

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



BE

FILE: [Redacted]
WAC 03 158 53311

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 16 2005**

IN RE: Petitioner: [Redacted]
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:



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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
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, [REDACTED] is a jewelry and clothing firm. It seeks to employ the beneficiary permanently in the United States in "jewelry repair and fabricator." 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. The director also found that the petitioner had failed to establish that the beneficiary had the requisite two years experience required by the offered position.

On appeal, counsel submits additional evidence and contends that the petitioner has established its financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

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, 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 regulation at 8 C.F.R. § 204.5(l)(3) also 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 worker.* 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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also establish that alien beneficiary has the required education,

training, and experience specified on the ETA 750 as of the priority date. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$9.00 per hour, which amounts to \$18,720. Part B of the ETA 750, signed by the beneficiary, does not indicate that the petitioner has employed the beneficiary.

Part A, item 14 of the ETA-750, indicates that the beneficiary must have two years of experience in the job offered in jewelry repair and fabricator.

On Part 5 of the visa petition, filed April 25, 2003, the petitioner claims to have been established in 1993, have a gross annual income of more than \$250,000, a net annual income of more than \$25,000, and to currently employ fourteen workers.

The petitioner is structured as a sole proprietorship. With the petition, as evidence of its ability to pay the proffered wage, the petitioner submitted a copy of the sole proprietor's individual tax return (Form 1040) for 2001 and copies of a 2001 and various 2002 bank statements held in the name of the sole proprietor and two different businesses. The tax return shows that the sole proprietor filed her taxes as a single person declaring one dependent. The tax return reflects that she declared adjusted gross income of \$27,500, including business income of \$28,499. Schedule C, Profit or Loss from Business, included as an attachment reflects that the sole proprietor's net business income is derived from [REDACTED]

In support of the beneficiary's requisite work experience, the petitioner submitted a letter, dated March 16, 2003, from [REDACTED] owner of an Indian firm, [REDACTED] states that the beneficiary worked for his company from July 1996 to January 2000, serving one year as a management trainee in the jewelry repair and fabrication department, and then from August 1997 to January 2000 as a manager in the jewelry repair and fabrication department where she directly worked with the jewelry making employees and made jewelry samples as per work orders received.

On October 17, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage and the beneficiary's qualifying work experience because the initial documentation submitted with the petition was inadequate. The director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of April 25, 2001. The director requested this evidence for 2001 and 2002. The petitioner was also instructed to provide copies of its last four state quarterly wage reports and all schedules and tables that accompany submitted tax returns.

The director further requested that the petitioner submit evidence demonstrating that the beneficiary possesses two years of work experience as set forth in the ETA 750. The director informed the petitioner that verification of such experience should be submitted on the previous employer's letterhead showing the name and title of the person providing the verification and with the beneficiary's job title, duties and dates of employment, including number of hours worked per week.

In response, the petitioner provided another letter, dated October 2003, from [REDACTED] [REDACTED] In this letter he re-states the facts presented in his first letter relevant to the beneficiary's employment and adds that she worked 40 hours per week as a management trainee and subsequently as a manager in

jewelry repair and fabrication. He adds that her management position included performing all the fabrication and repair duties that she had performed as a management trainee.

Regarding the petitioner's ability to pay the proffered wage, the petitioner submitted additional copies of its bank statements for January to November 2003, as well as another copy of the sole proprietor's 2001 individual tax return accompanied by an Internal Revenue Service (IRS) response to an inquiry, dated December 29, 2003. These documents reflect different figures than the first 2001 tax return submitted with the petition. Here, the sole proprietor's adjusted gross income is revealed as \$15,883, including business income of \$15,999. No tax return, audited financial statement or other documentation for 2002 was submitted. Although former counsel's transmittal letter mentions the enclosure of a copy of the IRS extension of time application to file the 2002 tax return, no copy was included in the petitioner's response.

The petitioner's response also included copies of its last four state quarterly wage reports beginning with the quarter ending September 30, 2002. This wage report reflects that the petitioner reported "-0-" full or part-time covered employees for July through September 2002. Thereafter, the petitioner reported an average of twenty-two covered employees, except for June 2003, when "-0-" were claimed.

The director issued another request for additional evidence on February 26, 2004. The petitioner was instructed to provide IRS copies of the income tax return filed for 2001, as the previous submissions reflected a discrepancy in the figures. The director also requested additional documentation of the petitioner's ability to pay the proffered wage from January 2002 to the present. Although there is no actual evidence in the record, the director stated that evidence of an extension to file the sole proprietor's 2002 tax return had been received. The director also requested that the petitioner provide a summary of the sole proprietor's monthly household expenses, as well as evidence of any other individual assets that are proposed to be used to pay the certified wage.

In response, the petitioner provided another copy of the IRS document reflecting the sole proprietor's adjusted gross income of \$15,883 in 2001. The petitioner also supplied copies of the petitioner's bank statements for January through October 31, 2003, November 29, 2003 through April 30, 2004, as well as copies of the sole proprietor's other business' bank statements for six months in 2002 and the first four months of 2004. The petitioner further submitted a summary of the sole proprietor's monthly household expenses totaling \$3,718.75 for a typical month. Former counsel's transmittal letter, dated May 19, 2004, claims that the sole proprietor's tax returns for 2002 and 2003 are not available and that extensions have been requested. He further states that the sole proprietor's household expenses are paid from the [REDACTED] account and that both accounts should be included in the review of the petitioner's ability to pay the certified wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 9, 2004, denied the petition. The director also noted that the petitioner had not established that the beneficiary possesses the requisite two years of qualifying work experience in jewelry repair and fabrication.

On appeal, the petitioner, through current counsel, provides a third letter from [REDACTED] owner of [REDACTED] in New Delhi, India, in order to verify the beneficiary's requisite two years of experience in jewelry repair and fabrication. This letter is similar to the earlier two letters submitted by [REDACTED]. He also asserts that as a manager from August 1997 to January 2000, the beneficiary "was directly involved in

jewelry repair where she repaired jewelry in complicated cases. She was involved fully as a fabricator. She made samples of various types of jewelry and fabricated them for eventual mass production.”

Counsel also submits copies of unaudited financial statements in the form of balance sheets and profit and loss statements for 2001-2003 and for the first six months of 2004 as indicative of the petitioner’s financial profile. Counsel also submits a letter, dated August 4, 2004, from [REDACTED] an attorney and certified public accountant, who states, that based on the beneficiary’s information, these statements were prepared by her accountant [REDACTED] who also prepared her 2001 individual tax return and that they demonstrate the petitioner’s ability to pay the proffered wage of \$18,720 per year.

At the outset, it is noted that the employment letters provided by [REDACTED] appear to comply with the terms of the regulation at 8 C.F.R. § 204.5(l)(3), *supra*, in verifying that the beneficiary has the requisite prior work experience of at least two years in jewelry repair and fabrication. The letters reflect that while the beneficiary was performing the duties of a management trainee and manager, she sufficiently participated in the direct work of fabrication and jewelry repair to satisfy the terms of the labor certification.

Relevant to counsel’s claims that the director erred in reviewing the petitioner’s ability to pay the proffered salary of \$18,720, it is noted that in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during a given 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 evidence provided does not reflect that the petitioner employed the beneficiary.

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, 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).

With regard to the unaudited financial statement that have been submitted on appeal, it is noted that 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. Unaudited statements are the unsupported representations of management, and as such, are not probative of the petitioner’s ability to pay the proffered salary.

A petitioner’s bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner’s financial status and do not reflect other liabilities and encumbrances that may affect a petitioner’s ability to pay the proffered wage. Additionally, as noted in the director’s decision, the single bank statement for 2001 does not show sufficient funds to pay the proffered wage, nor sufficiently demonstrate a sustained ability to pay the proffered wage. It is further noted that less than one-half of the petitioner’s 2003 bank statements show amounts sufficient to cover the certified wage on a monthly basis of \$1,560 per month.

In this case, the petitioner is operated as 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. 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. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). This is the reason that a review of the ability to pay the proffered wage includes consideration of the sole proprietor's household expenses, as well as the adjusted gross income set forth on page one of the tax return.

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, although the sole proprietor supports a smaller family than that illustrated in *Ubeda*, it is noted that in 2001, the only year for which a tax return has been offered, the proffered salary of \$18,720 is 118 percent larger than the sole proprietor's reported adjusted gross income of \$15,883. Even without considering any calculation for household expenses, the reported adjusted gross income does not support the additional deduction of the proposed wage offer of \$18,720 per annum. It is further noted that a prorated calculation of the proffered wage for the portion of the year that occurred after the priority date has been discussed. We 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 payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that evidence has not been submitted here.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. In this case, the evidence fails to demonstrate through the prescribed regulatory documentation that the petitioner has demonstrated its ability to pay the certified wage of \$18,720 per year beginning on April 25, 2001, as set forth in the approved labor certification. The petitioner must demonstrate that the petition is approvable as of the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on a review of the evidence and argument offered in the underlying record and on appeal, the AAO cannot conclude that the petitioner has the continuing financial ability to pay the proffered wage beginning on 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.