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U.S. Citizenship
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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **JAN 24 2006**

EAC-03-131-51379

IN RE:

Petitioner:

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition and a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing and home improvement business. It seeks to employ the beneficiary permanently in the United States as a roofer. 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 statement.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$20.44 per hour, which amounts to \$42,515.20 annually. The beneficiary represented that he was not current employed by the petitioner at the time of filing the Form ETA 750.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted the first two pages of his individual income tax returns for 2000 and 2001, and a complete individual income tax return with the petitioner's accompanying Schedule C, Profit or Loss from Business statement for 1999¹. The petitioner also submitted a copy of a residential real estate property assessment determination for a residence belonging to the sole proprietor and his spouse showing valuation at \$69,250 and copies of the petitioner's bank statements for June, July, and October 2002 reflecting an average balance of approximately \$7,500.

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 16, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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. The director specifically requested, *inter alia*, the sole proprietor's monthly expenses.

In response, counsel itemized the sole proprietor's monthly expenses, which totaled \$1,600 and annualized to \$19,200.

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 25, 2004, denied the petition citing the low balances in the petitioner's bank account and insufficient income left after reducing the petitioner's net profit by the sole proprietor's monthly expenses.

On motion to reopen/reconsider, counsel asserted that the sole proprietor has sufficient personal assets from which to pay the proffered wage, including proceeds from the sale of his house and other bank funds. Counsel also asserted that the director should consider the depreciation non-cash outlay in 2001 as additional evidence of the petitioner's ability to pay the proffered wage and pro-rate the petitioner's financial obligation to pay the proffered wage from the priority date onwards in that year. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the premise that many factors should be considered when determining a petitioning entity's continuing ability to pay the proffered wage including the length of time a business has been in business, whether its revenues steadily increase, its assets base, etc. The petitioner submitted a copy of bank statements in the name of his wife and dividend distributions on individual retirement accounts (IRA), certificates of deposits (CD), and stocks; Schedule C to his individual income tax return for 2001; a copy of a mortgage paid in full on the sole proprietor's private residence on November 20, 2003; and a copy of a real estate settlement statement reflecting that the sole proprietor sold their residence for \$89,009 on November 21, 2003.

The director construed the motion as a motion to reopen, granted it, and affirmed her prior decision on August 26, 2004 stating that the bank statements do not reflect cash with ending balances that increase and remain above the proffered wage for a sustained period of time.

On appeal, counsel reiterates the arguments in his prior motion and asserts that the director erred by failing to consider pro-rating the petitioner's financial obligation to pay the proffered wage in 2001.

The 2001 tax return reflects the following information:

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$39,895
Petitioner's gross receipts or sales (Schedule C)	\$144,673
Petitioner's wages paid (Schedule C)	\$0
Petitioner's cost of labor (Schedule C)	\$0
Petitioner's net profit from business (Schedule C)	\$36,749

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 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 contrary to counsel's assertion. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. If CIS were to prorate the proffered wage and the petitioner's annual expenses as suggested by counsel, CIS would also prorate the petitioner's net income and thus, the results would be the same as if working with non-prorated figures.

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).

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 four. In 2001, the sole proprietorship's adjusted gross income of \$39,895 fails to cover the proffered wage of \$42,515.20 without reducing the adjusted gross income amount by the sole proprietor's annualized expenses of \$19,200. It is impossible that the sole proprietor could support himself and his family on a deficit, which is what would remain after reducing the adjusted gross income by the amount required to pay the proffered wage and pay his personal expenses.

The sole proprietor asserts that the proceeds from the sale of his residential property should be considered towards the petitioner's continuing ability to pay the proffered wage. However, the sale was completed in November 2003 and the priority date is April 2001. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Even if those funds were available in April 2001, no evidence was provided to demonstrate where the real estate proceeds went to – a bank account, savings account, or another real estate property. Employers do not typically liquidate property to pay employee wages, so the petitioner would have had to provide evidence that those funds remained unencumbered and liquid for a sustainable period.

Finally, the petitioner maintains a balance of approximately \$7,500 in a checking account. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The record contains bank statements covering three months in 2002, but the priority date is April 2001, so again, the petitioner could not establish the element for the approval of the petition at the time of filing based upon those evidentiary submissions². Additionally, that average balance is not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months. The petitioner also submitted his spouse's bank account records for 2001. However, those records reflect that her balance went from \$3,154.42 in January 2001 to \$2,008.42 by December 2001. Her CD, IRA, and stock dividends are also nominal³ and do not reflect sufficient funds from which to overcome the information contained in the petitioner's tax returns and the lack of significant personal assets from which to demonstrate the petitioner's continuing ability to pay the proffered wage. Additionally, the sole proprietor's spouse is not listed as a signatory to the visa petition and thus her assets could be considered separate from the petitioner's accessible funds since she did not obligate herself to sponsoring the beneficiary and the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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

² As noted above, a petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. at 49 (Comm. 1971).

³ There is one \$1000 CD, one \$500 CD, and balances in her other investment funds ranging from a few hundred to a few thousand dollars. One fund got up to approximately \$13,000, but this would still not present sufficient income to pay the proffered salary of \$42,515.20.

\$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.

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

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 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.