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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 06 2008

WAC 06 068 52954

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Unskilled 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, Chief
Administrative Appeals Office

DISCUSSION: The employment based 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 is a nursery. It seeks to employ the beneficiary permanently in the United States as a nursery worker. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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)(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 other 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 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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 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 labor certification was accepted for processing on April 26, 2001. The proffered wage as stated on the ETA 750 is $360 per week, which amounts to $18,720 per year. On Part B of the ETA 750, signed by the

beneficiary on March 6, 2001, and as subsequently amended by letter from the beneficiary, he claims to have worked for the petitioner since May 1996.

The petitioner is structured as a sole proprietorship, which 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 $18,720 per year as of the April 26, 2001, priority date, the petitioner provided copies of its sole proprietor's U.S. Individual Income Tax Return for 2002, 2003 and 2004. They reflect that the sole proprietor filed as a single person during these years and claimed no dependents. The returns also contain the following information:

	2002	2003	2004
Wages	n/a	n/a	n/a
Taxable interest	$ 39	$ 25	$ 25
Capital gain or (loss)	$ 121	$ 53	$ 276
Farm income or (loss)	$ 13,091	$8,705	$7,375
Adjusted Gross Income[1]	$ 10,436	$6,462	$5,470

The petitioner did not provide a copy of the sole proprietor's income tax return for 2001, however various Wage and Tax Statements (W-2s) were submitted. Copies of a 2003, 2004 and 2005 W-2 appear to be issued by the petitioner to the identified beneficiary in the Immigrant Petition for Alien Worker (I-140). They show wages paid as follows:

2003	$ 2,800
2004	$20,240
2005	$18,320

Other W-2s for 2001, 2002, and 2003 were provided. They reflect payments made to an individual with a different name than the I-140 beneficiary. The amounts are shown as $12,320, $14,560, and $16,864, for each of these years. Two different social security numbers are reflected as belonging to employee named in the 2003-2005 W-2s and the other W-2s for 2001-2003.

The director denied the petition on August 1, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage of $18,320, noting the W-2 discrepancies and determining the petitioner did not demonstrate the ability to pay the proffered wage.

On appeal, the petitioner, through counsel, contends that the petitioner demonstrated its ability to pay the proffered wage. An additional copy of the sole proprietor's income tax return for 2005 was provided. It contains the following information:

	2005
Wages	n/a
Taxable interest	$ 13

[1] Adjusted gross income is shown on line 35 in 2002; line 34 in 2003; and on line 36 in 2004.

Capital gain or (loss)	$ 376
Farm income or (loss)	$ 7,599
Adjusted Gross Income (line 37)	$ 5,821

Counsel also provides a copy of the beneficiary's birth certificate, copies of the petitioning business' checking account statements for 2005, copies of the petitioner's state wage reports for the four quarters of 2005, showing wages paid to the I-140 beneficiary, and a notarized declaration of the beneficiary. He indicates that he worked for the petitioner during the periods reflected on the W-2s, but used his brother's name during 2001-2003 and his own name during 2003-2005. He adds that he "made up" the social security numbers. [2]Counsel asserts that the all of the W-2 wages should be attributed to the beneficiary and considered in support of the petitioner's ability to pay the proffered wage of $18,720 per year.

While we are inclined to consider at least the Wage and Tax Statements issued by the petitioner to the named beneficiary in the I-140 as also reflected in the beneficiary's birth certificate, we find that without specific and persuasive corroboration directly from the petitioner as to the other period(s) of employment claimed by the beneficiary on appeal, these documents will not be considered. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is additionally noted that the petitioner states that the beneficiary has no social security number on the I-140 the petitioner filed on December 28, 2005.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is April 26, 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. Actual amounts will be considered if they are credibly supported by the documentation contained in the record. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

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[2] This office notes that an individual who wrongfully uses or misrepresents a social security number may face civil and/or criminal penalties. *See* 8 U.S.C. § 1324c, 18 U.S.C. § 10901 and 42 U.S. C. § 408(a)(7).

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. In this case, the business-related income and expenses are reported on Schedule F as Profit or Loss From Farming and are carried forward to the first page of the tax return (line 18) and are included in the calculation of adjusted gross income. 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. 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. If the bank statements are, for example, savings accounts, money market accounts, certificates of deposits, or other similar accounts, such funds could be considered to be available to pay the proffered wage and/or personal expenses if supported by appropriate evidence from the sole proprietor. In this case, the 2005 business banking accounts represent the petitioner's cash flow that would already be reflected on Schedule F of the sole proprietor's tax returns as part of the gross receipts and expenses that have been brought forward to page 1 of the tax return and are necessarily included in the sole proprietor's declaration of personal income.[3]

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, they were not solicited by the director or offered by the petitioner.

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.

It may not be concluded that the petitioner established its ability to pay in 2001. The petitioner did not provide a tax return, audited financial statement or annual report as required by the regulation at 8 C.F.R. § 204.5(g)(2).

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[3] It is noted that ten out of the twelve ending balances shown the statements do not exceed the proffered wage.

In 2002, even without considering any household expenses, the petitioner's adjusted gross income of $10,436 is insufficient to cover the proffered wage of $18,720.

In 2003, the wages of $2,800 paid to the identified beneficiary are $15,920 short of the proffered wage of $18,720. The sole proprietor's adjusted gross income of $6,462 was insufficient to cover this amount or demonstrate the ability to pay.

In 2004, the beneficiary's wages of $20,240 exceeded the proffered wage and established its ability to pay. Similarly, we will consider that the petitioner's payment of wages to the beneficiary in 2005 to be sufficient to demonstrate its ability to pay in this year.

Citing figures from [redacted]s individual tax returns reflected on Schedule F, Profit or Loss from Farming, counsel asserts that the overall profile of the petitioner's business reflects a successful operation with high gross sales, assets and deductions for labor hired. A similar contention was successful in *Matter of Sonegawa* 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, although the nursery's gross income as shown on Schedule F of the individual tax returns provided for 2002 through 2005 were in the $500,000 range, the business also carried similar large expenses, resulting in the modest net profits noted above and shown as farm income. It cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonegawa,* or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case.

As noted above, the petitioner must demonstrate a *continuing* financial ability to pay the proposed wage offer as set forth in 8 C.F.R. § 204.5(g)(2). Based on the foregoing, it may not be concluded that the petitioner has established its ability to pay the proffered salary beginning at the priority date of April 26, 2001.

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.