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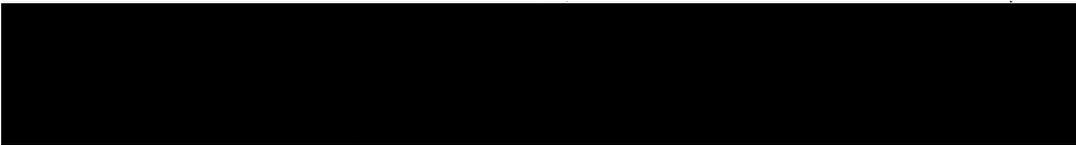


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2005
WAC-03-081-54862

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.

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 is involved in the wholesale, retail, and distribution of cosmetics. It seeks to employ the beneficiary permanently in the United States as an assistant sales 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, counsel submits a brief and additional evidence.

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 March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$20.45 per hour, which amounts to \$42,536 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedule C, Profit or Loss from Business, for the year 2001. The tax return reflects the following information:

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040)	\$57,581
Petitioner's gross receipts or sales (Schedule C)	\$477,487
Petitioner's wages paid (Schedule C)	\$18,700
Petitioner's net profit from business (Schedule C)	\$61,412

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 10, 2003, the director requested additional

evidence pertinent to that ability¹. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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. The director specifically requested signed and completed federal tax returns, the sole proprietor's 2002 tax return, and the sole proprietor's monthly expenses.

In response, the petitioner submitted proof that it had sought an extension of time to file its 2002 tax return and an unaudited income statement for the period ended December 31, 2002. The petitioner also submitted a letter from [REDACTED], its sole proprietor, describing his personal monthly expenses which total \$3558, which is \$42,696 per year [REDACTED] also described the two other employees working for the petitioner.

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 September 24, 2003, denied the petition because the sole proprietor's adjusted gross income reduced by its annual personal expenses was less than the proffered wage.

On appeal, counsel asserts that the sole proprietor's personal expenses are fluid and should not be determinative of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel states that the sole proprietor's house mortgage payment was cheaper in 2001 than currently and submits a check dated in 2002 showing the sole proprietor made payments approximately \$1,000 less than his current mortgage payments. Counsel asserts that the sole proprietor would "economize" to ensure payment of the proffered wage. Additionally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) as applicable precedent to the petitioner's case since the sole proprietor expanded his business in 2002 and has shown a reasonable expectation of increased business.

On appeal, the petitioner submits the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2002 with accompanying Schedule C, Profit or Loss From Business statement, and the petitioner's bank statements for a checking account held by California Center Bank for 2001 and 2002 showing an average available balance in 2001 of \$14,837.70 and an average available balance in 2002 of \$7150.52.² The sole proprietor's adjusted gross income in 2002 was \$37,828 and its gross receipts were \$411,666; wages paid were \$25,873; and net profit was \$108,370. The sole proprietor also showed gross receipts from two other businesses in 2002 for which one showed net profits of \$8,215 and one showed a loss of \$65,993.

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. In the instant case, the petitioner has not established that it has previously employed the beneficiary. On the Form ETA 750B and Form G-325, Biographic Information sheet submitted with her application to adjust status to lawful permanent resident, the beneficiary indicated that she has been unemployed since 1996.

¹ The director also requested additional evidence in March 2003, but did not ask for evidence concerning the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² These amounts were derived from adding each average available balance for each month in each year and dividing by twelve.

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).

The unaudited financial statements that counsel submitted in response to the director's request for evidence are not persuasive evidence. 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. The unsupported representations of management are not persuasive evidence of a 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 (7th 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 a family of five. In 2001, the sole proprietorship's adjusted gross income of \$57,581 covers the annual proffered wage of \$42,536. It is improbable that the sole proprietor could support himself and his family on \$15,045 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, especially considering the sole proprietor's stated annual expenses of \$42,696. Even if those expenses were reduced by an additional \$12,000 to accommodate the sole proprietor's purported lower mortgage payments, the sole proprietor does not show enough money to cover his own personal expenses and the proffered wage in 2001. In 2002, the sole proprietorship's adjusted gross income of \$37,828 is lower than the annual proffered wage of \$42,536. Thus, it would be impossible for the sole proprietor to support himself and his family and pay the proffered wage.

Finally, the petitioner maintained two balances of \$14,837.70 and \$7150.52 for 2001 and 2002, respectively, in a checking account. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. However, the average balance is not substantial enough to cover the proffered wage and cannot be considered in the aggregate as any funds used to pay the proffered wage in one month would not be available to pay the wage

in subsequent months. Additionally, the profit realized by one additional business held by the sole proprietor was cancelled out by the loss realized by the other additional business held by the sole proprietor. Thus, the personal assets of the sole proprietor do not lead to a determination that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

Finally, counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 or 2002 were uncharacteristically unprofitable years for the petitioner. No evidence was provided about years preceding 2001 or 2002 and both of those years showed similar financial results.

The petitioner also argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing 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.