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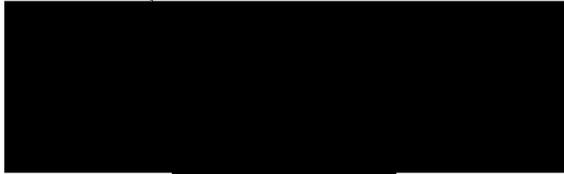
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
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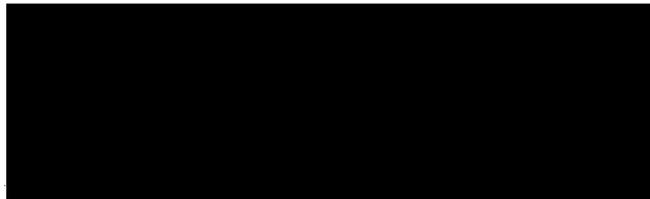
Petitioner:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner subsequently submitted a motion to reopen the matter. The director granted the motion and then subsequently denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a knitting and cutting garment business. It seeks to employ the beneficiary permanently in the United States as a knitter mechanic/technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. On June 1, 2005, the director determined that the petitioner had not established that, as a sole proprietor, it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and pay the sole proprietor's household expenses based on the sole proprietor's adjusted gross income. The director also stated that the petitioner had failed to establish that the beneficiary was qualified to perform the duties of the proffered position, based on a deficient letter of verification of previous work experience. The director denied the petition accordingly. On motion, counsel submitted further evidence with regard to the petitioner's ability to pay the proffered wage and with regard to the beneficiary's qualifications to perform the duties. On August 1, 2005, the director determined that the petitioner still had not established its ability to pay the proffered wage.¹

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 June 1, 2005 denial, there were two issues in this case, namely, whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary is qualified to perform the duties of the proffered position. The AAO will first address the issue of whether the petitioner has the ability to pay the proffered wage, and then examine the second issue of the beneficiary's qualifications.

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 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.

¹ In his August 1, 2005 decision as to the motion submitted by counsel, the director did not address the evidence submitted to the record with regard to the beneficiary's qualifications to perform the duties of the position. The AAO will examine this evidence further in these proceedings.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on December 12, 2001. The proffered wage as stated on the Form ETA 750 is \$15.50 an hour, or \$32,240 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 upon appeal². On appeal, counsel appears to submit evidence previously submitted on motion, namely, statements from three banking accounts, the petitioner's Forms 1040, U.S. Individual Income Tax Return, for tax years 2001 to 2004. Counsel also submits a letter from the sole proprietor, [REDACTED] dated August 15, 2005. In his letter, [REDACTED] states that he had operated a clothing manufacturing business in Los Angeles since 1985, although his factory had burned to the ground in May 2000. [REDACTED] states that he started his present business in late 2000. [REDACTED] further states that it has been hard to find a suitable technician to take care of 45 knitting machines operated in the sole proprietor's business, since most of the machines were made in Korea. [REDACTED] asserts that workers in the United States do not know how to manage and operate the machines. The sole proprietor states that the beneficiary has over 30 years of work experience in Korea, and without him, the sole proprietor's machines would shut down as he is one of the few persons who can operate and fix the flat knitting machines. The record also contains wage slips for the beneficiary from October 2004 to June 2005, as well as a copy of an interoffice memorandum written by William R. Yates, Former Associate Director for Operations, Citizenship and Immigration Services (CIS).³ Finally the sole proprietor submitted Forms DE-6 for all four quarters of tax year 2003 that indicated it paid one employee \$6,573 during 2003.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on April 1, 1997, currently employs one worker, and has gross annual income of \$304,208 and a projected net annual income of \$65,000 for tax years 2004. On the Form ETA 750B, signed by the beneficiary on November 30, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that bank account records and/or personnel records may be submitted as additional evidence of ability to pay the proffered wage. Counsel states that in the instant case, CIS failed to take into

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which 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 document newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

consideration all the income available to the sole proprietor, and based its determination of the petitioner's ability to pay the proffered wage solely on the sole proprietor's income.

Counsel then notes the copies of three banking account statements previously submitted to the record, and states that the sole proprietor and his dependents use the funds from these checking accounts to operate the sole proprietorship and also to sustain their living expenses. Counsel states that the balance on each statement reflects the balance after paying the business related expenses and living expenses for the sole proprietor and his dependents. Counsel also states that the average monthly balance is "the accurate reflection of the petitioner's accounts balance since it shows the average balance available during the month by averaging daily balance for each month." Counsel asserts that the ending balance is not the accurate reflection of the sole proprietor's account balance since the ending balance only shows the account balance for "one closing moment for each month." Counsel states that the average balance of the sole proprietor's checking accounts for December of 2001 was \$10,752.41, and that since the proffered wages is \$32,240 a year, or \$2,687 per month, the sole proprietor clearly had the ability to pay the proffered wage. Counsel then lists the average monthly balance for all three of the sole proprietor's bank accounts, for the months from January of 2002 to May of 2005, and also lists the combined average monthly balances for all three accounts. Counsel states that based on these checking accounts, the sole proprietor has the ability to pay the proffered wage.

Counsel also states that the sole proprietor has owned his own personal residence since 1998. Counsel states that the sole proprietor now has substantial equity in his home and is more than willing to spend money from this equity to cover his business and living expenses, if necessary.

Counsel also notes that the petitioner is a sole proprietor and as such the petitioner can choose to allocate money from its gross income to pay the beneficiary's wages, and adjust other expenditures as needed.

Counsel then states that the beneficiary obtained his work permit based on the filing of the I-140 and I-485 petitions in September 2004, and began working for the petitioner in October 2004. Counsel states that the memorandum from William Yates does not state that the beneficiary needs to work for the sole proprietor and be paid the proffered wages as of the priority date, but that the beneficiary needs to be employed and currently being paid the proffered wage. Counsel states that the wages paid to the beneficiary since he began working for the petitioner are sufficient evidence to establish the sole proprietor's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, 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 the instant case, the sole proprietor submitted the beneficiary's wage slips from October 2004 to June 2005.

These wage slips indicate a weekly salary of \$620, which would result in an annual wage of \$32,240.⁴ While the sole proprietor appears to have established that it employed and paid the beneficiary wages from October 2004 to June 2005 that meet the weekly salary stipulated by the Form ETA 750, this evidence does not establish that the sole proprietor had the ability to pay the proffered wage to the beneficiary as of the 2001 priority date. On motion and on appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since October 2004, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that Mr. Yates does not mention that the beneficiary needs to work and be paid the proffered wage as of the priority date.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is December 12, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in October 2004 when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage as of the 2001 priority date, in tax years 2002, 2003, and the entire 2004 tax year. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Thus the petitioner has not established its ability to pay the proffered wage, based on wages paid to the beneficiary. Thus, the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001, 2002, and 2003, and the difference between any wages paid to the beneficiary in 2004 and the proffered wage.

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).

⁴ The record is not clear as to why the sole proprietor did not submit the beneficiary's W-2 form for 2004, which would have provided more evidentiary weight to the sole proprietor's claimed payment of wages to the beneficiary. However, for further clarification of the issue, the AAO will accept the documentation of wage slips submitted to the record by the sole proprietor.

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, as counsel asserts, 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 two, himself and a spouse. The tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 14,544	\$ 22,526	\$ 21,404
Petitioner's gross receipts or sales (Schedule C)	\$ 293,189	\$ 269,403	\$ 304,208
Petitioner's wages paid (Schedule C)	\$ 22,558	\$ 15,080	\$ 6,573
Petitioner's net profit from business (Schedule C)	\$ 16,361	\$ 24,212	\$ 23,032
2004			
Proprietor's adjusted gross income (Form 1040)	\$ 9,774		
Petitioner's gross receipts or sales (Schedule C)	\$ 256,983		
Petitioner's wages paid (Schedule C)	\$ 6,820		
Petitioner's net profit from business (Schedule C)	\$ 10,518		

In tax years 2001, 2002, 2003 and 2004, the sole proprietorship's adjusted gross incomes of \$16,361, \$24,202, \$23,032, and \$10,518 fail to cover the proffered wage of \$32,240 during 2001, 2002, and 2003, and the difference between the beneficiary's claimed wages in 2004 and proffered wage. It is improbable that the sole proprietor could support himself and his spouse on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On motion and on appeal, counsel asserts that the available funds in the sole proprietor's bank accounts can be used to establish the sole proprietor's ability to pay the proffered wage. Counsel submits copies of bank accounts statements that include one business checking account with Nara Bank, in the name of the sole proprietor's business, a second standard checking account with Bank of America in the sole proprietor's name, and a third household checking account with Nara Bank, in the sole proprietor's name as well as [REDACTED]

[REDACTED] As stated previously, counsel on appeal provides the average monthly balance for each account and then the combined average monthly balance for the three accounts for the months from January 2002 to May 2005. While these accounts are considered additional funds with which to

pay the proffered wage, it is noted that the average balances for each account and the combined average balances are not sufficient to cover the full or remaining proffered wage, as each month's balance or the combined monthly balances could not alone support the full proffered wage for a year. Furthermore it is noted that although the director requested that the sole proprietor submit a monthly expenses document to the record, the sole proprietor still has not provided any further substantiation as to his household monthly expenses, which would include monthly mortgage payments, insurance, food, education expenses, among other items. Thus the record is not complete as to the sole proprietor's financial liabilities, namely the household expenses. Such expenses would have to be considered prior to considering what available funds remain to pay the beneficiary's wages. Although counsel asserts on appeal that the sole proprietor and his dependents pay their household expenses out of the three checking accounts, counsel's assertions 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). 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)). Furthermore, two of the accounts with records submitted to the record represented primarily the sole proprietor's business checking accounts. These funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses.

Counsel on appeal also asserts that the sole proprietor is willing to use the financial equity in his personal residence to pay the proffered wage. However, counsel provides no further evidentiary documentation to support his assertion. 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). Furthermore as noted correctly by the director, the sole proprietor's personal residence, or the equity in it, are not considered as sources of additional funding with which to pay the proffered wage.

As stated previously, the AAO may also consider the instant petition in relation to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This decision 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. The AAO, in petitions analogous to the circumstances of the petitioner in *Sonogawa*, also considers the longevity of the business, the established historical growth of the business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within the industry, whether the beneficiary is replacing a former employee or an outsourced service, and the number of employees, when judging the viability of the petitioner's business.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. In fact the sole

proprietor has never had an unprofitable year. However, as documented by the record, the sole proprietor has had decreased wages from tax years 2001 to 2004. As stated previously, the sole proprietor's wages in tax year 2001 were \$22,558, in tax year 2002 were \$15,080, in 2003 were \$6,573, and in tax year 2004, were \$6,820. These wages could be indicative of a declining business activity, rather than a one-time interruption in a fully successful business operation. As stated previously, the sole proprietor has one employee. Furthermore the record is inconsistent as to when the sole proprietor established his current business. In his letter submitted on appeal, the sole proprietor states that he started the current business in 2000, while the I-140 petition indicates that the business began in 1997. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Thus, the AAO does not view the circumstances of the sole proprietor as analogous to the petitioner in *Matter of Sonogawa*. With regard to additional financial resources available to the sole proprietor to pay the proffered wage or the difference between the beneficiary's wages and the proffered wage, the sole proprietor's business checking accounts can be considered within the totality of the petitioner's circumstances. However, without more evidence as to the sole proprietor's monthly household expenses, the record is not clear as to what weight to give these additional financial resources.

Beyond the decision of the director, the petitioner submitted additional evidence with regard to the beneficiary's qualifications that confused the record as to whether the beneficiary has the requisite two years of work experience as a knitter mechanic/technician. On motion, counsel submitted further evidence with regard to the beneficiary's work experience in Korea. One document is entitled "Verification of Business Dissolution" and the translation of the document indicated that the beneficiary was the owner of the business [REDACTED] Seoul, Korea. The record also contains a letter from In [REDACTED], who states she was the president of [REDACTED] and that the beneficiary worked as a knitter mechanic/technician for the Jae-II SA business. The beneficiary's Form I-485 clearly identifies In [REDACTED] as the beneficiary's wife. Given the family relationship established by the record, the sole proprietor needs to establish more substantively whether the beneficiary actually worked as a knitter mechanic/technician for the stated business and for the stated amount of time.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.