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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-108-53895

NOV 26 2004

IN RE: Petitioner:
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:

[redacted]

PUBLIC COPY

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 retail butcher shop and food market. It seeks to employ the beneficiary permanently in the United States as a butcher. 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, counsel submits a brief and additional evidence.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200 annually.

The petitioner was structured as a sole proprietorship for the first six months of 2001 and was incorporated thereafter. With the petition, the petitioner submitted a letter stating that its annual sales are in excess of $669,000 and that its incorporation in 2001 and expansion has resulted in increasing net income over the past three years. The petitioner submitted a letter from its certified public accountant stating that the petitioner incorporated in June 2001 and all of its assets and liabilities transferred to [redacted], which became the petitioner's successor-in-interest, and sustained the business operations, location, and ownership. The petitioner also submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns for 2000[1] and 2001 without accompanying Schedules C, Profit or Loss Statements from Business. Finally, the petitioner submitted an unaudited financial statement for the year ending December 31, 2002.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 24, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the

[1] Because the tax return dated 2000 precedes the priority date of 2001, it is not necessarily dispositive evidence of the petitioner's continuing ability to pay the proffered wage as of the priority date.

petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested complete tax returns and evidence from 2001 to the present.

In response, counsel submitted previously submitted evidence and cited *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) in an accompanying letter as a case applicable to the petitioner's financial situation. The substantive content of counsel's letter is similar to the petitioner's letter submitted with its initial filing.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 30, 2003, the director again requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested complete tax returns, evidence from 2001 to the present, quarterly wage reports, and evidence that Megna Premium, Inc. (Megna) is truly a successor-in-interest to the petitioning entity.

In response, the petitioner's sole proprietor submitted complete individual tax returns for 2000 and 2001, documentation evidencing the successorship of Megna to the petitioner, Megna's Form 1120S, U.S. Income Return for an S Corporation for the year 2002, and [redacted] quarterly wage reports for the quarters ending December 31, 2002, March 31, 2003, and June 30, 2003. Counsel stated that "Schedule E of [the sole proprietor's 2001 individual income] tax return indicates that the filers have a loss from the S Corporation named Megna [redacted] Counsel also reiterates his assertion that *Sonegawa* is applicable precedent to the petitioner's case excusing the petitioner from one year of reported losses on its tax returns.

The tax returns reflect the following information for the following years:

	2001
Proprietor's adjusted gross income (Form 1040)	$36,449
Petitioner's gross receipts or sales (Schedule C)	$442,933
Petitioner's wages paid (Schedule C)	$0
Petitioner's net profit from business (Schedule C)	$30,041

	2002
Net income[2]	$48,532
Current Assets	$34,061
Current Liabilities	$4,572
Net current liabilities	$29,489

The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 19, 2003, denied the petition. The director noted that after the sole proprietor paid the proffered wage from his adjusted gross income, he would not

[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

have enough income to sustain himself and his dependents. The director also noted that the petitioner failed to submit tax returns for the portion of 2001 when it was a corporation, but noted that it sustained a loss as reflected on the sole proprietor's individual income tax return.

On appeal, counsel states that the petitioner's net income is greater than the proffered wage, that the petitioner's business is growing, and that *Sonegawa* applies to the petitioner's case because it stands for the proposition that additional factors other than tax returns should be considered in examining a petitioning entity's ability to pay a proffered wage. Additionally, the petitioner, through counsel, submits the petitioner's bank statements from January 1 through December 31, 2001, and a copy of a real estate loan approval for the petitioner's sole proprietor's home showing that "they possessed the personal asset necessary to live and purchase their current residence during 2001." The bank statements reflect that the petitioner sustained ending balances ranging from $15,909.21 in January 2001 to $2,937.55 in December 2001 in one account and $310.50 in January 2001 to $353.86 in December 2001. The June 2001 statements reflect ending balances of $74.81 and $208.46, respectively. The petitioner also submitted banking statements from Megna.

At the outset, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. The petitioner has not established that it has previously employed the beneficiary.

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).

For six months of 2001, the petitioner was 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 a family of six. In 2001, the sole proprietorship's adjusted gross income of $36,449 barely covers the proffered wage of $31,200.[3] It is improbable that the sole proprietor could support himself and his family on $5,249 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, the petitioner produced evidence that while it was a sole proprietorship, it maintained average ending balances of $4,017.02 in one bank account and $436.95 in another.[4] Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The average balance is not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months. Additionally, the loan granted to the sole proprietor to purchase real estate does little to alter the outcome of this analysis since it reflects a debt, a liability, instead of an asset.

Thus, the petitioner has not established that it could pay the proffered wage while it was structured as a sole proprietorship for the first half of 2001.

As the petitioner was also structured as a corporation for the remainder of 2001 and all of 2002, this decision will examine the petitioner's ability to pay the proffered wage during that timeframe.

While the petitioner was structured as a corporation, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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. 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) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

As stated above, CIS will examine the petitioner's net income to determine if it has the sufficient funds to pay the proffered wage. In this case, the petitioner showed it had $48,532 in net income in 2002, which is sufficient to pay the proffered wage of $31,200. Thus, the petitioner has established it can pay the proffered wage out of its net income in 2002.

The problem in this case is the lack of evidence from the remainder of 2001 when the petitioner was incorporated. The petitioner should have filed a tax return for the six months of revenue generated while it was operating as a

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[3] If we were to pro-rate for six months, the result is the same, since both the adjusted gross income and the proffered wage would be divided by two.

[4] This calculation came from adding each month's ending balance from January through June 2001 and dividing by six. The petitioner was only structured as a sole proprietorship through June 2001, and since personal assets and bank balances may only be considered while the petitioner was structured as a sole proprietorship, the evaluation will only consider the first six months of 2001.

corporation in 2001. It did not present such evidence into the record of proceeding so no analysis may be made concerning its financial situation during that timeframe. In any event, since the sole proprietor's individual income tax return reflects a loss from Megna during 2001, the AAO concurs with the director's assessment that this reflects poorly upon the petitioner's continuing ability to pay the proffered wage as of the priority date.

Finanally, counsel's assertion with respect to the applicability of *Sonegawa* to the instant petition will be discussed. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 2001 was an uncharacteristically unprofitable year for the petitioner.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it 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.