

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
WAC 03 216 53583

Office: CALIFORNIA SERVICE CENTER

Date: SEP 05 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, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food, specialty cook. 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 December 30, 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, 40 hours per week or \$31,200 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position. No specific educational background is required for the 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 on appeal.¹ Evidence in the

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

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 1998, 1999, 2000, 2001, 2002 and 2003; the sole proprietor's Form 1040 for 1998, 1999, 2000, 2001, 2002 and 2003; copies of three checks which the sole proprietor made out to the beneficiary during 2004; copies of the sole proprietor's business checking account statements for June through October 2002; the Form 941, Employer's Quarterly Federal Tax Return, for 2001 through 2002 for the petitioner; and a copy of William R. Yates, Associate Director for Operations, U.S. Citizenship and Immigration Services (CIS), Interoffice Memorandum dated May 4, 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 1992 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on July 12, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel refers to the Yates' memorandum dated May 4, 2004 which indicates that where the petitioner's corporate net income is equal to or greater than the proffered wage, the petitioner has shown the ability to pay the wage. Counsel then asserts that the instant petitioner has likewise shown the ability to pay by demonstrating that, during 2003, the sole proprietor's adjusted gross income was greater than the proffered wage. Counsel also indicates that the copies of the beneficiary's pay checks for three pay periods in 2004 demonstrate that the petitioner has the ability to pay the proffered wage.

In response to the director's September 9, 2004 request for evidence, counsel also suggested that the petitioner has shown an ability to pay the wage by demonstrating that: its wages paid were above the proffered wage; and that its gross sales greatly exceeded the proffered wage.

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, 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 April 27, 2001 priority date onwards. On appeal, counsel did submit three checks made out to the beneficiary by the petitioner which indicate that the petitioner paid the beneficiary: \$1,167.74 on November 29, 2004; \$1,158.96 on December 13, 2004; and \$1,185.30 on December 27, 2004; or a total of \$3,512 during

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).

2004. Thus, the record appears to indicate that the petitioner paid the beneficiary an amount which is \$27,688 less than the proffered wage during 2004.²

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). Reliance on the petitioner's gross receipts and wage expense is misplaced, contrary to assertions of counsel. It is not sufficient to show that the petitioner's gross receipts exceeded the proffered wage. It is also not sufficient to show that the petitioner paid wages in excess of the proffered wage.

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 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. Further, contrary to assertions of counsel, sole proprietors must document for the record that they can also sustain themselves and their dependents out of their adjusted gross income or other available funds. See *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 sole proprietor, the petitioning entity in that case, 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 had three dependents in 2001, two dependents in 2002 and one dependent in 2003. He did not provide information regarding his annual, household expenses. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross income (Form 1040)	\$13,111	\$30,130	\$91,319
Petitioner's gross receipts or sales (Schedule C)	\$288,342	\$375,951	\$340,373
Petitioner's wages paid (Schedule C)	\$46,700	\$31,629	\$33,543
Petitioner's net profit from business (Schedule C)	\$7,401	\$26,450	\$4,353

² It is noted that there is no proof in the record that these checks were cashed, such as a copy of the back of the checks showing that they had been processed by a bank or some other financial institution. Such additional evidence would be necessary before this office might consider such checks as evidence that the petitioner had paid the beneficiary the full proffered wage.

Given that the priority date falls in 2001, the information from the 1998, 1999 and 2000 Forms 1040 need not be considered at this point, though it will be considered in the totality of the circumstances analysis which follows. In 2001 and 2002, the sole proprietor's adjusted gross income of \$13,111 and \$30,130, respectively, fails to cover the proffered wage of \$31,200. 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. In 2003, the sole proprietor's adjusted gross income of \$91,319 appears sufficient to cover the proffered wage and to cover the annual expenses for a household of three, the sole proprietor, his wife and the one dependent listed on the sole proprietor's Form 1040 that year.

Thus, in sum, the record indicates that the sole proprietor would not have been able to pay the proffered wage from his adjusted gross income in 2001 and 2002, but would have been able to do so in 2003.

As noted earlier, the record indicates that the petitioner paid the beneficiary an amount which is \$27,688 less than the proffered wage during 2004. There is no other evidence in the record relating to the petitioner/sole proprietor's ability to pay the wage during 2004. The record of proceeding closed on December 6, 2004 when the petitioner responded to the director's request for evidence. The sole proprietor's 2004 tax return would not have been available at that time. Thus, for purposes of this appeal, the petitioner is excused from any obligation to demonstrate the ability to pay the proffered wage in 2004.

Any reliance on the sole proprietor's business checking account statements in the record is misplaced. First, the petitioner failed to show that these funds are not part of the funds listed on Schedule C of the sole proprietor's returns as gross receipts and expenses which have already been considered in this analysis. This office would note as well that only the statements for the months of June through October 2002 were submitted, not the statements for the entire relevant period of analysis, or even one year during that period. It is also noted that the average balance (\$2294.13) in the sole proprietor's checking account over the five month period June through October 2002 is far below the full annual proffered wage, and that the ending balance each month is not always even sufficient to cover one month or one-twelfth of the proffered wage.

Counsel's reliance on the statement regarding corporate net income in Yates' memorandum dated May 4, 2004 is also misplaced. In the memorandum, Associate Director Yates refers to petitioners whose corporate income tax returns demonstrate a net income which is equal to or greater than the proffered wage during each year of the relevant period of analysis. In the present case, the petitioner is a sole proprietor, not a corporation. Sole proprietors must show that they can cover the proffered wage as well as sustain themselves and their dependents out of their adjusted gross income or other available funds. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Moreover, this office would again note that of the three Forms 1040 submitted for the relevant period of analysis, two showed an adjusted gross income for the sole proprietor which did not even cover the proffered wage.

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 Forms 1040 and accompanying schedules for the years 1998 through 2003. The 1998, 1999 and 2000 Forms 1040 submitted into the record each show an adjusted gross income that falls far below the proffered wage. Thus, these forms leave only a deficit as funds available to cover the sole proprietor's annual household expenses. As noted above, the 2001 and 2002 Forms 1040 also list adjusted gross incomes that fall below the proffered wage. Only the 2003 Form 1040 lists an adjusted gross income that is both above the proffered wage, and appears to cover the annual, household expenses for a family of three. 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 1998 through 2002 were uncharacteristically low profit years for the petitioner/sole proprietor.

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.