

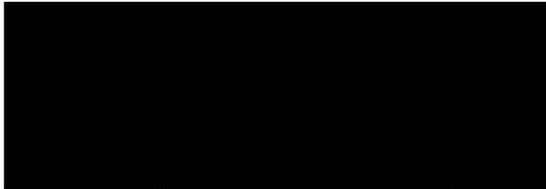


U.S. Citizenship
and Immigration
Services

B6

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

PUBLIC COPY



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JUL 11 2006**
WAC 03 221 52555

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

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 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 workers.* 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 17, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$24,000.00 per year. The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a U.S. Internal Revenue Service Form tax return for 2001; an income statement; the beneficiary's W-2 Wage and Tax statements; a physician's statement; and, copies of documentation concerning the beneficiary's qualifications.

The director requested additional evidence, *inter alia*, on July 9, 2004, of the petitioner's ability to pay the proffered wage. In response to the request for evidence, counsel submitted copies of the following documents: an explanatory letter dated September 10, 2004; U.S. Internal Revenue Service Form tax returns for 2002 and 2003; a statement of the petitioner's monthly expenses dated September 15, 2004; and, the beneficiary's W-2 Wage and Tax Statements for 2001 and 2002.

The director denied the petition on November 10, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel contends "... that were ...[the petitioner's] net income exceeds the prevailing wage, the case is per se approvable ...[according to case precedents] *Matter of Sonogawa*, 12 I&N Dec. 612 ... [(BIA 1967)] and, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), and, the director failed to advise the petitioner how to proceed in proving his ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: a legal brief; and, a copy of the director's notice of decision.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary as discussed below. In 2001, the petitioner paid the beneficiary \$10,530.00, and in 2002, \$4,590.00.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,000.00 per year from the priority date of April 17, 2001:

- In 2001, the Form 1040 stated an adjusted gross income² of \$39,596.00.
- In 2002, the Form 1040 stated an adjusted gross income of \$75,499.00.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² IRS Form 1040, Line 34.

- In 2003, the Form 1040 stated an adjusted gross income of \$70,869.00.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. In addition, they 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 three.** In 2001, the sole proprietorship's adjusted gross income of \$39,596.00 plus wages paid to the beneficiary of \$10,530.00 covers the proffered wage of \$24,000.00 per year with \$26,126.00 remaining. The petitioner's monthly expenses were stated as \$48,012.00.³ There are insufficient funds to pay the proffered wage in 2001.
- In 2002, the sole proprietorship's adjusted gross income of \$75,499.00 plus wages paid to the beneficiary of \$4,590.00 covers the proffered wage of \$24,000.00 per year with \$56,089.00 remaining. The petitioner's monthly expenses were stated as \$48,012.00. There are sufficient funds to pay the proffered wage in 2002.
- In 2003, the sole proprietorship's adjusted gross income of \$70,869.00 covers the proffered wage of \$24,000.00 per year with \$46,869 remaining. The petitioner's monthly expenses were stated as \$48,012.00. Conceding a minimal shortfall, the AAO finds there are sufficient funds to pay the proffered wage in 2003.

It is probable that the sole proprietor could support himself and his family for each of the above years. It is credible to believe that the petitioner's personal expenses were substantially less in 2001 than in 2004 for which a statement was provided.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001, 2002 and 2003. For those years, the taxable income for the petitioner increased from \$39,596.00, to \$75,499.00, and, \$70,869.00. In only one year, 2001, did the petitioner fail to evidence that he could not pay the proffered wage according to the exposition already

³ The monthly statement was dated September 15, 2004. Since we do not have any other statements in the record of proceeding for prior years, we shall treat that figure as an indicator only for years prior to 2004.

⁴ 8 C.F.R. § 204.5(g)(2).

presented in this discussion, and, the deficit would be reduced, it is credible to believe, if the petitioner's personal expenses were reduced from year 2004 to 2001 levels.

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.

Unusual and unique circumstances have been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined, year 2001, was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner has proven its ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

ORDER: The appeal is sustained.