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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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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 28 2006

SRC-04-144-52464

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, 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 operates a business related to custom and alteration tailoring. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 4, 2005, denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record shows that the appeal is properly filed, 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.

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 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 CFR § 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 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 for processing by the relevant office within the DOL employment

[1] 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).

system on April 12, 2001. The proffered wage as stated on the Form ETA 750 is $20,510 per year,[2] 40 hours per week. The labor certification was approved on December 30, 2003. The petitioner filed an I-140 Petition for the beneficiary on April 26, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: 1992; gross annual income: $361,549.00; net annual income: $35,319; and current number of employees: 4.

The Service Center issued a Notice of Intent to Deny on December 17, 2004 requesting that the petitioner provide the petitioner's 2002 federal tax return, annual report, or audited financial statement; proof that the employer is a U.S. citizen or U.S. legal permanent resident; and that the petitioner forward a completed part 4 of the I-140 petition. The petitioner submitted a response, including its tax return, proof of the owner's citizenship, and a completed part 4 of Form 140. The Service Center denied the petition on February 4, 2005, based on the petitioner's failure to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence.

The petitioner obtained different counsel and appealed the denied I-140 Petition.[3] We will address the merits of the appeal.

We will first examine the petitioner's ability to pay, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's Forms 1040, for the years 2001, 2002, 2003,[4] along with a statement from a certified public accountant, business bank statements for the year 2002, as well as a 2002 reviewed Financial Statement, reviewed Balance Sheet, reviewed income sheet, a letter from the petitioner's bank, and a 2004 W-2 statement for the beneficiary.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on April 7, 2001, the beneficiary did not list that he was employed with the petitioner, but rather listed that he has been unemployed from September 1999 to the present (April 7, 2001). The petitioner submitted a 2004 W-2 form for the beneficiary, which reflected earnings of $6,800.[5]

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. Reliance on federal income tax returns as a basis for determining a petitioner's

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[2] The petitioner initially listed the wage as $18,000, but was required to change the wage to $20,510. The change was handwritten and approved by DOL prior to DOL certification.

[3] Additionally, on March 21, 2005, petitioner's new counsel filed another I-140 Petition for the beneficiary based on the same labor certification, and same position. The subsequent I-140 Petition remains pending.

[4] The petitioner also initially submitted its tax return for the year 2000, however, since the priority date is April 12, 2001, the 2000 tax return is not relevant.

[5] The record is unclear regarding the beneficiary's exact start date. We note that the beneficiary was issued an employment authorization card on June 18, 2004 based on the I-485 Adjustment of Status application filed on the beneficiary's behalf. The W-2 likely reflects partial year wages.

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 proprietor, 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 two, including himself, and his wife in Houston, Texas. The tax returns reflect the following information for the following years[6]:

M/S Broadway Fashions	**Petitioner's AGI (1040)**	**Gross Receipts (Schedule C)**	**Wages Paid (Schedule C)**	**Net profit from business (Schedule C)**
2003	$48,984[7]	$361,549	$18,470	$35,319
2002	$27,835	$391,945	$16,800	$14,656
2001	$47,332	$411,227	$14,400	$35,983

If we reduced the owner's adjusted gross income (AGI) by $20,510, the proffered wage that the petitioner must demonstrate that it can pay, the owner would be left with an adjusted gross income of $26,822 in 2001, $7,325 in 2002, and $28,474 in 2003. Based on the above analysis, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage in 2002 and support himself and his wife. In the other years, the owner likely could support himself and his wife. Here, we note that the petitioner should submit a statement of the owner's expenses in any future proceedings so that CIS can conclude this definitively. However, based on the above, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

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[6] No tax return was submitted for the year 2004, which may not have been available at the time that the petitioner submitted its appeal.

[7] The petitioner's tax returns also reflect other income from a "Kristal Enterprises," which is additionally reflected in the petitioner's AGI.

The petitioner additionally forwarded a statement from a certified public accountant, which provides: "this is to certify that [redacted] is the sole proprietor of Broadway Fashions. Broadway Fashions was established in 1992 and has been running a successful business since then. The total asset of Broadway Fashions on 2002 was $151,020. The total asset of [redacted] in 2002 was $544,320, which could be used for business. Broadway Fashion had other employees. Broadway Fashion could have easily hired an employee for $20,510 in 2002." On appeal, as well as with the initial filing, counsel has provided the CPA's statement, but no documents to verify whether the assets the CPA references are valid. Without independent evidence to verify the statement, we cannot conclude that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage in the year 2002.

The petitioner also submitted an unaudited balance sheet reflecting assets and liabilities for the years ending December 31, 2002, 2003, and 2004, which lists owner's equity in the amounts of $149,172, $159,605, $196,165 for each year-end respectively. The petitioner did not submit any documentation to verify these calculations and did not list what documents that were examined to reach these totals. A CPA reviewed the balance sheet, as well as an income statement, but provides that "all information included in these financial statements is the representation of the management of [redacted], Owner of Broadway Fashions." 8 C.F.R. § 204.5(g)(2) provides that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As the financial statements were unaudited, they are, as the CPA properly notes, solely the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record of proceeding also contains a letter from a bank, signed by the Branch Manager, dated January 12, 2005, which provides: [redacted] has been a long time established customer with our bank since May of 1985. Along with his personal account he also maintains business accounts with us since July of 1992. [redacted] has average balance over $20,000 with us. He maintains a good average balance and manages his account in excellent standing with our bank." While as a sole proprietor, the owner's assets and bank balance would be relevant, the letter provided does not address what [redacted] balance was in 2002, the year in which the tax returns do not demonstrate the petitioner's ability to pay the proffered wage. Further, "good average balance" is undefined, as well as the time period in which [redacted] maintained a "good average balance."

The petitioner also submitted a one-page credit application form completed by the owner, dated December 31, 2002, which lists the owner's individual assets and liabilities. Similarly, we note that this document would solely contain the owner's representations. The petitioner did not submit any documentation to verify the assets listed on the form. The petitioner did not attach any documentation to show that the report was verified, or that the bank issued any credit based on the application.

On appeal, the only new item that the petitioner submitted was the petitioner's bank statements for each month of 2002. Counsel contends that the statements demonstrate that the petitioner had enough money in the bank to pay the beneficiary's proffered wage on a monthly basis. The statements reflect four months in which the petitioner's bank account contained under $2,000 at the end of the month (the lowest month reflected $997.74), another four months where the petitioner's bank account contained just over $2,000, and in one month, the petitioner's account contained $16,596, the high amount for the year.

Bank statements, however, are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." The petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise does not provide an accurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported in the petitioner's bank statements reflect funds that would be additionally available to the amounts shown by the petitioner's tax return, which would normally be included in the gross receipts on Schedule C, and would already be considered as part of the petitioner's AGI. As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns reflect the company's liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

Further, on appeal, counsel contends that the Service Center decision indicates that the petitioner has established its ability to pay in the years 2001 and 2003, and, therefore, only the petitioner's ability to pay in the year 2002 is in question. Counsel contends that a "totality" approach based on *O'Conner v. Attorney General,* 1987 WL 18243 (D. Mass.) should be used to examine the petitioner's ability to pay, and cites to several cases. We note that the AAO does examine the totality of the circumstances, and for sole proprietors, the AAO does examine the sole proprietor's other liquid assets to determine the petitioner's ability to pay the proffered wage. In the instant case, however, the owner has not provided verifiable evidence of his other liquid assets.

Counsel cites to Ohsawa America, 1988-INA-240, Bureau of Alien Labor Certification Appeals (BALCA 1988) for the premise that BALCA approved a case where the employer had shown prior losses, and specifically cites from the decision: "while that company did also have attestations as to its financial worth by its bank and its major accounting firm, in addition to the continuing financial support pledged by its major shareholder, we think those attestations are made up for by his employer's ongoing progress toward increased profitability and its logical explanation of what it has done and is doing to maintain it."

First, we note that while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all its employees in the administration of the Act. BALCA decisions, however, are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Examining the facts in *Ohsawa* specifically, the corporate owner in that case was able to demonstrate $4 million in personal assets, which BALCA found were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. In the case at hand, the petitioner's owner has considerably less assets. Further, in contrast to *Ohsawa*, and the portion of the case that counsel specifically cites, the petitioner has not explained its ongoing progress toward increased profitability, or what it has done, or is doing to maintain any increased profitability. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel also cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the

petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

In contrast to *Sonegawa,* the petitioner has not indicated why 2002 was a difficult year, or what short-term expenses the petitioner incurred, which caused the loss in income. Further, we note that the petitioner's adjusted gross income remaining after subtracting out the wages only amounts to $26,822 in 2001, and $28,474 in 2003. These figures are on the low end of what might be acceptable wages for the owner and his wife on which to live. The petitioner did not provide any estimate of living expenses to aid in determining the amount the owner and his wife would be able to live on, which might provide an additional piece of evidence to lend support to the petitioner's contention that it would be able to pay the beneficiary the proffered wage. However, we cannot reach that conclusion in the absence of this information.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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.