U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 21 2006

EAC-03-063-52772

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as an Other Worker 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial sign company. It seeks to employ the beneficiary permanently in the United States as a sign maker. 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 ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 9, 2001. The proffered wage as stated on the Form ETA 750 is $27.09 per hour, which amounts to $56,347.20 annually. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on November 20, 2002.

The I-140 petition was submitted on December 19, 2002. On the petition, the petitioner claimed to have been established in June 1992 and to currently have five employees. The items on the petition for gross annual income and for net annual income were left blank. With the petition, the petitioner submitted no supporting evidence.

In a request for evidence (RFE) dated July 2, 2003, the director requested evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted evidence. The petitioner's submissions in response to the RFE were received by the director on August 8, 2003.

In a decision dated October 24, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that the petitioner has the ability to pay the proffered wage and that copies of a summary of invoices and of deposits slips submitted on appeal provide additional relevant evidence.

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).

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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001 and 2002. The record before the director closed on August 8, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE.

As of that date, the federal tax return of the petitioner's owner for 2003 was not yet available. Therefore the owner's tax return for 2002 is the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than $20,000.00 where the beneficiary's proposed salary was $6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and his wife. The return for 2001 shows one dependent daughter, two dependent sons and one dependent sister. Therefore the household size of the petitioner's owner was six persons in 2001. The return for 2002 shows one dependent daughter and two dependent sons, for a household size of five persons in 2002.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns state amounts for adjusted gross income as shown in the following table.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$30,888.00	not submitted	$56,347.20*	-$25,459.20
2002	$34,280.00	not submitted	$56,347.20*	-$22,067.20

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

The record contains a letter dated November 8, 2003 from the petitioner's owner, submitted for the first time on appeal. In the letter, the owner states that the petitioner's business income was unusually low in the year 2001 because collecting monies was difficult as a result of the September 11 terrorist attack. The owner states that most of the petitioner's clients are based in New York City and were greatly affected by that incident. The owner states that as of December 30, 2001, the petitioner had outstanding invoices totaling $159,201.00, most of which was produced in 2001. The owner states that the petitioner uses a cash-basis method of accounting, and that he would like to have the collected monies for the first quarter of 2002, totaling $106,905.30, considered as income for 2001. The owner refers to an attached summary of open invoices and to deposit slips matching the open invoices summary.

The owner also states that the petitioner would have been able to save some of its expenses for payroll and for materials and supplies in 2001 if the beneficiary had been on the payroll, since the beneficiary would have replaced less experienced employees and also would have been able to produce in-house some materials which the petitioner was required to purchase pre-fabricated from outside sources.

Also submitted on appeal is a copy of a summary of the petitioners open invoices as of December 31, 2001, showing open invoices totaling $159,201.00. Finally, also submitted on appeal are copies of seven deposit slips for the First Union bank showing deposits in the following amounts: $10,576.90 on January 11, 2002; $4,718.99 on January 22, 2002; $4,380.41 on January 28, 2002; $58,637.10 on February 1, 2002; $3,696.32 on February 8, 2002; $2,657.74 on February 15, 2002; and $22,237.83 on March 1, 2002. The individual checks on each deposit slip are annotated with abbreviations referring to the sources of each of the checks. The amounts on the seven deposit slips total $106,905.29.

Records on open invoices and copies of deposit slips are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, such evidence is acceptable to supplement evidence in one of the three alternative forms required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. In the instant petition, the petitioner has submitted copies of federal tax returns of the petitioner's owner. The information on those returns fails to establish the petitioner's ability to pay the proffered wage. In his letter, the petitioner's owner states that amounts received by the petitioner and deposited during the first quarter of 2002 should be counted as income for 2001. To do so, however, would be to use an accrual method of accounting with regard to those deposits, which is a method of accounting inconsistent with the cash basis of accounting which the owner states is used in the business. Moreover, if funds received and deposited in 2002 were counted as income in 2001, the owner's income for the year 2002 would have to be considered reduced by a corresponding amount. However, as the above analysis shows, the owner's Form 1040 tax return for 2002 fails to establish the petitioner's ability to pay the proffered wage in the year 2002. Therefore no surplus income appears on the 2002 return which could be allocated to the year 2001 for purposes of establishing the petitioner's ability to pay the proffered wage in 2001.

Although assigning income from 2002 to the year 2001 is not an acceptable method of analysis, some of the considerations raised in the owner's letter are relevant to an analysis of the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Under *Matter of Sonegawa* the totality of the circumstances affecting the petitioner's financial condition may be considered. In the instant petition, the petitioner's owner asserts that the events of September 11, 2001 caused financial difficulties for the petitioner in the year 2001.

Matter of Sonegawa relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 $100,000.00. 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 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.

Although the owner's letter dated November 8, 2003 is sufficient to establish that unusual circumstances affected the petitioner during 2001, the evidence does not establish the degree to which the petitioner was affected by those circumstances. The petitioner has not established that the years 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. The petitioner has submitted no evidence showing its normal amount of year-end outstanding invoices. Therefore the record provides no criteria against which to compare the petitioner's $159,201.00 in outstanding invoices at the end of 2001. Nor has the petitioner submitted any evidence concerning its profitability in prior years. For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his letter of November 8, 2003, the petitioner's owner also states that the petitioner's costs during 2001 would have been lower if the beneficiary had been on the payroll that year. The owner states the amounts of the petitioner's costs for payroll in 2001 to have been $92,332.00 and for materials and supplies in that year to have been $61,180.00. But the petitioner's owner provides no evidence indicating the amounts of savings which could have accrued to the petitioner in either of those areas if the beneficiary had been on the petitioner's payroll. Nor does the owner identify any specific employee who would have been replaced by the beneficiary. The evidence therefore fails to establish the amount of any savings which the petitioner would have realized if the beneficiary had been on the payroll in 2001.

The record contains no other evidence relevant to the financial situation of the petitioner. For the reasons discussed above, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director based her financial analysis on the petitioner's business income shown on the Schedule C attached to the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife. However, in the case of a sole proprietorship, the proper measure of net income is the adjusted gross income of the petitioner's owner. Although the director's analysis was incorrect, the director was correct in her conclusion that the evidence failed to establish the petitioner's ability to pay the proffered wage in the year 2001.

The director made no analysis of the petitioner's ability to pay the proffered wage in the year 2002, because a finding of the inability to pay the proffered wage in the year of the priority date was a sufficient ground to deny the petition. But in failing to discuss the evidence for the year 2002 the director failed to consider each of the years at issue in the instant petition.

Although the director's analysis was incorrect for the reasons noted above, the decision of the director to deny the petition was correct, based on the evidence in the record before the director. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal are insufficient to overcome the decision of the director.

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.