

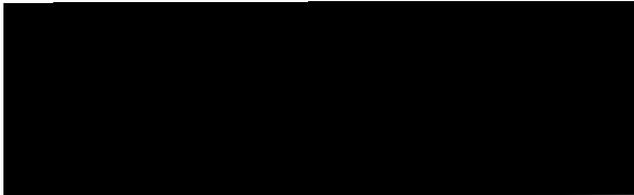
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and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

DEC 19 2007

EAC 06 033 50417

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.

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 nature of the petitioner's business is a dry cleaners. It seeks to employ the beneficiary permanently in the United States as a presser - delicate fabrics worker. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated June 15, 2006, the single issue in this case is 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.

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 9089 Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent 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 9089 was accepted on September 6, 2005. The proffered wage as stated on the Form ETA 750 is \$7.52 per hour (\$15,641.60 per year). The Form ETA 9089 states that the position requires two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant² evidence in the record includes copies of the following documents: the original Form ETA 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1040, Schedule C for the petitioner for tax year 2005; a cover letter from counsel dated October 31, 2005; an explanatory letter dated May 17, 2006 from counsel; the 2004 joint personal tax return Form 1040 for [REDACTED] and [REDACTED] (the sole proprietors) with a W-2 Wage and Tax statement from the petitioner to [REDACTED] a W-2 Wage and Tax statement from the petitioner for 2005 to the beneficiary in the amount of \$11,900.00; two exhibits entitled "2004 Monthly Expenses;"³ 97 pages of the petitioner's business checking statements for 2004 stating an ending balance on January 31, 2004 of \$727.79, and an ending balance of \$852.66 on December 31, 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company.⁴ On the petition, the petitioner claimed to have been established in 1997 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on October 28, 2005, the beneficiary did not claim to have worked for the petitioner.

Since the priority date is September 6, 2005, the AAO will examine independent and objective evidence of the petitioner's ability to pay the proffered wage from that date in 2005. Evidence submitted in this case for

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The qualifications of the beneficiary are not at issue.

³ The monthly expenses total \$27,785.00. We are making the assumption, as the director did in his decision that the petitioner's 2005 personal expenses are at least as much as its 2004 expenses.

⁴ Evidence was submitted in the record of proceeding that indicates that the petitioner is a limited liability company (LLC). Normally, according to Internal Revenue Service regulations taxpayers with that status report their income on Form 1065. A LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner (as is the case here), it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under New York State law is considered to be a sole proprietorship for federal tax purposes. Here, the petitioner has reported its income on Form 1040.

years prior to 2005 is discussed for what evidence it may provide, but it has slight probative value in these proceedings.

As a preface to the following discussion, counsel has made various contentions and has cited cases in support of his contentions but only some of the cases cited are precedent that are binding upon Citizenship and Immigration Services (CIS) and the AAO. Counsel has cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977).

Counsel referred to unpublished decisions in support of his contentions but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).⁵

On appeal, counsel asserts that the director erred in his determination that the employer failed to demonstrate the ability to pay the proffered wage and that the director's denial was arbitrary and capricious.

Accompanying the appeal, counsel submits a legal brief.

Counsel asserts that CIS "retains at least the burden of producing substantial evidence supporting its determination when it seeks to deny a visa petition." That statement is incorrect. The burden of proof in these proceedings rests solely with the petitioner that includes producing, in this instance, evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) aforesaid. See also Section 291 of the Act, 8 U.S.C. § 1361. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Counsel asserts that based upon the financial evidence submitted that the net incomes of the business for years 2004 and 2005 as well as the business net profits stated are evidence of the ability to pay the proffered wage. This statement must be qualified. It is only evidence for the 2005, the year of the priority date, which is relevant here.

Counsel contends that the director failed to take into consideration the beneficiary's wages of \$11,900.00 earned in 2005, that if prorated to the remaining portion of the year from the priority date, is evidence of the ability to pay the proffered wage. Further counsel advocates that, if in an additive fashion, the business' net income of \$16,472.00 in 2005 is combined with the wages paid to the beneficiary in 2005, the sum of \$28,372.00 is evidence of the ability to pay the proffered wage.

⁵ We also note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Along with the legal brief, as additional evidence, counsel submitted the following documents (documents already submitted into the record and listed above are not noted here): a cover letter from counsel dated October 31, 2003 and 12 pages of the petitioner's business checking statements⁶ for 2005 that stated an average daily balance on January 31, 2005 of \$860.58 and an average ledger balance on December 31, 2005 of \$958.21.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the ETA 9089, 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 (BIA 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. A W-2 Wage and Tax Statement for 2005 from the petitioner to the beneficiary stated wage payments in the amount of \$11,900.00. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Since the proffered wage is \$15,641.60 per year, the petitioner must establish that it can pay the difference between the wages paid to the beneficiary and the proffered wage, which is \$3,741.60 in 2005, as well as meet the petitioner's personal expenses.

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 (or adjusted gross income for sole proprietorships) reflected on the petitioner's federal income tax return, without consideration of depreciation. 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner reports its income as 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

⁶ Since the 2004 bank statements submitted are prior to the priority date of September 6, 2005, they cannot be proof of the petitioner's ability to pay the proffered wage from the priority date.

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). The sole proprietor's yearly personal expenses total \$27,785.00 according to the evidence submitted.

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 individuals. The 2005 tax return⁷ reflects the following information:

	<u>2005</u>
Proprietor's adjusted gross income (Form 1040, Line 36)	\$ 22,614.00
Petitioner's gross receipts or sales (Schedule C, Line 1)	\$177,598.00
Petitioner's wages paid (Schedule C, Line 26)	\$ 19,160.00
Petitioner's net profit from business (Schedule C, Line 31)	\$ 16,472.00

In 2005, the sole proprietor's adjusted gross income in the amount of \$22,614.00 does not cover the proffered wage of \$15,641.60 per year including the payment of the petitioner's personal expenses even with a credit for wages paid to the beneficiary in 2005 of \$11,900.00. In 2005 the petitioner was not able to pay the proffered wage.⁸

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel contends that the director failed to take into consideration the beneficiary's wages of \$11,900.00 earned in 2005, that if prorated to the remaining portion of the year from the priority date, is evidence of the ability to pay the proffered wage. 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.

⁷ The 2004 tax return data and wage amount paid to [REDACTED] are not relevant here to the issue of whether or not the petitioner had the ability to pay the proffered wage on and after the priority date of September 6, 2005.

⁸ The shortfall in 2005 was \$8,912.60.

⁹ 8 C.F.R. § 204.5(g)(2).

The record of proceeding contains 12 pages of the petitioner's business checking statements for 2005 that stated an average daily balance on January 31, 2005 of \$860.58 and an average ledger balance on December 31, 2005 of \$958.21 with an ending balance of \$2,246.53. The average balance is not sufficient to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for a year. The shortfall evident from the evidence in the record of proceeding, the difference between the petitioner's adjusted gross income and the wages paid, and the petitioner's personal expenses and proffered wage for the year 2005 indicates a shortfall of \$8,912.60. Therefore, the ending bank balance of \$2,246.53 for 2005 is insufficient, less than the shortfall of \$8,912.60, and not proof of the petitioner ability to pay the proffered wage.

Further counsel advocates that, if in an additive fashion, the business' net income of \$16,472.00 in 2005 is combined with the wages paid to the beneficiary in 2005 the sum of \$28,372.00 is evidence of the ability to pay the proffered wage. This statement must be qualified. The petitioner reports its income as a sole proprietorship. 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). The sole proprietors' yearly personal expenses total \$27,785.00 according to the evidence submitted. Giving the petitioner credit for the adjusted gross income earned in 2005 of \$22,614.00 plus wages paid to the beneficiary of \$11,900.00 equals a total of \$34,514.00. That total must be off-set according to *Ubeda v. Palmer, Id.* by the petitioner's personal expenses totaling \$27,785.00 and the proffered wage of \$15,641.60. That sum is \$43,426.60, that is more than the total adjusted gross income plus the wages paid the beneficiary in 2005 (\$34,514.00). Although the petitioner paid wages in the amount of \$19,160.00, wages paid to other employees can not also be used as an asset to pay the proffered wage since to do otherwise would be duplicative of the petitioner's finances.

Counsel has cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) and contended using the adjusted gross income and wages paid to the beneficiary in 2005, that these figures are evidence of the petitioner's ability to pay, and by implication, that the petitioner reasonably expected increased profitability in the future by hiring the beneficiary.

The case precedent of *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states in part:

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.

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). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a presser - delicate fabrics worker will significantly increase petitioner's profits. Net income is not examined contingent upon some event in the future. Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns

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 \$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.

There is insufficient evidence submitted in this case to determine the petitioner's profitability over a term of years. Further, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner.

The evidence submitted establishes that the petitioner does not have the 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.