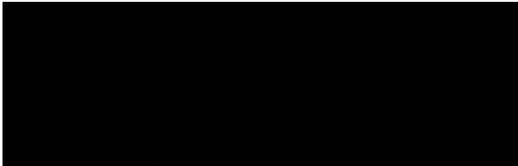


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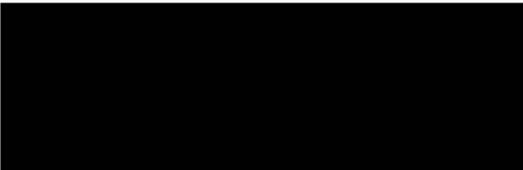
Office: TEXAS SERVICE CENTER

Date: JUN 20 2007

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the acting Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a business that sells, repairs, and restores automobiles. It seeks to employ the beneficiary permanently in the United States as an automotive electrician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 and continuing until the beneficiary receives lawful permanent residency. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely¹ 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 21, 2005 denial, 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 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 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 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 750 Application for Alien Employment Certification as certified by the U.S. Department

¹ The record reflects that the petitioner submitted a timely appeal, and that the Texas Service Center then sent counsel a request dated November 21, 2005 for the \$385 filing fee. Counsel responded by submitting a copy of the I797C received by the petitioner that indicated \$385 had been received and a copy of his cover letter that listed a check for \$385. Counsel in response to the Texas Service Center correspondence, then submits a check for \$385, which he describes as a second check. Based on the I797C found in the record, the AAO finds the petitioner's appeal to be timely submitted.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20 per hour (\$41,600 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 submits the sole proprietor's Wells Fargo Bank monthly statements from March 14, 2001 to January 15, 2002. Other relevant evidence in the record includes Forms 1040, with accompanying Schedule C for Rami Auto for tax years 2001 and 2002; two Forms 1120S for Rami Auto, Inc., for tax years 2003 and 2004; and the beneficiary's W-2 forms for tax years 2001, 2002, 2003, and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner indicates that it was structured as a sole proprietorship in tax years 2001 and 2002, and as an S corporation in tax years 2003 and 2004. On the petition, the petitioner claimed to have been established in May 1998 and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner only has to establish its ability to pay the proffered wage as of the April 2001 priority date to December 2001, and not for the entire priority year. Counsel notes that the petitioner only has to establish its ability to pay \$27,733.28, a sum that represents the beneficiary's monthly salary of \$3,466.66 multiplied by eight months. Counsel further notes that the petitioner's 2001 tax form included a non-cash deduction of \$3,190 for depreciation that, when added to \$1,508.72, would result in \$4,698.73 in additional funds available to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel finally notes that the petitioner's monthly bank statements from Wells Fargo during tax year 2001 also establish that the petitioner had available monthly balances 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, 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).

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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the petitioner only has to establish its ability to pay eight months of salary to the beneficiary in the 2001 priority year. Thus, 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.

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 petitioner has established that it employed and paid the beneficiary \$18,100 in 2001, \$28,200 in 2002, \$25,600 in 2003, and \$18,450 in 2004. Therefore the petitioner did not establish that it paid the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in all of these relevant years.

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, and, contrary to counsel's assertions, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.

In tax years 2001 and 2002, the petitioner indicates it was structured as a sole proprietorship.³ Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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). For this reason, the director may request a list of the sole proprietor's household monthly expenses to better gauge the sole proprietor's ability to pay the proffered wage and to meet its household expenses. In the instant petition, the director did not request nor did the petitioner submit any further evidence with regard to household monthly expenses.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of five dependents, including himself, in tax year 2001. In tax year 2002, the sole proprietor supported a family of four. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	\$ 31,812	\$ 34,931
Petitioner's gross receipts or sales (Schedule C)	\$ 1,158,867	\$ 1,203,115
Petitioner's wages paid (Schedule C)	\$ 36,200	\$ 67,450
Petitioner's net profit from business (Schedule C)	\$ 34,230	\$ 38,176

In 2001, the sole proprietor had an adjusted gross income of \$31,812. The record reflects the petitioner paid the beneficiary \$18,100 in tax year 2001, while the entire proffered wage is \$41,600. Thus the petitioner has to establish its ability to pay the remaining proffered wage of \$23,500 in tax year 2001.⁴ If the remaining proffered wage is subtracted from the sole proprietor's adjusted gross income for priority year 2001, the sole proprietor's remaining adjusted gross income is \$8,312.⁵ It is improbable that the sole proprietor could support himself and his family on \$8,312 for an entire year. On appeal, counsel submits copies of the sole proprietor's bank account with Wells Fargo, in Houston, Texas, from March 14, 2001 to December 14, 2001. This account is identified as the sole proprietor's basic business checking account. These records indicate an average monthly balance of \$67,390.63. While the average balance for the monthly statements submitted to the record is sufficient to cover the entire or remaining proffered wage, the record lacks the sole proprietor's

³ The tax returns submitted to the record for 2001 and 2002 do not reflect an Employer Identification Number (EIN); however, the W-2 forms submitted to the record for tax years 2001 and 2002 show the EIN of Rami Auto to be [REDACTED]

⁴ This sum represents the entire proffered wage of \$41,600 minus the beneficiary's actual wages paid in tax year 2001.

⁵ The director in his determination with regard to the sole proprietor's ability to pay the difference between the beneficiary's actual wages and the proffered wage referenced the Federal Poverty Guidelines for 2001; however, the AAO does not use these guidelines in its deliberations.

monthly bank statements for January and February 2001, and that three of the months ending balances, namely March, June, and September, are less than the proffered annual wage.

In addition, as the account statements represent what appear to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Thus, the bank statements submitted on appeal do not establish the sole proprietor's ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2001.

In 2002, the sole proprietor has an adjusted gross income of \$34,931. The record reflects the petitioner paid the beneficiary \$28,200. Thus the petitioner has to pay the remaining proffered wage of \$13,400. While the record does not contain an itemized list of the proprietor's monthly or annual household expenses, Schedule A of the sole proprietor's Form 1040 indicates medical expenses of \$235, real estate taxes of \$4,752, and home mortgage interest payment of \$6,881, with total expenditures of \$11,868 for 2002. These expenditures would leave the petitioner \$9,663 to cover such annual household expenses as food, clothing, schooling, car and insurance for a family of four. Without more persuasive evidence, the AAO cannot determine whether it is probable that the sole proprietor could support the remaining annual expenses on \$9,663 in tax year 2002. Thus, the petitioner did not establish its ability to pay the proffered wage as a sole proprietor in the priority year 2001 or in tax year 2002.

With regard to tax years 2003 and 2004, the petitioner indicates that it was structured as an S corporation. While the AAO will examine the tax returns submitted to the record for tax years 2003 and 2004, it is noted that the record is not clear that the 2001 and 2002 Forms 1040 tax returns, and the Forms 1120S tax returns for tax years 2003 and 2004 are for the same petitioner. The AAO notes that Schedule Cs for the years 2001 and 2002 identified the address for Rami Auto as 9236 Kingville, Houston, Texas, while the Forms 1120S identify the address of Rami Auto, Inc. as 6100 Richmond Avenue, Suite 205, Houston, Texas. The Employer Identification Number (EIN) for Rami Auto on the 2001 and 2002 W-2 forms is 76-0667040. The EIN listed for Rami Auto, Inc. on the 2003 and 2004 Forms 1120S and the W-2 forms for 2003 and 2004 is [REDACTED]

The different EINs and the change in addresses raise questions as to whether the initial business, Rami Auto, was bought by another entity, and whether Rami Auto, Inc. is a successor in interest to Rami Auto. If so, the record contains no evidence that Rami Auto, Inc. assumed all rights, duties, obligations, and assets of Rami Auto. Furthermore the Forms 1120S state that the petitioner incorporated on February 20, 2003 with S corporation election effective March 1, 2003. Thus, it is not clear that the 2003 tax return covers the entire 2003 financial year. In any future proceedings, the petitioner must address the relationship between Rami Auto and Rami Auto, Inc. Nevertheless, the AAO will examine the returns provided to the record.

The tax returns for Rami Auto, Inc. reflect the following information for tax years 2003 and 2004:

In 2003, the Form 1120S stated net income⁶ of \$22,022.

⁶ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's

- In 2004, the Form 1120S stated net income of \$45,430.

In tax year 2003, based on the beneficiary's W-2 form, the petitioner paid the beneficiary \$25,600. The petitioner has sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$16,000. In tax year 2004, the petitioner paid the beneficiary \$18,450, and only has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$23,150. Therefore, for the years 2003 and 2004, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage.

The petitioner, while structured as a sole proprietorship in priority year 2001 and tax year 2002, did not establish that it had sufficient financial resources to pay the difference between the beneficiary's actual wages and the proffered wage, and also support himself and four family members. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

As previously noted, the AAO also may consider the totality of the petitioner's circumstances when determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 or 2002 were uncharacteristically unprofitable years for the petitioner.

Finally, the AAO notes that the beneficiary, the sole proprietor, and the sole shareholder of Rami Auto, Inc. appear to share the same surname. Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a

income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003 and 2004, the petitioner's net income for both years is found on line 23, of Schedule K of its tax return.

bona fide job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Therefore, the petitioner cannot establish that it has made a *bona fide* job offer to the beneficiary.

Thus, the petitioner has not established its ability to pay the proffered wage as of the 2001 priority year and to the present time.

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.