U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 20 2009

SRC 07 017 50169

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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.

As set forth in the director's February 23, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL 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 on April 20, 2001. The proffered wage as stated on the Form ETA 750 is $11.55 per hour ($24,024.00 per year). The Form ETA 750 states that the position requires two years of experience in the position offered.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal counsel has submitted a brief, a copy of the IRS Form 1040 Individual Income Tax Return for [redacted] for the year 2006, and copies of previously submitted evidence. Other evidence in the record includes the IRS Form 1040 Individual Income Tax Returns for [redacted] for the years 2002 through 2005,[2] Form W-2 Wage and Tax Statements issued to the beneficiary by the petitioner in 2001, 2002 and 2003, and copies of the Forms 1120 U.S. Corporation Income Tax Return for Taipan Food Service Group, Inc. for the years 2001 through 2005.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1987, to have gross annual income of $568,863.00 and net annual income of $40,879.00, and to currently employ 10 workers. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claimed to have worked for the petitioner since June of 1991.

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, U.S.

---

[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).

[2] The Forms 1040 for the years 2002, 2003 and 2004 each contain a Schedule C, Profit or Loss from Business. The name of the business is listed on the Schedule C as Taipan Café on the 2003 tax return, and as Taipan Bakery on the 2002 and 2004 tax returns. The Employer Identification Number (EIN) listed on Schedule C is [redacted] which corresponds with the EIN listed on the I-140 petition. This EIN is also listed on the Forms W-2 that are in the record. Therefore, the AAO finds that the filer of the Forms 1040 (an individual) is the petitioner.

[3] The name of the corporation listed on each Form 1120 is Taipan Food Service Group, Inc. and the EIN is listed as [redacted] As noted by the director, this is different than the EIN listed on the Form I-140. Thus it appears that Taipan Service Group, Inc. is a separate entity from the petitioner. As discussed below, the AAO will not consider the financial resources of entities that have no legal obligation to pay the proffered wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). However, it is noted that [redacted] listed as the sole shareholder of Taipan Food Service Group, Inc. Presumably, any income received or loss incurred from Taipan Food Service Group, Inc. by [redacted] would be listed on his individual income tax return and would therefore be considered to the extent that it impacts his adjusted gross income.

Citizenship and Immigration Services (USCIS) 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 during a given period, USCIS will first 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. In the instant case, the petitioner submitted copies of Forms W-2, Wage and Tax Statement, issued to the beneficiary for the years 2001, 2002 and 2003. These show that the petitioner paid the beneficiary $8,906.25 in 2001, $10,530.00 in 2002 and $4,050.00 in 2003. Since the proffered wage is $24,024.00 per year, the petitioner must establish that it had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is $15,117.75 in 2001, $13,494.00 in 2002, and $19,974.00 in 2003. The petitioner must establish that it had the ability to pay the full proffered wage in the years 2004, 2005 and 2006.

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 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).

The petitioner is a sole proprietorship, 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.[4] 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

[4] It is noted that the director incorrectly considered only the net loss from Schedule C of the sole proprietor's income tax returns, rather than the sole proprietor's adjusted gross income as listed on the first page of the tax returns. However, as discussed below, the sole proprietor had insufficient AGI to establish his ability to pay the proffered wage beginning on the priority date. Therefore, the director's error does not alter the result in this case.

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 petitioner operating 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 five, which includes himself, his spouse, and his three children. The tax returns reflect the following information for the following years:

Year	Proprietor's Adjusted Gross Income
2001	Not provided
2002	$41,855.00
2003	$43,655.00
2004	$203,133.00
2005	$102,898.00
2006	$123,945.00

The sole proprietor has not established that it had the ability to pay the proffered wage in 2001. Reducing the sole proprietor's adjusted gross income (AGI) by the difference between the proffered wage and the wages paid in 2002 and 2003 would leave the sole proprietor with an adjusted gross income of $28,361.00 in 2002 and $23,681.00 in 2003. It is unlikely that the petitioner could have sustained a family of five on these amounts. The record does not contain evidence of additional assets or sources of income that could have been used to pay the proffered wage. Therefore, the sole proprietor has not established that it had the ability to pay the proffered wage in 2001, 2002 or 2003. 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)).

The sole proprietor's AGI was significantly higher in 2004, 2005 and 2006. Reducing the sole proprietor's AGI by the proffered wage would leave the sole proprietor with $179,109.00 in 2004, $78,884.00 in 2005 and $99,471.00 in 2006. Although these amounts are substantial, the record does not contain evidence of the living expenses of the sole proprietor and his dependents. Thus the AAO cannot determine whether these amounts were sufficient to sustain the sole proprietor and his dependents. Therefore, the sole proprietor has not established that he had the ability to pay the proffered wage in these years.

In his brief, counsel seeks to rely on the gross sales figures and assets listed on the corporate income tax returns of Taipan Food Service Group, Inc. in order to establish the petitioner's ability to pay the proffered wage. However, as noted above, Taipan Food Service Group, Inc. is a corporation which is separate and distinct from the petitioner, Taipan Café.

Although [redacted] is listed as the sole shareholder on the corporate tax returns for Taipan Food

Service Group, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The AAO will not consider the financial resources of entities that have no legal obligation to pay the proffered wage. *See Sitar v. Ashcroft,* 2003 WL 22203713 (D.Mass. Sept. 18, 2003). However, as noted, [redacted] is listed as the sole shareholder on the tax returns for Taipan Food Service Group, Inc. Presumably, any income received or loss incurred from Taipan Food Service Group, Inc. by [redacted] was listed on his individual income tax return and has therefore already been considered in determining the sole proprietor's ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.[5]

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.

---

[5] Furthermore, it is noted that the evidence in this matter does not warrant approval under a totality of the circumstances analysis. *See Matter of Sonegawa,* 12 I&N Dec. 612. The decision in *Sonegawa* related to a petition filed during uncharacteristically unprofitable or difficult years 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 $100,000.00. 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 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. Clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a pattern of profitable or successful years, or that it has a sound business reputation. Instead, as noted above, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the ability to pay the proffered wage.