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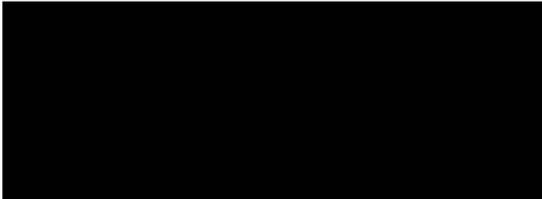
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
EAC 03 129 50268

Office: VERMONT SERVICE CENTER

Date: OCT 25 2006

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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 15, 2004 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$13 per hour, 40 hours per week or \$27,040 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position and an unspecified number of years of high school education.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup> Relevant evidence in

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

the record includes: the petitioner's Schedule C, Profit or Loss from Business (Sole Proprietorship), filed in conjunction with the sole proprietor's Form 1040, U.S. Individual Tax Return, for 2000, 2001, 2002 and 2003; the sole proprietor's Form 1040 for 2000, 2001, 2002 and 2003; and the sole proprietor's letter dated November 5, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1980 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that the beneficiary will generate income sufficient to cover the proffered wage and that the petitioner has demonstrated the ability to pay the wage from the priority date onwards.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition that is later based on that Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period of analysis, 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). Thus, the sole proprietor's adjusted gross income, assets and personal

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are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 (7<sup>th</sup> 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 this case, the sole proprietor indicates on the Form 1040 that he and his wife have two dependents. He did not provide other information regarding his annual, household expenses. The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$31,742	\$22,830
Petitioner's gross receipts or sales (Schedule C)	\$36,070	\$38,200
Petitioner's wages paid (Schedule C)	\$1,800	\$1,800
Petitioner's net profit from business (Schedule C)	\$9,401	\$8,998
	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$26,384	\$12,824
Petitioner's gross receipts or sales (Schedule C)	\$36,850	\$33,600
Petitioner's wages paid (Schedule C)	\$1,800	(none claimed)
Petitioner's net profit from business (Schedule C)	\$8,029	\$9,385

Given that the priority date falls in 2001, the information from the Form 1040 for 2000 need not be considered at this point, though it will be considered in the totality of the circumstances analysis which follows. In 2001, 2002 and 2003, the sole proprietor's adjusted gross income of \$22,830, \$26,384 and \$12,824, respectively, fails to cover the proffered wage of \$27,040. Further, the sole proprietor could not support his household on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage in each of these years.

Where the record does not indicate that the sole proprietor has sufficient net income or sufficient personal assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities and the totality of the circumstances concerning a petitioner's financial performance, when determining its ability to pay the wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition that had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably more than the petitioner's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's net profit, including financial data, the petitioner's reputation and clientele, its number of employees, future business plans, news articles, and explanations of the petitioner's temporary financial difficulties. The Regional Commissioner looked beyond the petitioner's inadequate net income for the year

of filing and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the proffered wage.

Accordingly, CIS may, in its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a sole proprietor's net income and personal assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only relevant forms of evidence provided by the petitioner are the Form 1040 and accompanying schedules for the years 2000 through 2003. This is not sufficient evidence to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonegawa*, nor to establish whether 2000 through 2003 were uncharacteristically unprofitable years for the petitioner/sole proprietor.

Likewise, the petitioner has failed to present sufficient evidence to support its claim that the beneficiary will generate income such that it will have the funds necessary to pay the proffered wage. To support the claim, the petitioner provided the beneficiary's Form 1040 for 2003 which indicates that the beneficiary earned \$9,308 in gross receipts or sales and a net income of \$6,887 during 2003 as a self-employed, sole proprietor cosmetologist. Such documentation is not sufficient to demonstrate that the beneficiary would increase profits for the petitioner/sole proprietor to the extent that he could have paid the proffered wage of \$27,040 and covered his household expenses from the priority date onwards. It cannot be found that the petitioner's hypothesis of significantly increased income from the beneficiary outweighs the evidence presented in the tax returns reviewed earlier. To counter arguments put forth which utilize the projection of future earnings to demonstrate the ability to pay the proffered wage, the Acting Regional Commissioner in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

It is also noted that any income which the proprietor received from trusts and estates as listed on the Form 1041, U.S. Income Tax Return for Estates and Trusts, is also listed as income on the Form 1040. The income listed on the Form 1041 shall not be added to the adjusted gross income listed on the Form 1040 such that estate and trust income would be double counted when analyzing the petitioner's ability to pay the proffered wage.

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.