

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

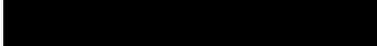
PUBLIC COPY



bg

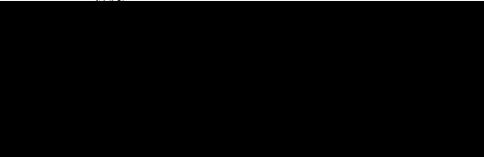
FILE: LIN 04 028 50478 Office: NEBRASKA SERVICE CENTER

Date: DEC 19 2005

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, Director
Administrative Appeals Office

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

The petitioner is a gasoline and convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien 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 asserts that the director misinterpreted the evidence and should have approved the petition.

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 Services (CIS)].

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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$16.72 per hour, which amounts to \$34,777.60 per year. The ETA 750B, signed by the beneficiary on March 21, 2001, does not reflect that the petitioner has employed the beneficiary.

On Part 5 of the preference petition, filed November 10, 2003, reflects that the petitioner was established in 1998, has one employee, and a gross annual income of \$1.5 million dollars.

The petitioner is structured as a sole proprietorship. As evidence of its ability to pay the proffered salary of \$34,777.60 per year, the petitioner initially submitted copies of the sole proprietor's Form 1040, U.S.

Individual Income Tax Return for 2001 and 2002. These tax returns show that the sole proprietor files separately as a married person, claiming no other exemptions. The following information is presented on the returns:

	2001	2002
Adjusted Gross Income (Form 1040)	\$ 26,063	\$ 37,473
Gross Receipts or Sales (Sched. C)	\$1,440,530	\$1,583,157
Gross Income (Sched. C)	\$ 130,882	\$ 150,590
Wages (Sched. C)	n/a	\$ 7,260
Casual labor (Part V, Sched. C)	\$ 14,700	\$ 13,707
Total Expenses (Sched. C)	\$ 108,218	\$ 128,560
Business Net Income (Sched. C, line 31, Form 1040, line12)	\$ 22,664	\$ 22,030

The petitioner also initially submitted copies of its bank statements covering January 2001 through September 2003. They indicate that the petitioner initially held its funds at "Old Kent Bank" and later opened another account at "Fifth Third Bank."

On March 18, 2004, the director requested additional evidence in support of the petitioner's continuing ability to pay the proffered salary as of March 26, 2001. The director requested additional copies of the sole proprietor's 2001 and 2002 federal tax returns, as well as a list of monthly recurring household expenses and checking and savings account balances.

In response, the petitioner resubmitted copies of its bank statements covering the period from February 2001 to December 2003, as well as extracts from some compiled unaudited financial statements for 2001 and 2002. No list of household expenses was submitted. Rather, counsel's transmittal letter merely states that the sole proprietor doesn't have any installment loan or credit card payments and advises that copies of an apartment lease and a recent cell-phone and electric bill are enclosed. The apartment lease indicates that the sole proprietor pays \$560 per month in rent, which amounts to \$6,720 per year. A copy of a loan agreement reflects that the sole proprietor was paying \$349 per month for an automobile. Copies of a phone and utility bill reflect monthly payments of \$78.25. No indication of other expenses such as food, clothing, gas, or insurance, or cable etc., was provided. Copies of the sole proprietor's individual bank statements show that he held balances of \$2,267.86 in December 2001, \$27,827.13 in December 2002, and \$21,545.31 in December 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on May 12, 2004, denied the petition. The director primarily based his decision on the sole proprietor's tax returns for 2001 and 2002, finding that the figures reflected therein failed to support the petitioner's ability to pay the proffered wage.

On appeal, counsel submits additional documentation including a copy of the sole proprietor's individual tax return for 2003 and copies of two Wage and Tax Statements indicating that the petitioner paid compensation to the beneficiary in 2002 and 2003. In 2002, the \$7,260 was paid as wages, and in 2003, the wages were \$2,420. The sole proprietor's tax return for 2003 reflects that the sole proprietor reported adjusted gross income of \$42,358, including net business income of \$43,168 from the petitioner's operation as reflected on

Schedule C, Profit or Loss from Business. This figure is derived from other amounts reflected on Schedule C such as gross receipts of \$936,048, gross income of \$118,890, and total expenses of 43,168.

Counsel includes the accountant's compilation reports with the financial statements submitted on appeal urging that the petitioner's net current assets as shown ranging from approximately \$48,000 to \$75,000 during 2001 to 2003, were each sufficient to cover the proffered wage. Counsel maintains that the principles outlined in a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), supports the demonstration of a petitioner's ability to pay through its net current assets.

Counsel's reasoning is recognized, but we do not find that these compilations of the petitioner's financial data are independently probative of the petitioner's ability to pay the proffered wage. 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. By their own terms, these financial "statements of assets, liabilities, and owners' equity" represent part of a compilation. A compilation is a presentation of financial statement information by an entity 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 management. *See Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not determinative of the petitioner's ability to pay the proffered wage during the period represented. Although the regulation permits in appropriate cases, such documentation as profit/loss statements to be submitted or requested, if such statements are not audited or at least reviewed, they offer limited evidentiary value of the petitioner's ability to pay a wage offer.

With regard to the petitioner's and the sole proprietor's bank statements, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," it neither states nor implies that such material may be offered as a substitution for the required evidence. 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. Relevant to the petitioning business' bank statements, no evidence was submitted to the underlying record demonstrating that the funds reported on the petitioner's bank statements, which presumably represent the normal day-to-day business revenue of the petitioner, are representative of amounts other than those already utilized in the calculation of the petitioner's gross income and total expenses shown on the corresponding portion of Schedule C provided to the record. We are more inclined to consider the cash holdings of an individual sole proprietor as reflected on his bank statements because they are likely to represent more diverse cash assets held by a sole proprietor that can be applied toward the review of the petitioner's ability to pay the proffered wage, and which would not automatically be represented on an individual tax return for a given year. In that regard, consideration of the sole proprietor's individual bank statement balances for 2001, 2002, and 2003 will be included in the examination of the petitioner's ability to pay the proffered wage.

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 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. To the extent that a petitioner may have paid wages less than the proffered salary to the alien will, these amounts will also be considered. In the instant case, the wages paid to the beneficiary in 2002 were \$27,517.60 less than the proffered wage. In 2003, the wages were \$32,357.60 less than the proffered wage.

If the petitioner does not establish that it may have 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, if provided, 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.

In this case, 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. 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). In the instant matter, as mentioned above, the sole proprietor's monthly expenses offered to the record, are \$560 per month for rent, or \$6,720 per year, \$78.25 per month for phone and utilities, or \$939 per year, and \$349 for an automobile, or \$4,188 per year, totaling a minimum of \$11,847 per year without including any other expenses such as for food, clothing, gas, or insurance, which were not provided to the record.

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 this case, while the sole proprietor's adjusted gross income and year-end available cash holdings suggest that while he might have been able to cover the \$27,827.13 and \$21,545.31 difference(s) between the proffered wage and the actual wages paid to the beneficiary in 2002 and 2003, respectively, after paying household expenses of approximately \$12,000 per year; in 2001, this ability has not been shown. The sole proprietor's adjusted gross income in 2001 was \$8,714.60 less than the certified wage of \$34,777.60. The record does not demonstrate that there was sufficient available other resources to pay the sole proprietor's living expenses as well as pay the proposed wage offer of \$34,777.60 per year.

In the context of the financial information contained in the record, counsel maintains that the petitioner's situation is similar to that described in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. 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 *Sonogawa* 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 Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. He considered a number of factors including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. In this case, the two tax returns submitted to the underlying record and the 2003 tax return provided on appeal do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Here, although the petitioning business increased its net profit in 2003, the AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the arguments presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the visa 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.