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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: WAC-02-214-55115 Office: CALIFORNIA SERVICE CENTER Date: MAR 07 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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

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 full service hair and beauty salon. It seeks to employ the beneficiary permanently in the United States as its manager. 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 August 31, 1999. The proffered wage as stated on the Form ETA 750 is $31,339.36 per year.

The petitioner is structured as a sole proprietorship. The beneficiary indicated that she worked for the petitioner since January 1999. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedules C, Profit or Loss from Business statements, for 1999, 2000, and 2001.

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

	1999	2000	2001
Proprietor's adjusted gross income (Form 1040)	$43,831	$65,134	$70,043
Petitioner's gross receipts or sales (Schedule C)	$50,339	$103,195	$110,347
Petitioner's wages paid (Schedule C)	$0	$0	$0
Petitioner's cost of labor (Schedule C)	$1,920	$43,692	$52,776
Petitioner's net profit from business (Schedule C)	$5,231	$20,532	$14,659

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 October 22, 2002, 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 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 the sole proprietor's monthly expenses noting that it did not seem likely that the sole proprietor's adjusted gross income could both pay the proffered wage and sustain the sole proprietor's family.

In response, the petitioner submitted its sole proprietor's monthly expenses, which include such items as utility bills, mortgage payments, credit cards, food, and entertainment, for a total of $3425.79. The sole proprietor stated that his family's cars are fully paid and health insurance is derived from his spouse's employment. The sole proprietor's monthly expenses correlate to an annual expense of $41,109.48.

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 February 3, 2003, denied the petition.

On appeal, counsel asserts that the beneficiary was already paid wages by the petitioner and submits copies of the beneficiary's individual income tax returns, that establish that the beneficiary received wages in the amount of $34,000 in 2000 but her portion (as opposed to that of her spouse) of the adjusted gross income reported on the 2001 return is unclear. Additionally, counsel asserts that the sole proprietor's living expenses doubled from 1999 to 2001, and are thus a poor indicator of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel submits copies of materials showing the sole proprietor's rent and mortgage payments during that timeframe. Counsel cites to *Masonry Masters Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the premise that the beneficiary's employment will increase the petitioner's revenues since the petitioner may open up an additional salon with her "secured" employment. Counsel also cites to *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) for the premise that the petitioner expects its revenues to increase and has shown a historical increase in its revenues over the years. Finally, counsel asserts that there is no basis for using the sole proprietor's adjusted gross income to determine the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

At the outset, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of Citizenship and Immigration Services (CIS) for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation, such as a business plan, the beneficiary's outstanding reputation, or other steps undertaken to open another salon, has been provided to explain how the beneficiary's employment as a salon manager will significantly increase profits for the petitioner. Finally, the beneficiary has been working for the petitioner already and no evidence was provided that her contributions were responsible for any increases in the petitioner's revenues. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Regardless, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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 established that it employed and paid the beneficiary $34,000 in 2000. Since the proffered wage is $31,339.36, the petitioner has established that it has previously employed and paid the beneficiary the full proffered wage in 2000. Thus, it has established its continuing ability to pay the proffered wage in 2000. No evidence was presented concerning wages earned by the beneficiary from the petitioner in 1999 and the evidence was insufficient in 2001[1]. Thus, the petitioner must demonstrate that it can pay the full proffered wage in 1999 and 2001.

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).

Contrary to counsel's assertion; however, CIS has a basis for reviewing the sole proprietor's adjusted gross income in its analysis of a petitioning entity's, structured as a sole proprietorship, continuing ability to pay the proffered wage beginning on the priority date. 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).

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[1] As noted above, the individual income tax returns for 2001 fail to itemize the beneficiary's exact wage contributions in that year. Additionally, no paystubs, W-2, or 1099s were submitted into the record of proceeding.

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 two. In 1999, the sole proprietorship's adjusted gross income of $43,831 barely covers the proffered wage of $31,339.36. The sole proprietor's stated expenses in 2002 were $41,109.48, but counsel asserts that in 1999, the sole proprietor's expenses were half of that. Even assuming that the assertions of counsel could be construed as evidence, half of $41,109.48 is $20,554.74[2]. Reducing the sole proprietor's adjusted gross income by half of its 2002 stated expenses still only leaves $23,276.26, which is less than the proffered wage. The sole proprietor could not support himself and his family and pay the proffered wage in 1999, and thus, has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date for that year.

In 2001, the sole proprietorship's adjusted gross income of $70,043 covers the proffered wage of $31,339.36. However, the sole proprietor's stated expenses of $41,109.48 reduce its adjusted gross income to $28,933.52, which is less than the proffered wage. The sole proprietor could not support himself and his family and pay the proffered wage in 2001, and thus, has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date for that year.

Furthermore, the adjusted gross income for does not even take into account wages allegedly paid to the beneficiary in 2001 as Schedule C for that year does not list any wage expense for the petitioner and the petitioner's cost of labor expenses are listed as only $52,776. The petitioner indicated that it employed four employees, so it is unclear how $52,776 was distributed among them.

Counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), applied to the instant case. *Sonegawa*, however, 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 1999 or 2001 were uncharacteristically unprofitable years for the petitioner.

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[2] The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

Finally, while counsel is correct that a sole proprietor may use other sources of income to pay its living expenses, it is noted that there is no evidence in the record of proceeding concerning other liquifieable and unencumbered personal assets to bolster the petitioner's continuing ability to pay the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 1999 or 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 and 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.