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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 06 2009

WAC 03 269 51148

IN RE: Petitioner:
Beneficiary: [redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
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 beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. As required by statute, a Form 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[1] asserts that it 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 either in the form of copies of annual reports, federal tax returns, or audited financial

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[1] The record shows that the beneficiary's counsel actually filed the appeal. This attorney has never submitted a properly completed Notice of Entry of Appearance as Attorney or Representative (Form G-28) on behalf of the petitioner, although recently requested to do so by this office. Instead, he has submitted previously filed G-28s by other counsel and has altered other previously filed G-28s in the record of proceeding. For this reason, this decision will be sent to the petitioner's last counsel of record.

> 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 [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is realistic. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that 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). Therefore, 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.

Here, the ETA 750 was accepted for processing on January 16, 1998. The proffered wage as stated on Part A of the ETA 750 is $10.00 per hour, which amounts to $20,800 per year. On Part B of the ETA 750, signed by the beneficiary on June 12, 1999, the beneficiary claims to have worked for the petitioner since February 1993 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on September 25, 2003, the petitioner states that it was established in 1991.

The petitioner was initially structured as a sole proprietorship, but became a corporation as of February 2, 2000. 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). As evidence of its continuing financial ability to pay the proposed wage offer of $20,800 per year, the petitioner has provided copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 1998, and 1999. For 2000, 2001, 2002, and 2003, the petitioner has submitted copies of its Form 1120, U.S. Corporation Income Tax Return. The corporate returns indicate that the petitioner files its tax returns using a standard calendar year. The individual returns filed for 1998 and 1999 were filed by the sole proprietor jointly with her spouse and declared three dependents in each year. The returns also contain the following information:

	1998	1999
Wages	$20,175	$20,832
Taxable Interest	$ 165	$ 421
Business Income	$8,325	$12,983

Adjusted Gross Income[2]	$28,298	$33,590

The corporate tax returns contain the following information for the years, 2000, 2001, 2002, and 2003:

	2000	2001	2002	2003
Net Income[3]	$ 334	-$ 423	$2,109	$1,412
Current Assets	$6,641	$ 9,746	$ 4,606	$5,101
Current Liabilities	$ -0-	$ 6,357	$ -0-	$-0-
Net Current Assets	$6,641	$ 3,389	$ 4,606	$5,101

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] 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 L of its 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.

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[2] Adjusted gross income is shown on line 33 of the Form 1040 in 1998 and in 1999.

[3] For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[4] 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.

The petitioner also provided copies of 2000, 2001, and 2002 Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary. They reflect the following:

Year	Wages Paid	Difference from Proffered Wage of $20,800
2000	$18,054	-$ 2,746
2001	$18,520	-$ 2,280
2002	$18,000	-$ 2,800

The petitioner additionally submitted copies of the beneficiary's payroll records indicating that as of March 15, 2003, he had received $3,760 in compensation.

Following a review of the petitioner's net income and net current assets, the director determined that the petitioner had not established its ability to pay the proposed wage offer. He further observed that the position offered is for a permanent full-time worker and that the petitioner's lack of sufficient profit did not warrant such a position. The director denied the petition on September 23, 2004.

On appeal, the petitioner asserts that it has established the financial ability to pay the proffered wage.

At the outset, we note that the director did not consider the petitioner's employment of the beneficiary and the wages paid to him in 2000-2002. The facts do not support the director's suggestion that the petitioner somehow lacked the intent to offer a permanent full-time position to the beneficiary. That said, for the reasons set forth below, we do not find that the petitioner established its continuing financial ability to pay the beneficiary the proffered wage set forth in the approved labor certification.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record indicates that the petitioner paid wages to the beneficiary in the years 2000, 2001 and 2002. They reflect a -$2,746 difference from the proffered wage of $20,800 in 2000; a -$2,280 difference from the proffered wage in 2001; and a -$2,800 difference from the proffered wage in 2002. The record does not contain any evidence of wages paid in 1998 and 1999. In 2003, at least as of March 15, 2003, the petitioner was compensating the beneficiary at the hourly rate of $10.00 per hour as set forth on the

ETA 750. It is unclear if this compensation continued throughout the year because the record did not contain a copy of the beneficiary's W-2 or a Form 1099.

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, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

It is noted that a petitioner's personal holdings will not be considered in determining the corporate petitioner's ability to pay the proffered wage in 2000, 2001, 2002 or 2003. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

That said, in 2000, although the petitioner's net income of $334 was not sufficient to cover the $2,746 shortfall between the wages paid and the proffered salary of $20,800, the petitioner's net current assets of $6,641 could pay this difference and demonstrate the petitioner's ability to pay the proffered wage in this year.

In 2001, the petitioner's net income of -$423 was not sufficient to pay the difference of $2,280 when comparing the beneficiary's actual wages of $18,250 and the certified salary of $20,800, however the petitioner's net current assets of $3,389 could cover this difference.

Similarly, the petitioner demonstrated its ability to pay the proffered wage in 2002 because its net current assets of $4,606 could cover the $2,800 difference between the beneficiary's actual wages and the proffered salary of $20,800.

As noted above, although a payroll record was provided showing payment of wages as of March 15, 2003, no W-2 was provided by the petitioner for 2003 that revealed the total wages paid to the beneficiary for that year, although the 2003 corporate tax return was supplied. Without any yearly basis for comparison, the information necessary for evaluating the petitioner's ability to pay the full proffered wage is not present for 2003. It is noted that in this year, neither the petitioner's net income of $1,412 nor its net current assets of $5,101 could cover the proffered salary. The petitioner has not established its ability to pay in 2003.

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 did not provide such a summary for 1998 and 1999.

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 1998, the proffered salary of $20,800 per year represents 74% of the sole proprietor's adjusted gross income of $28,298 even without considering any household expenses. In 1999, the proffered salary represents 62% of the sole proprietor's adjusted gross income of $33,590 without considering any household expenses. No other cash or cash equivalent assets available to pay the proffered wage were documented by the record. The petitioner has not demonstrated its ability to pay the proffered salary in 1998 or 1999.

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related 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.

In the present matter, as set forth above, although the petitioner has demonstrated its ability to pay the proffered wage in 2000, 2001 and 2002 through its ability to cover the difference between wages paid to the beneficiary and the proffered wage of $20,800, it remains that the sole proprietor reported modest adjusted gross income as a sole proprietorship in 1998 and 1999 and modest net income as a corporation. The petitioner did not establish that it paid the beneficiary any wages in 1998 or 1999, and the tax returns for those years would not support that the sole proprietor could pay the proffered wage and support himself and his family. *See Ubeda v. Palmer,* 539 F. Supp. at 647. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner.

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 of January 16, 1998. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is additionally observed that Item 15 (Other Special Requirements) of the ETA 750 was amended on April 10, 2002 to include a requirement that the applicant possesses a cosmetology license. There is no evidence of this license in the record. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification,

> meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As the record contains no evidence of the beneficiary's cosmetology license, the petitioner has failed to establish that the beneficiary meet the requirements of the labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(B).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.