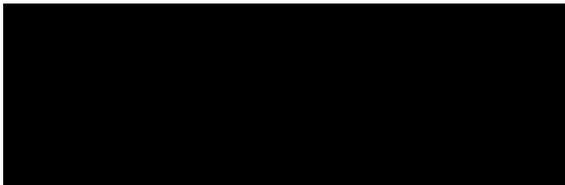




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FILE: WAC 03 061 53104 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

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:  
[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, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition, and a subsequent motion to reopen was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile body repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile body repairman. 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. Accordingly, the director denied the petition.

On appeal, counsel submits a Form I-290B with comments. Counsel does not submit any additional documentation.

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 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 April 24, 1998. The proffered wage as stated on the Form ETA 750 is \$664.80 a week, or an annual salary of \$34,569.60. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1994.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in December 1975, to have three employees, to have a gross annual income of \$345,502, and a net annual income of \$14,098. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary from [REDACTED], General Manager, Diesel Service and Maintenance, Mexico City, Mexico. Mr. [REDACTED] stated that the beneficiary had worked for him from 1991 to 1994. The petitioner also submitted its IRS Form 1040, U.S. Individual Income Tax Return, for 2001. This document indicated that the petitioner had an adjusted gross income of \$24,364 in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 15, 2004, the director requested additional evidence pertinent to that ability. The director stated that the petitioner could submit copies of annual reports, federal tax returns, or audited financial statements from April 24, 1998, the priority date to the present. The director also requested that the petitioner submit all schedules and tables for the 2001 tax return. The director then requested that the petitioner submit copies of the state of California Employment Development Department (EDD) Form DE-6 Quarterly Wage Reports for all employees for the last eight quarters, and that these forms include the names, social security numbers, and number of weeks worked by each employee. The director also requested that the petitioner provide the job titles and duties for each employee listed on the DE-6 forms. Finally the director requested the beneficiary's W-2 statements for 1998, 1999, 2000, and 2001, as well as copies of the beneficiary's pay statements for the last four months, which the director identified as November 2003 to February 2004.

In response, the petitioner submitted its federal tax returns from 1998 to 2003. The petitioner stated that it included the beneficiary on its DE-6 reports until the middle of 2002. At that time, the U.S. Social Security Administration (SSA) advised the petitioner that the social security number of the beneficiary did not match SSA records. The petitioner stated that the beneficiary was then paid in cash from mid 2002 to the present time. The petitioner submitted a copy of a letter sent by the SSA to the petitioner with regard to incorrect social security numbers on Forms W-2 during the 2001 tax year.

The petitioner also submitted copies of the beneficiary's Forms W-2 for tax years 1998 to 2002. These documents indicated that the beneficiary earned \$ 20,700 in 1998, \$20,050 in 1999, \$25,990 in 2000, \$36,765 in 2001, and \$17,040 in 2002. The DE-6 forms submitted by the petitioner were from the last quarter of 2001 to the third quarter of 2003, and also from the first quarter of 2004. As stated by the petitioner, the beneficiary was listed on the Form DE-6 for the last quarter of 2001 and the first two quarters of 2002. The remaining Forms DE-6 for the remainder of 2002 and for 2003 either listed two employees who were identified as body man helper and painter's helper, or just one employee, the body man helper. For the first quarter of 2004, the petitioner's Form DE-6 listed three employees and identified one of them as a car painter, part time helper to remove and replace parts, to wash cars and clean the shop, and the other two employees as a part-time helpers to remove and replace parts, do minor bodywork, and wash cars. On a list of all employees, the beneficiary's duties are identified as the "body man, frame work (set-up and pull), prep. [sic] and complete bodywork on cars, remove and replace parts, restoration work."<sup>1</sup>

The petitioner's Forms 1040 indicated the following adjusted gross incomes: -\$48,897 in 1998; \$25,160 in 1999; \$1,261 in 2000; \$24,364 in 2001; and \$66,000 in 2002.

On June 28, 2004, the director denied the petition. In his denial, the director examined the petitioner's adjusted gross income, Schedule C wages, and cost of labor, as identified on the petitioner's federal income tax returns. The director also noted the beneficiary's wages from 1998 to 2002. The director then stated that

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<sup>1</sup> The fact that no body man employee is identified in the petitioner's DE-6 Forms for the last quarter of 2002 does add weight to the petitioner's account that the beneficiary, whose job would be essential for a body shop, was taken off the employment document and paid in cash.

based on the petitioner's adjusted gross income for 1998 and 2000, the petitioner did not have the ability to pay the proffered wage from the priority date to the present.<sup>2</sup>

On appeal, counsel states that the beneficiary has been steadily employed and paid by the petitioner since 1994. Counsel states that there is no question that a bona fide job offer exists and that the beneficiary has been regularly paid by the petitioner. Counsel also states that since the job offer is prospective in nature, and relates to after the beneficiary acquires his permanent residency, it appears improper to require the petitioner to establish its ability to pay the proffered wage by examining previous tax returns. Counsel concludes that the beneficiary is critical to the petitioner's operations and with the beneficiary, the petitioner would have great difficulty carrying out his business operations.

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 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. As stated on the ETA Form 750, the petitioner employed the beneficiary as of 1994. Although the petitioner also indicated on its list of employees that it had employed the beneficiary since 1997, in either case, the petitioner employed the beneficiary as of the April 1998 priority date. With regard to the reported wages paid to the beneficiary from 1998 to 2002, the petitioner paid the beneficiary \$20,700 in 1998, \$20,050 in 1999, \$25,990 in 2000, \$36,765 in 2001, and \$17,040 in 2002. In only 2001 did the petitioner pay the beneficiary a salary equal to or greater than the proffered wage of \$34,569.60. Thus, the petitioner established that it has the ability to pay the proffered wage in 2001. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). During the years 1998, 1999, 2000, 2002, and 2003, the petitioner did not pay the beneficiary a salary equal to or greater than the proffered wage. Furthermore although the petitioner stated that post mid-2002, the beneficiary's wages were paid in cash, the petitioner provided no objective evidence to support this claim. Therefore the petitioner cannot establish that it has the ability to pay the proffered wage as of the priority date and onward, based on the beneficiary's wages.

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).

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<sup>2</sup> The director did not explain why only the adjusted gross income for two years were found to be inadequate to establish the petitioner's ability to pay the proffered wage.

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 (7<sup>th</sup> Cir. 1983).

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, the sole proprietor supports himself and one other dependent. As previously stated, the petitioner established that it had the ability to pay the proffered wage in 2000 because the petitioner paid the beneficiary a salary greater than the proffered wage. Therefore the AAO will not examine the sole proprietor's adjusted gross income in 2001. The petitioner's adjusted gross income for the years 1998, 1999, 2000, 2002, and 2003 are as follows: -\$48,897 in 1998; \$25,160 in 1999; \$1,261 in 2000; \$66,000 in 2002, and \$63,862 in 2003.

In examining the sole proprietor's ability to pay a proffered wage, the director may request that the petitioner submit a statement of monthly expenses for the petitioner and his family. Such expenses may include but are not limited to housing, food, car payments, insurance, utilities, credit cards, student loans, clothing, school, daycare, gardener, housecleaner, nanny and any other reoccurring monthly household expenses. If the sole proprietor would use personal assets to pay the difference between the beneficiary's actual wages and the proffered wage, the petitioner had to submit evidence that the petitioner possessed sufficient assets to pay the wage continuously.

In the instant petition, it is noted that even if the director had requested and the petitioner had provided a list of monthly personal expenses, the petitioner's negative adjusted gross income in 1998 would not have been sufficient to pay the petitioner's household expenses, and also pay the difference between the beneficiary's actual wages of \$20,700, and the proffered wage of \$34,569.60, namely, \$13,869.60. Thus, the petitioner has not established its ability to pay the proffered wage in 1998 based on the petitioner's adjusted gross income.

With regard to the year 1999, the beneficiary earned \$20,050 in 1999. The petitioner had adjusted gross income in 1999 of \$25,160 in 1999. Without evidence such as the itemized list of monthly expenses, or sources of additional funding in 1999 available to pay the proffered wage, it does not appear reasonable that the sole proprietor could pay the household expenses of himself and one dependent and pay the difference between the beneficiary's actual wages of \$20,050 and the proffered wage, namely, \$14,519. If this difference were paid of the petitioner's adjusted gross income in 1999, the petitioner would only have \$10,581 available

to pay his household expenses. Thus, the petitioner has not established that it has the ability to pay the proffered wage in 1999 based on its adjusted gross income.

The same can be said for the year 2000. In 2000, the petitioner had an adjusted gross income of \$1,261. In this year, the beneficiary earned \$25,990. To establish its ability to pay the proffered wage in the year 2000, the petitioner had to establish it had sufficient funds to pay its household expenses, and also pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$8,579.60. It does not appear reasonable that the petitioner could have done so, with a gross adjusted income of \$1,261. Thus, the petitioner has not established that it can sustain himself and his one dependent, and pay the difference between the beneficiary's actual wages and the proffered wage in the years 1998, 1999, and 2000.

In 2002, based on the beneficiary's Form W-2, the beneficiary earned at least \$17,040. The record does not reflect any information with regard to the beneficiary's earned wages in 2003. The petitioner's adjusted gross income for these two years is \$66,000 in 2002, and \$63,862 in 2003. The petitioner's adjusted gross income in 2002 appears sufficient to pay the household expenses of two individuals and to pay the difference between the beneficiary's documented wages of \$17,040 and the proffered wage of \$34,569.60, namely, \$17,529.60. With regard to the year 2003, it appears that the petitioner had sufficient adjusted income in 2003 to also pay the difference between the beneficiary's wages and the proffered wage, or the entire proffered wage. However, as previously stated, there is no evidence in the record with regard to the beneficiary's wages in 2003.

In sum, the petitioner has established that in 2001, it paid the beneficiary a salary greater than the proffered wage, and that it had sufficient adjusted gross income in the year 2002 to pay the proffered wage. The petitioner has not established that it had the ability to pay the proffered wage in the years 1998, 1999, 2000, or 2003.

Furthermore, the petitioner did not provide any evidence as to additional sources of funding that are liquid enough and available to pay the difference between the beneficiary's actual wages and the proffered wage in these years. In addition, it is noted that the year 1998 was an unprofitable year for the petitioner. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. With regard to the instant petition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner.

Therefore, the petitioner has not established that it had the ability to pay the proffered wage as of the 1998 priority date and continuing to the present.

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 with regard to the petitioner's ability to pay.

**ORDER:** The appeal is dismissed.