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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 10 2006
SRC 04 022 51223

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a masonry contractor. It seeks to employ the beneficiary permanently in the United States as a mason. 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. Accordingly, the director denied the petition.

On appeal, counsel states the director focused exclusively on the petitioner's adjusted gross income and failed to take into consideration other financial factors. Counsel submits no further documentation.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$15.55 per hour, which amounts to \$32,344 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 2000.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2000. The petitioner did not identify its net annual income or number of employees on the petition. In support of the petition, the sole proprietor submitted Form 1040 for tax year 2001 that indicated an adjusted gross income of \$8,586. The accompanying Schedule C, Profit or Loss from Business, indicated gross receipts of \$90,399, and wages paid of \$65,796. The sole proprietor also submitted his W-2 Form for 2001 which indicated he was paid \$65,796.25 in 2001. In addition the sole proprietor submitted an offer of employment letter for the beneficiary, and a letter of employment verification submitted by [REDACTED] Mexico City, Mexico. Mr. [REDACTED] stated that the beneficiary had worked as a mason for his company for five years.¹

¹ These two letters are contained in the I-485 petition documentation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 8, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the sole proprietor provide a copy of its 2001, 2002, and 2003 federal tax returns, as well as a copy of a W-2 Form for each employee in 2001, 2002, and 2003. Finally the director requested copies of Form 941, Federal Quarterly Tax report, for each quarter in 2004.

In response, the sole proprietor submitted a document entitled "Assumed Name Records" from the Office of the County Clerk, Brazoria County, Texas. The document states that [REDACTED] was the assumed name for a **sole proprietorship business owned by [REDACTED]**. The sole proprietor also submitted its Forms 1040, with accompanying Schedules C, for tax years 2001, 2002, and 2003. The tax forms indicated the sole proprietor had adjusted gross income for the tax years 2001 to 2003 as follows: \$8,597, \$8,668, and \$19,563. The sole proprietor submitted no further documentation with regard to any employees.

On December 2, 2004, the director denied the petition. In his denial, the director noted that the petitioner had submitted no further information with regard to its employees, therefore, it could not be determined if the sole proprietor had ever paid the beneficiary the proffered wage. The director also noted that since the petitioner was a sole proprietorship, the proprietor's individual expenses must be considered in calculating funds available to pay the beneficiary's proffered wage. The director stated that CIS may reasonably rely on net taxable income, rather than gross receipts when examining a petitioner's ability to pay a proffered wage.² The director stated that funds expended for a business's operating expenses such as advertising, insurance, and salaries cannot be considered as available to pay the proffered wage, while funds expended for the beneficiary's wage/salary, may be considered as available.³ The director then examined the sole proprietorship's adjusted gross income for each tax year, namely \$8,597, \$8,668, and \$19,563; any other available income as documented by the tax records; and the number of dependents the sole proprietor had to support each year. Based on this examination, the director determined that the sole proprietor did not have the ability to pay the proffered wage of \$32,344 as of the 2001 priority date and up to tax year 2003, based on its adjusted gross income.

On appeal, counsel states that the director in his decision focused on a policy memorandum issued by William Yates outlining an "unorthodox" method of calculating the net assets of the petitioner from Schedule L of the corporate tax return. Counsel states that net assets is an unrealistic figure that does not provide an accurate economic picture of the petitioner's financial wellbeing. Counsel then states that CIS fails to take into consideration the precedent decision, *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967).

Counsel states that in *Sonogawa*, the Board of Immigration Appeals (BIA) did not rely on the petitioner's net income, but rather took into account other factors. Counsel identified these extenuating factors in *Sonogawa* as the

² The director uses the term "net taxable income" in his decision, the AAO refers to this figure as net income when examining the financial records of corporations. In sole proprietorships, adjusted gross income is primary financial figure examined, as well as the sole proprietor's assets and personal liabilities. The AAO will discuss the sole proprietor's adjusted gross income, assets and personal liabilities further in these proceedings.

³ Although the director did not explicitly state such in his decision, if the sole proprietor had established that it paid the beneficiary a wage as of the 2001 priority date, the sole proprietor would then only have to establish that it had the ability to pay the difference between the beneficiary's actual wages and the proffered wage.

petitioner had been in business for over 11 years; the petitioner was seeking the services of the beneficiary which was an indication that the petitioner was planning to continue in the business; the petitioner employed four to eight employees without any evidence of financial difficulties; the petitioner presented a financial statement that indicated that the year in question was not profitable; and that the petitioner's plan to hire the beneficiary would increase business.

Counsel states that it is obvious that the sole proprietor has demonstrated reasonable expectations that the business will continue to function and is expected to be profitable. Counsel states that every year since 2001, the entire staff of employees and contract labor had been fully paid and that the sole proprietor continues to increase revenues.

Upon review of the record, counsel's reference to a policy memorandum written by William Yates with regard to the review of Schedule Ls in examining the petitioner's ability to pay the proffered wage is immaterial. The director did not examine any Schedules L in the present proceedings as the petitioner is a sole proprietor and does not submit a Schedule L, which is a tax form submitted by corporations. The director did refer to precedent decisions that allow for the examination of a petitioner's net income to establish the ability to pay the proffered wage. As will be discussed further, a sole proprietor's net income is established on Form 1040, as adjusted gross income.

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. Although the beneficiary indicated on the Form ETA 750, that the sole proprietor had employed him since May of 2000, the sole proprietor submitted no evidentiary documentation, such as pay slips, or Forms 1099-MISC to further substantiate this assertion. In fact, the only evidence on the record with regard to any wages paid by the sole proprietor is the W-2 Form submitted for tax year 2001 that indicates all wages in that year were paid to the sole proprietor. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the sole proprietor did not establish that it employed or paid the beneficiary the proffered wage, or any wages, prior to or following the 2001 priority date.

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); *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).

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 himself and his wife in the years 2001 and 2002. In tax year 2003, he supports himself, his wife, and one child. As previously stated, the petitioner's adjusted gross income in the years 2001 to 2003 is the following: \$8,597, \$8,668, and \$19,563. It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal monthly household expenses. Nevertheless, even without such information, the sole proprietor's adjusted gross income for the years 2001 and 2002, minus the proffered wage of \$32,344, leaves a substantial negative adjusted gross income to support a household of two family members. With regard to tax year 2003, the sole proprietor's adjusted gross income, minus the proffered wage of \$32,344, leaves a substantial negative adjusted gross income to support a household of three family members. Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and the respective dependents, based on his adjusted gross income.

In addition, the sole proprietor has not identified any further assets that are readily available or liquidable with which to pay the proffered wage.

Finally, counsel urges the consideration of the totality of the sole proprietor's circumstances when examining the ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Sonogawa* 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.

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 sole proprietor. In fact, the sole proprietor has not had an unprofitable year to date. With regard to counsel's statements as to the sole proprietor's employees and contract labor always being paid, and the sole proprietor's planning to hire the beneficiary to help increase the business revenues, 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). The record reflects no information with regard to any employees and their wages, beyond the wages paid to the sole proprietor in 2001. The Form ETA 750 submitted to the record indicates that the petitioner already employs the beneficiary, thus the record is not clear as to how any prospective hiring would impact the sole proprietor's future revenues. Finally it is also noted that the petitioner in *Sonegawa* had been in business for 11 years when it petitioned for the beneficiary, while the sole proprietor in the instant petition had been in business for one year as of the April 2001 priority date.

The petitioner has not established that it has the ability to pay the proffered wage as of 2001 and onward. 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 with regard to the petitioner's ability to pay the proffered wage. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.