



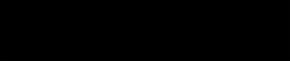
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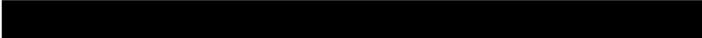
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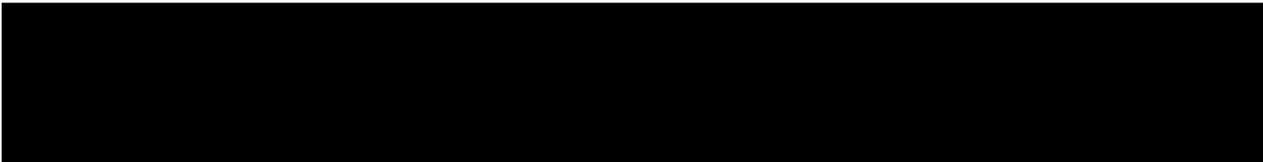


FILE:  Office: TEXAS SERVICE CENTER Date: JAN 22 2008
WAC 06 087 50406

IN RE: 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, Chief
Administrative Appeals Office

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

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a chef (Japanese). As required by statute, a Form 9089, Application for Permanent 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, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

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. 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 Service's (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form 9089 was accepted for processing on September 5, 2001. The proffered wage as stated on the Form 9089 is \$27.06 per hour, which amounts to \$56,284.80 per year. On the Form 9089, signed by the beneficiary on December 23, 2005, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, the petitioner states that it was established in 2000, currently employs ten workers, and reports an annual gross income of \$409,494.

The petitioner was initially structured as a sole proprietorship, but became a corporation as of March 12, 2004. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$56,284.80 per year as of the September 5, 2001, priority date, the petitioner provided copies of its sole proprietor's U.S. Individual Income Tax Return for 2000, 2001, 2002, 2003 and 2004. They reflect that the sole proprietor filed jointly with his spouse and claimed two dependents in 2001 and no dependents in 2002, 2003 or 2004. The returns also contain the following information:

	2001	2002	2003	2004
Wages	n/a	n/a	\$5,531	\$31,124
Taxable interest	\$ 0	\$ 5	\$ n/a	\$ n/a
Business Income	\$386	\$ 32,932	\$33,644	\$13,877
Capital gain or (loss)	\$112,918	\$ n/a	\$ n/a	\$ n/a
Adjusted Gross Income ¹	\$113,304	\$29,469	\$ 33,042	\$38,115

The petitioner also provided a summary of sole proprietor's monthly household living expenses that totaled \$6,355 per month, annualized to \$76,260 per year. In addition, the petitioner provided a compiled statement of the financial condition of the sole proprietor and spouse as of August 31, 2006, a copy of the 2001 closing statement relevant to the real property where the petitioning business is located, copies of a deed and closing statement related to the purchase of real property located at [REDACTED] in Los Angeles in 2005 by the petitioner's sole shareholder and spouse as individuals, a copy of the title to an automobile issued on February 3, 2004, held individually by the sole proprietor's spouse, and a copy of an automobile lease with an illegible date.

The petitioner also provided copies of its corporate tax returns for 2004 and 2005. The 2004, Form 1120, U.S. Corporation Income Tax Return covers the period from May 1, 2004 to December 31, 2004. The 2005, Form 1120S, U.S. Income Tax Return for an S Corporation covers the calendar year of 2005. Both returns contain the following:

	2004	2005
Net Income ²	\$ 175	\$ 1,162

¹ Adjusted gross income is shown on line 33 of the Form 1040 in 2001; line 35 in 2002; line 34 in 2003; and on line 36 in 2004.

² For the purpose of this review, net income on the 2004, Form 1120 refers to line 28, taxable income before net operating loss deduction and special deductions. On the 2005 Form 1120S, the figure reflected as the petitioner's ordinary income shown on line 21 of page one will be treated as net income in this case. In some cases, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional

Current Assets	\$10,881	\$15,436
Current Liabilities	\$ 4,862	\$ 5,284
Net Current Assets	\$ 6,019	\$10,152

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule of its 2004 and 2005 federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on October 19, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage of \$56,284.80. For 2001, 2002, 2003, and approximately the first three months of 2004 before the petitioner incorporated, she reviewed the sole proprietor's adjusted gross income including any adjustments for household expenses and relevant assets and concluded that the petitioner had not established the ability to pay the proffered wage. For the remainder of 2004 and 2005, the director determined that the petitioner had also failed to establish that it could cover the prorated portion of the proffered wage for 2004 or the full certified salary through either its net income or net current assets. Therefore, the director examined the petitioner's income and household expenses as previously supplied within the documentation submitted to the record and concluded that the petitioner had not established its ability to pay the proffered wage.

On appeal, the petitioner, through counsel, contends on appeal that the petitioner demonstrated its ability to pay the proffered wage. For 2001, counsel asserts that because the priority date was September 5, 2001, then only a prorated amount should be considered. Using this calculation, counsel maintains that the petitioner's ability to pay the certified wage is established. For the remaining period, counsel contends that the sole proprietor, [REDACTED] had substantial equity in his business and that even after the business was incorporated, his personal assets would have been available. Counsel asserts that [REDACTED] net worth exceeded 1.1 million dollars, which supports the petitioner's ability to pay the proffered wage. Along with copies of the documents previously submitted to the underlying record, counsel provides a copy of a letter from [REDACTED] a real estate broker. [REDACTED] offers her opinion that the petitioning business is worth approximately \$800,000 to \$850,000. Counsel also provides a sworn statement from [REDACTED] who states that he lives at the real property identified above at [REDACTED] in Los Angeles. He affirms that his equity in his personal residence and the petitioning business support the petitioner's ability to pay the proffered wage.

income, credits, deductions or other adjustments, net income may be found on line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

As noted by the director, if there is no evidence that a petitioner may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is a sole proprietorship, additional factors will be considered. 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 (line 12). 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). Such petitions often include a summary of household expenses. In this case, the petitioner indicated that the sole proprietor's expenses were approximately \$76,260 per year.

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.

At the outset, it is noted that the [REDACTED] personal holdings will not be considered in determining the corporate petitioner's ability to pay the proffered wage in 2004 or 2005. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Regarding the documentation submitted to the underlying record and on appeal consisting of the [REDACTED] unaudited, compiled financial statement as of August 31, 2006, it is noted that such a financial statement is not persuasive evidence of the sole proprietor's ability to pay the certified wage in 2001, 2002, 2003 or 2004. 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. A compilation is a presentation of financial information that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of [REDACTED]. See *Barron's Accounting Handbook* 370-371 (3rd ed. 2000). As the document relating to the August 31, 2006 individual financial condition of [REDACTED] is not audited as required by the regulation at 8 C.F.R. § 204.5(g)(2), it is not sufficiently probative of the ability to pay the proffered wage during the period represented.

It is also noted that the financial information provided to the record relates to the real estate held by the sole proprietor consisting primarily of the petitioner's location of business and the sole proprietor's personal residence. Although CIS will consider a sole proprietor's overall personal assets and liabilities, they must represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid. Real estate is considered a long-term asset and is not readily convertible to be available to pay the proffered wage. Moreover, if it is considered part of a petitioner's total depreciable assets used in the business, it would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. A copy of an automobile title to a 1999 Mercedes and a copy of a car lease related to another vehicle were also included. The lease agreement appears to involve a Lexus but the copy is almost illegible and no value may be assigned to a piece of personal property that is not titled in the sole proprietor's name. The record also contains no evidence of the other vehicle's value. It is unknown if these vehicles are used in running the business. We would also note that it would be unreasonable to expect the sale of a personal vehicle to finance the payment of a proffered wage for a sponsored alien worker.

Counsel requests that CIS prorate the proffered wage for the portion of the year 2001 that occurred after the priority date. In general, CIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or, for example payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. In this case, as noted by the director after deducting for payment of household expenses from the petitioner's adjusted gross income of \$113,304, the remaining \$37,044 would not cover payment of the proffered wage of \$56,284.80. The petitioner has not demonstrated its ability to pay the proffered salary in 2001. Even if counsel's suggestion of prorating this calculation is utilized, the outcome would be same. The petitioner's ability to pay the proffered wage for the approximate four months from September 5 until December 31, 2001 would not be established when compared to the proportionately adjusted figures representing four months of the petitioner's adjusted gross income less four months of household expenses.⁴

In 2002 and 2003, as noted by the director, the sole proprietor's adjusted gross income of \$29,469 and \$33,042, respectively, are less than the proffered wage of \$56,284.80 even without considering household expenses. The petitioner has not demonstrated its ability to pay the proffered salary in 2002 or 2003.

⁴ This would represent adjusted gross income of \$28,326 minus household expenses of \$19,065, leaving \$9,261 to cover a proffered (prorated) wage of \$14,071.20.

In 2004, because the form of the petitioner's business structure changed, the director's method of apportioning the ability to pay the proffered wage between the figures reported on the sole proprietor's 2004 tax return and the corporate petitioner's tax return is appropriate. The proffered wage for approximately three months is \$14,071.20. The sole proprietor's adjusted gross income for approximately three months would be approximately \$9,528.75. The proportionate proffered wage exceeds the sole proprietor's adjusted gross income without considering the proportionate household expenses. Relevant to the corporate tax return covering the remaining nine months of 2004, even without reducing the petitioner's net income or net current assets to a figure representing approximately nine months of each amount, the proffered prorated wage of \$42,213.60 could not be met by either the petitioner's \$175 in net income or its net current assets of \$6,019. The petitioner has not demonstrated its ability to pay the proffered wage in 2004.

Similarly, in 2005, neither the petitioner's net income of \$1,162 nor its net current assets of \$10,152 could pay the proffered wage. The petitioner did not establish its ability to pay the proffered salary in 2005.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at 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.