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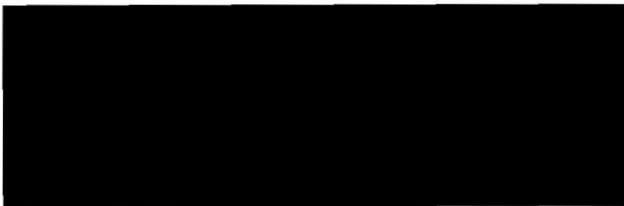
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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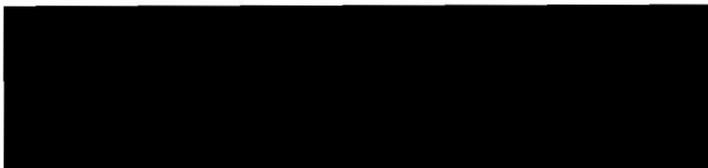
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a garment company.¹ It seeks to employ the beneficiary permanently in the United States as an accountant. 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 did not have sufficient net profit in tax years 2004 and 2006 to pay the beneficiary's proffered wage. The director denied the petition accordingly.

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 15, 2007 decision, the single issue in this case is whether or not the petitioner, as a sole proprietorship, has the ability to pay the proffered wage.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 petitioner, a sole proprietorship, identifies itself as a garment company on the initial I-140 petition. In the cover letter submitted with the petition, the sole proprietor further describes itself as a designer and manufacturer of high quality, ready-to-wear clothes, with a design arm called Bunda & Dowd.

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 July 23, 2004. The proffered wage as stated on the Form ETA 750 is \$33 per hour (\$68,640 per year). The Form ETA 750 states that the position requires six years of grade school, four years of high school, a four-year bachelor's degree in accounting, and two years of work 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.²

On appeal counsel submits a brief and the following accompanying evidence:

Bank statements from Wells Fargo Bank for the petitioner's custom checking account for the months January 2004 to December 2004 and January 2006 to November 2006;

Copies of the beneficiary's W-2 Wage and Tax Statement for tax years 2004, 2005, and 2006. These documents indicated the petitioner paid the beneficiary \$18,600 in 2004, \$18,600 in 2005, and \$12,400 in 2006;

Copies of twelve checks issued by the petitioner to the beneficiary. These checks indicate an hourly wage of \$15.50 and cover January 31, 2004; the months of September through December 31, 2004; the months of January through June 2005; and the months of September 2006 through December 2006; and

Copy of a letter dated February 1, 2007 from the petitioner that is identical to the letter the petitioner submitted with the initial I-140 petition that addresses the petitioner's business need for an accountant and the beneficiary's qualifications.

Other relevant evidence in the record includes the sole proprietor's IRS Forms 1040 for tax years 2004, 2005, and 2006, with accompanying Schedules C.³

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).

³ The sole proprietorship apparently submitted its Form 1040 for tax years 2005 and 2004 with the initial I-140 petition, and in response to the director's request for further evidence, dated September 6, 2007, submitted its tax returns for tax year 2006.

On appeal, counsel states that the petitioner has additional financial resources to pay the beneficiary the proffered wage in tax years 2004 and 2006, and that based on the monthly balances for the sole proprietor's checking account with Wells Fargo, she has more than the proffered wage available each month during tax years 2004 and 2006. Counsel notes that the petitioner's lowest monthly balance for tax years 2004 and 2006 was \$84,422.77, which is still more than the beneficiary's proffered annual wage. Counsel also notes that the beneficiary worked for the petitioner on a part-time basis during the years 2004 to 2006, and for this reason, the pay stubs reflect less than the proffered wage. Counsel also asserts that the denial of the instant petition will adversely affect the petitioner's operations.⁴

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on January 1, 1997, to currently employ three workers, and to have an estimated gross annual income of \$902,574. On the Form ETA 750B, signed by the beneficiary in 2004,⁵ the beneficiary claimed that he presently worked for the petitioner, but did not indicate any beginning date of employment.

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).

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 submitted W-2 Wage and Tax Statements for the beneficiary for tax years 2004 to 2006. As previously stated, these documents indicate the petitioner paid the beneficiary \$18,600 in 2004, \$18,600 in 2005, and \$12,400 in 2006. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2004 priority date onwards. The petitioner has to establish that it

⁴ Counsel is incorrect in his assertion with regard to the sole proprietorship's lowest monthly balance in tax years 2004 and 2006. In January 2004, the sole proprietorship's monthly balance was \$64,061.69, less than the proffered wage.

⁵ The actual month in 2004 when the beneficiary signed the ETA Form 750, Part B, is whited-out, while the day of the month is indicated as the 30th.

has the ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2004 to 2006, namely, \$50,040 in tax years 2004 and 2005, and \$56,240 in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

In the instant case, the sole proprietor supports herself. The sole proprietor's tax returns reflect the following information for the following years:

	2004	2005	2006
Proprietor's adjusted gross income (Form 1040)	\$ 14,677	\$ 339,173	\$ 25,424 ⁶
Petitioner's gross receipts or sales (Schedule C)	\$ 104,501	\$ 902,574	\$ 101,312
Petitioner's wages paid (Schedule C)	\$ 56,373	\$ 136,768	\$ 48,210
Petitioner's net profit from business (Schedule C)	\$ 14,701	\$ 350,173	\$ 15,844

⁶ The petitioner's 2006 tax return contains two Schedules C, one for the petitioner as M & R Design Studio, and the other for the petitioner's work as a caregiver. The petitioner's adjusted gross income for tax year 2006 is the combined net profits from both business operations.

In tax year 2005, the sole proprietorship's adjusted gross income was sufficient to cover the difference between the beneficiary's actual wages and the proffered wage, namely, \$50,040. However, in the priority year 2004, and during tax year 2006, the sole proprietorship's adjusted gross income was not sufficient to cover the difference between the beneficiary's actual wages and the proffered wage, namely, \$50,040 and \$56,240. Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has 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.

Furthermore, the sole proprietor also has to establish that she can both pay the difference between the beneficiary's wages and the proffered wage and also pay her yearly household expenses. The AAO notes that in his request for further evidence, dated September 6, 2007, the director did not request that the petitioner submit an itemized list of her monthly household expenses covering such items as car or insurance payments, food, utility bills, clothing, property tax, and other miscellaneous items. In his decision, the director also did not address the issue of the sole proprietorship's ability to both pay the difference between the beneficiary's wages and the proffered wage, and her yearly household expenses. Upon review of the sole proprietor's tax returns, the AAO further does not note any itemized deductions for items such as mortgage interest payments that would provide partial documentation on possible yearly household expenses.

On appeal, counsel states that the sole proprietor has additional financial resources with which to pay the proffered wage and submits the sole proprietor's Wells Fargo checking account bank statements for tax years 2004 and 2006. The AAO notes that the average monthly balances of this checking account from February 2004 to December 2004 and from January 2006 to December 2006 are sufficient to cover the remaining proffered wage as each month's balance could alone support the full proffered wage for a year. However, the record is not clear as to whether this checking account is also the sole proprietor's business checking account, and whether these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. The AAO also notes that the July 2004 Wells Fargo bank account statement identifies the holder of the bank account as [REDACTED] rather than the sole proprietor. Furthermore, the record contains no documentation as to the sole proprietor's yearly household expenses. Therefore the AAO cannot determine whether the sole proprietor during the 2004 priority year and during 2006 could pay both the sole proprietor's yearly household expenses and the remaining proffered wage.

As previously stated, the AAO may also examine the totality of the petitioner's circumstances when it evaluates the petitioner's ability to pay the proffered wage. *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

Sonegawa 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 *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. The sole proprietor's business operation, as established by the tax returns submitted to the record, has always made a profit and paid wages. The record reflects that in the 2004 priority year and in tax year 2006, the sole proprietor was less profitable. The record does suggest, however, that the sole proprietor's clothing design business in 2006 did considerably less business and that the sole proprietor herself took on a second job of caregiver which provided the majority of the sole proprietor's adjusted gross income in tax year 2006. Based on the 2006 tax return, it also appears that the sole proprietor moved her business operations to her home residence. These factors raise the question of the sole proprietor's continued profitability, and whether the sole proprietor has continued her clothing design business operation. The AAO would also note that the petitioner has not demonstrated that the proffered position of fulltime accountant is bona fide, considering the scope of the sole proprietor's business. Thus the sole proprietor's circumstances are not analogous to those of the petitioner in *Sonegawa*.

The evidence submitted does not establish that the petitioner had the continuing 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.