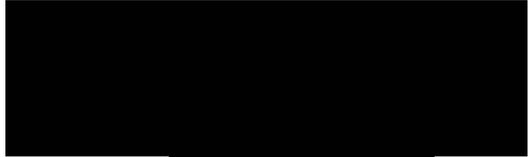


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Services

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FILE: [REDACTED]
LIN 06 194 51716

Office: NEBRASKA SERVICE CENTER

Date: **DEC 17 2008**

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)

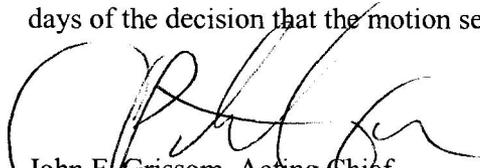
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a painting company. It seeks to employ the beneficiary permanently in the United States as a brush painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its Form ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved Form ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of The Department of Labor. See 8 CFR § 204.5(d). Therefore, 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).

Here, the Form ETA 750 was accepted for processing on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 per year. On Part B of the Form ETA 750, signed by the beneficiary on March 13, 2001, the beneficiary claims to have worked for the petitioner since November 1998 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), which was filed on May 30, 2006, the petitioner states that it was established in May 1986, currently employs three workers, reports an annual gross income of \$100,994 and an annual net income of \$19,430.

The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$26,000 per year as of the priority date and in response to the director's request for additional evidence, the petitioner provided copies of the sole proprietor's U.S. Individual Income Tax Return for 2001, 2002, 2003, 2004, and 2005. The tax returns reflect that the sole proprietor filed jointly with his spouse and claimed four dependents. The returns also contain the following information:

	2001	2002	2003	2004	2005
Wages	\$ 3,808	\$ n/a	\$ 3,157	\$14,208	\$14,930
Gross Income (Schedule C)	\$100,994	\$50,114	\$25,800	\$40,195	\$62,597
Total Expenses (Schedule C)	\$ 81,564	\$35,178	\$16,891	\$21,283	\$42,102
Business Income or (loss)	\$ 19,430	\$14,936	\$ 8,909	\$18,912	\$20,495
Adjusted Gross Income ¹	\$ 21,865	\$13,881	\$11,436	\$31,784	\$33,977

As noted in the above table, the sole proprietor's business income represents the painting company's gross income less total expenses as reported on line 31, Schedule C, Profit or Loss from Business, designated as Net profit or (loss). This amount is carried over to line 12 of the Form 1040 and is

¹ Adjusted gross income is shown on line 33 of the Form 1040 in 2001; line 35 in 2002; line 34 in 2003; line 36 in 2004 and on line 37 in 2005.

reported as Business Income or (loss). It is subsequently included in the amounts included in the calculation of the sole proprietor's adjusted gross income.

The petitioner also provided a summary of the sole proprietor's household living expenses that totaled \$47,872 annually. In addition, the Wage and Tax Statements (W-2s) provided by the petitioner indicate that the petitioner paid the beneficiary the following wages:

Year	Wages	Difference from Certified Wage of \$26,000
2001	\$22,945	-\$ 3,055
2002	\$12,376	-\$13,624

The petitioner did not provide any W-2 statements for the beneficiary for any other year.²

Additionally, the petitioner supplied copies of various accounts representing the following:

- 1.) a bank credit line statement reflecting a \$51,900 line of credit held by the sole proprietor beginning in 2002 and as of October 19, 2006, showing \$728 in available credit;
- 2.) a copy of a bank statement reflecting the sole proprietor's individual savings account (xxxx█ showing an ending balance of \$272 as of the period from July 3, 2006 to October 1, 2006;
- 3.) copies of two bank statements indicating checking account (xxxxx█ held by the sole proprietor and spouse that shows ending balance as of September 18, 2006, and an ending balance of \$1,708.55 as of October 17, 2006;
- 4.) copies of three bank statements showing the account (xxxxx█ was held by the sole proprietor as a nonpersonal checking account transacting business as the petitioning painting firm and reflecting an ending balance of \$684 as of October 1, 2006;
- 5.) a copy of a BB&T Bank of Maryland loan account statement held by the sole proprietor individually and showing a payoff balance owed of approximately \$21,800 as of October 19, 2006;
- 6.) copies of two BB&T Bank of Virginia checking account statements (xxxxxxxxxx█ held individually by the sole proprietor showing a balance of approximately \$540 as of October 19, 2006 and a balance of \$3,500 as of November 9, 2006.

² Additionally, the beneficiary's W-2 statements reflect that he resides at the petitioner's address. Whether the beneficiary has any prior relationship with the sole proprietor is unclear. 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 *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). If the sole proprietor and the beneficiary had a relationship and it was not properly disclosed to DOL, the *bona fides* of the position may be in question.

The director examined the petitioner's income and household expenses as well as wages shown to be paid to the beneficiary which were supplied to the record and concluded that the petitioner had not established its ability to pay the proffered wage beginning as of the priority date. He denied the petition on February 12, 2007.

On appeal, the petitioner, through counsel, submits additional copies of the documentation already submitted to the underlying record. Counsel contends on appeal that the petitioner has demonstrated its ability to pay the proffered wage. Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel states that the petition may be approved based on the petitioner's record of profitability, cash on hand, and reasonable expectation of profits. Counsel also asserts that a petition may be approved based on any combination of documents.

The assertion that any combination of documents may be used to approve a petition is unpersuasive. It is also noted that the selected 2006 bank statements submitted to the record do not establish a sustainable ability to pay the proffered wage in that year or from the April 2001 priority date through 2006. Further, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. As noted above, while this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) consisting of federal tax returns, audited financial statements or annual reports is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements generally reflect only a portion of a petitioner's financial profile and are not indicative of other encumbrances affecting its position and are not an acceptable substitute for the required evidence over a prolonged period. Further, based on the amounts shown above, it is observed that the sole proprietor's 2006 liabilities, appearing to be a \$21,800 loan and a statement reflecting only \$728 credit available on a \$51,900 credit line, cumulatively outweigh his assets.³

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, there has been evidence submitted of the beneficiary's employment and wages paid only in 2001 and 2002, despite other claims in the record that the petitioner has employed the beneficiary in

³ Generally, similar to the limit on a credit card, a line of credit cannot be treated as cash or as a cash asset for the purpose of evaluating a petitioner's ability to pay a certified wage.

subsequent years.⁴ In 2001, the beneficiary's wages of \$22,945 were \$3,055 less than the proffered wage. In 2002, his wages of \$12,376 were \$13,624 less than the proffered wage of \$26,000 per year.

USCIS will also 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).); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is a sole proprietorship, additional factors will be considered. 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.⁵ As noted above, 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, Profit or Loss from Business and are carried forward to the first page of the tax return and included within the calculation of the adjusted gross income. Sole proprietors must show that they can cover their existing business expenses as well as show that they can sustain themselves and their dependents and pay the proffered wage out of their

⁴ It is noted that on a subsequent Form G-325A, Biographic Information, signed by the beneficiary on March 8, 2006 and submitted in support of his application for permanent residency, he also claims to have worked for the petitioner from November 1998 to the present (date of signing). 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁵ Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. This is usually based on a review of Schedule L of a corporate tax return, but may be taken from an audited financial statement submitted by a corporate petitioner or a sole proprietor.

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). As in this case, a summary of household expenses is often provided. As set forth above, counsel submitted the sole proprietor's signed statement that his household expenses were approximately \$3,989.41 per month or \$47,872 per year.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, even though the sole proprietor's family is slightly smaller than the household described in *Ubeda*, it is noted that the beneficiary's salary of \$26,000 represented approximately 77% of the sole proprietor's adjusted gross income of \$33,977 in 2005, which was the highest adjusted gross income reported by the petitioner. After payment of household expenses of approximately \$47,872, the remaining -\$13,895 was not sufficient to cover the proffered wage. The petitioner did not demonstrate its ability to pay the proffered salary in this year.

In 2001, after payment of household expenses of \$47,872, the sole proprietor's adjusted gross income would be negative (-\$26,007). The negative income would be insufficient to cover the -\$3,055 shortfall remaining after comparing the beneficiary's actual wages paid (\$22,945) and the proffered wage of \$26,000. The petitioner has not demonstrated its ability to pay the proffered salary in 2001.

In 2002, after payment of household expenses, the sole proprietor is left with negative (-\$33,991) adjusted gross income. The sole proprietor therefore could not meet the difference of -\$13,624 remaining after comparing the beneficiary's actual wages paid of \$12,376 to the proffered wage or establish the petitioner's financial ability to pay the proffered wage in this year.

In 2003, the beneficiary's proffered wage of \$26,000 exceeded the sole proprietor's adjusted gross income by \$14,564 even without considering payment of the household expenses. The evidence is insufficient to demonstrate the petitioner's ability to pay the certified salary in this year.

In 2004, the beneficiary's proposed wage offer represented approximately 82% of the sole proprietor's adjusted gross income of \$31,784, even without considering payment of household expenses. After payment of household expenses of approximately \$47,872, the negative amount of (-\$16,088) was not sufficient to cover the proffered wage. The petitioner did not demonstrate its ability to pay the proffered salary in this year.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning as of the priority date. (Emphasis added.) In this case, the petitioner failed to demonstrate its ability to pay the proffered wage in 2001, 2002, 2003, 2004 and 2005.

Additionally, the assertion that the petitioner's expectations of increasing net profits support an approval of the petition is not convincing in this matter. It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, as noted above, the sole proprietor's adjusted gross income was consistently modest during the relevant period and failed to demonstrate sufficient funds to cover the proffered wage and household expenses from 2001 through 2005. Even in viewing the gross income of the painting business as shown on Schedule C of the 2001-2005 tax returns, it declined from over \$100,000 in 2001 to \$62,597 in 2005. There is no evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* that have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary as of 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.