition, filed on March 10, 2003, it is claimed that the petitioning business has one employee, a gross annual income of \$81,199 and a net annual income of \$9,140. With the petition, the petitioner submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001, including Schedule C, Profit or Loss from Business. It shows that the sole proprietor files his tax returns jointly with his spouse and declares no dependents.

The tax return contains the following:

	2001
Wages, salaries, tips, etc. (Form 1040)	\$ 50,511

Net business income (Schedule C and Form 1040)	\$ 9,140
Adjusted Gross Income	\$58,510

On February 5, 2004, the director requested additional evidence from the petitioner. She instructed the petitioner to submit a copy of the sole proprietor's birth certificate and also requested a copy of the monthly household expenses for 2001. She did not request any further specific evidence of the petitioner's continuing ability to pay the proffered salary in 2002 or 2003.

In response, the petitioner, through counsel, submitted the requested documents, including a summary of the sole proprietor's monthly household expenses amounting to \$2,810 per month or \$33,720 per year.

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 June 4, 2004, denied the petition. Reviewing the sole proprietor's 2001 adjusted gross income of \$58,510 and the list of household expenses submitted in response to the request for evidence, the director concluded that after deducting the \$33,720 for household expenses from the adjusted gross income, the remaining \$24,790 was not sufficient to pay the proffered wage of \$48,880.

On appeal, counsel resubmits copies of various documentation previously supplied to the record, along with a letter from the beneficiary's church and a letter from the sole proprietor vouching for the beneficiary's character. Except for sole proprietor's admission that over the past four years the beneficiary "has worked with me," these letters are irrelevant to the issue on appeal as they do not directly speak to the petitioner's ability to pay the proffered wage.

Counsel asserts on appeal that consideration of the petitioner's financial profile falls within the context of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. 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 *Sonogawa* 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 petitioner had 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. In this case, the petitioner's 2001 tax return fails to establish that the petitioning business has demonstrated a framework of profitable years. It is noted that the petitioner's net business income of \$9,140 comprised a small part of the sole proprietor's adjusted gross income of \$58,510, which appeared to be primarily derived from wages of \$50,511 from unidentified employment. It cannot be concluded that the petitioner's evidence establishes that similar unusual circumstances exist in this case, which parallel those in *Sonogawa*.

Counsel does submit with the appeal, a copy of a Form 1099-Miscellaneous Income, showing nonemployee compensation of \$30,840 paid to the beneficiary in 2001. The 2001 tax return filed by the sole proprietor shows a total of \$45,144 paid to independent contractors as reflected on Form 1099s filed. Counsel contends

that this 2001 compensation of \$30,840 paid to the beneficiary should be considered in reviewing the petitioner's ability to pay the proposed wage offer of \$48,880.

The AAO agrees and will remand this case for consideration of this factor in subsequent years. 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. In this case, the petitioner paid the beneficiary as an independent contractor as shown by the Form 1099 submitted on appeal. The compensation paid was \$30,840 or \$18,040 less than the proposed wage offer of \$48,880.

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). 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.

In this case, as mentioned above, the petitioner is structured as a sole proprietorship. It 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 individual owners' 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 as sole proprietorships 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. Existing business expenses as well as the ability to pay the proffered wage must be shown to be covered by their adjusted gross income or other available funds. In addition, sole proprietors must show that they can personally sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In order to review whether sole proprietors can personally support the household and dependents, as well as pay the proffered wage, as in this case, CIS frequently requests a summary of household living expenses from petitioners.

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 tax returns reflect that the sole proprietors consist of a family of two. The petitioner requires an additional \$18,040 to demonstrate its ability to pay the full amount. After paying the household expenses of \$33,720, the sole proprietor would have \$24,790 to cover the shortfall of \$18,040 from his

adjusted gross income of \$58,510. This is sufficient to demonstrate the petitioner's ability to pay the proffered wage in 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) requires, however, that a petitioner demonstrate a *continuing* ability to pay a proffered salary, beginning at the priority date. As noted above, the case will be remanded to the director for further investigation of any wages or compensation paid to the beneficiary in subsequent periods.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.