

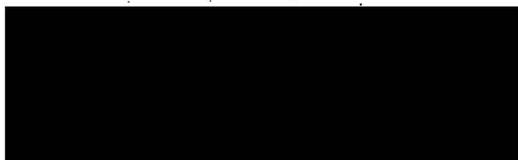


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6.



FILE: [REDACTED]
LIN-05-206-51073

Office: NEBRASKA SERVICE CENTER

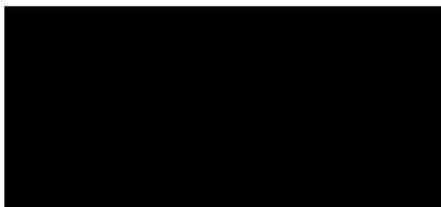
Date: DEC 31 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center ("director"), denied the preference visa petition. The petitioner filed an appeal. The director determined that the appeal was late and treated it as a Motion to Reopen. The director reopened the petitioner, and then affirmed his original decision. The petitioner filed a Motion to Reconsider the denied Motion to Reopen. The director again affirmed his original decision to deny the petition. The petitioner appealed, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive salvage, repair, and sales operation, and seeks to employ the beneficiary permanently in the United States as an auto repair service estimator ("Service Manager"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's August 28, 2006 decision, the petition was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). 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 for processing by the relevant office within the DOL employment system on November 6, 2001. The proffered wage as stated on the Form ETA 750 is \$700 per week, which is equivalent to \$36,400 per year based on a 40 hour work week. The labor certification was approved on February 14, 2005. The petitioner filed an I-140 Petition for the beneficiary on June 29, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1993; gross annual income: \$749,282; net annual income: \$45,757; and current number of employees: twelve full-time, and three part-time.

On August 25, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide the following information: evidence of the petitioner's ability to pay the proffered wage from November 6, 2001 to the present. The RFE provided that such evidence may include audited profit/loss statements, bank account records, and/or personnel records. Further, the RFE requested that the petitioner provide all W-2 Forms that the petitioner issued to the beneficiary. The petitioner responded. On March 7, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed, but the director determined that the appeal was untimely filed and treated it as a Motion to Reopen, reopened the petition, and then affirmed his decision to deny the petition.² The petitioner filed a Motion to Reconsider the Motion to Reopen. The director reconsidered the petition, and following consideration, affirmed his initial decision to deny the petition on the basis that the petitioner failed to establish its ability to pay the beneficiary the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on November 2, 2001, the beneficiary listed that he has been employed with the petitioner since March 1999.

In response to the RFE, the petitioner's owner, a sole proprietor, provided that:

I am the owner of [the petitioner] . . . I am also the petitioner and elder brother of the beneficiary . . .³

² In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.5a(b). The appeal would have been due on April 9, 2006, however, as that day was a Sunday, the petitioner would have been allowed to file until Monday, April 10, 2006. The petitioner filed its appeal on April 10, 2006. The petitioner asserted in its Motion to Reconsider the initially filed appeal, which was treated as a Motion to Reopen, that it had timely filed the appeal. As the director reopened the petition and reconsidered the petition, the appeal issue is moot.

³ Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of*

My brother [the beneficiary] 17 years my junior, came to the United States in 2000. As the eldest son and brother, I became responsible for him. Since his arrival in the U.S., he has been living in my house. I have been supporting him financially. In exchange for his room and board and other necessities, he has been assisting me in my business since his arrival . . . because he did not have legal authority to work in the United States, I have provided him a small stipend. He is neither a paid employee nor a consultant. For this reason, no W-2 forms exist for [the beneficiary].⁴

As the petitioner is unable to document wages paid to the beneficiary, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid.

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. 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 petitioner is a sole proprietor, 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).

Amger Corp., 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See also *Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in [redacted] that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." If the petitioner did not reveal the relationship to DOL, then the bona fides of the position may be in question.

⁴ We note that the proffered wage is \$36,400. The petitioner would need to pay the proffered wage in wages. The ETA 750 does not include payment of room or board as part of the job offer.

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, his wife, son, and both his parents and resides in Golden, Colorado. The tax returns reflect the following information:

Tax Return for Year:	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C) ⁵	Petitioner's Net Profit from business (Schedule C)
2004	\$99,370	\$749,282	\$172,721	\$45,757
2003	\$90,265	\$521,105	\$102,183	\$7,971
2002	\$41,160	\$496,398	\$87,874	-\$5,748
2001	\$32,480	\$467,621	\$54,641	\$14,907

If we reduced the sole proprietor's adjusted gross income (AGI) by the proffered wage that the petitioner must demonstrate that it can pay the beneficiary (\$36,400), the owner would be left with an adjusted gross income of: 2004: \$62,970; 2003: \$53,865; 2002: \$4,760; and 2001: -\$3,920.

Further, the sole proprietor submitted a list of estimated monthly family expenses, which were broken down per year into the following: 2001: monthly estimate of \$2,956.35 for an annual total of \$35,476.20; 2002: monthly estimate of \$3,294.44 for an annual total of \$39,533.28; 2003: monthly estimate of \$3,909.83 for an annual total of \$46,917.96; 2004: monthly estimate of \$4,125.46 for an annual total of \$49,505.52; and 2005: monthly estimate of \$45,909.48. The sole proprietor's estimate included the following expenses: average utilities, auto insurance, mortgage payments, TV, phone, and Internet, credit card payments, and food. The sole proprietor additionally broke the estimate down by month for each year. While the estimate appears, therefore, comprehensive, the sole proprietor did not provide any evidence of representative bills to verify that the expenses listed were accurate.

The following would represent the sole proprietor's income remaining after subtracting out the family's annual expenses, and the amount they would need to show to pay the proffered wage.

Tax Return for Year:	Sole Proprietor's AGI (1040)	Annual Estimated Expenses	Amount Remaining after subtracting the proffered wage
2004	\$99,370	\$49,505.52	\$13,464.48
2003	\$90,265	\$46,917.96	\$6,947.04

⁵ The sole proprietor did not submit all relevant schedules for the tax returns to determine whether the sole proprietor paid wages under the category "costs of labor." We note that the RFE did request that the petitioner provide all relevant schedules for tax returns submitted. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

2002	\$41,160	\$39,533.28	-\$34,773.28
2001	\$32,480	\$35,476.20	-\$39,396.20

If we were to accept his estimate without further documentation, and looked at the amount that the sole proprietor would have remaining after payment of the proffered wage, the sole proprietor would be able to pay the proffered wage and support himself and his family 2003, and 2004, but not in the year of the priority date 2001, or in 2002.

As additional evidence of its ability to pay, the petitioner provided copies of its business bank account statements for the months ending November 31, 2001 through July 31, 2005. The bank statements show significant variation from a high balance of \$37,549.80 (in February 2004) to a low balance of \$1,005.24 (in June 2002).

As noted above, the petitioner is a sole proprietor, 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. Further, the business bank account records, as well as individual savings would be considered. However, the petitioner did not provide evidence that the funds from the business bank account were not already considered or accounted for on Schedule C of the sole proprietor's Form 1040.

The petitioner additionally provided copies of unemployment insurance tax reports for each quarter in 2001, 2002, 2003, 2004, and for the first two quarters of 2005. The reports note wages paid to employees during the quarter. In general, wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary at the time of the petition's priority date continuing to the present. Further, the unemployment insurance reports do not specifically list any amounts paid to the beneficiary, and, therefore, would not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel provides that the business' gross income has doubled, and its wage payments have almost tripled between 2001 and 2004.

As noted above, if we accept the petitioner's estimate of personal expenses, then the sole proprietor can show that he can support his family and pay the proffered wage in 2003 and 2004. The chart above accounts for the petitioner's higher gross receipts, and the sole proprietor's resultant higher AGI. However, based on 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate that it can pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not demonstrated its ability to pay for the years 2001, and 2002.

Further, counsel provides that in the bank statements submitted, the petitioner's income showed a positive balance for the 45-month time period submitted.

Based on the sole proprietor's estimated living expenses, and payment of the proffered wage, the sole proprietor would experience significant negative income in 2001 and 2002. While the bank statements might reflect positive balances for the time period in question, a positive balance is different, and in this case, insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Counsel contends that an employer's assets, such as inventory, may be considered in addition to the petitioner's "cash on hand" as evidence of the petitioner's ability to pay the proffered wage. *Sitar Restaurant v. Ashcroft*, 2003 U.S. Dist. Ct. LEXIS 16571 (D. Mass., May 1, 2003).

We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). However, as noted above a sole proprietorship does not exist as an entity apart from the individual owner, and the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. *See Matter of United Investment Group*, 19 I&N Dec. at 250.

In support, counsel provided a report from the certified public accountant ("CPA") that prepares the sole proprietor's individual tax returns. The CPA provides that the sole proprietor purchased his home in January 1999 for \$275,000, and that he secured a loan of \$244,000, and made a cash down payment for the remainder of the purchase price. The CPA then provides that by 2001, the sole proprietor would have had sufficient equity in his home, of approximately \$100,000, from which he could borrow funds to pay the proffered wage.

The petitioner, however, did not provide any sample mortgage payments, or other documentation to evidence the assertions that the value of the sole proprietor's house, or the amount of personal equity that the sole proprietor had in the residence to allow us to conclude that the petitioner could pay the proffered wage from that equity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, business owners do not typically encumber real estate holdings to pay employee wages. CIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The CPA further provides that the sole proprietor purchased the warehouse and car lot where the petitioner's business is located in March 1998 for \$500,000, and that by 2001, the sole proprietor had built up equity in the property. Further, both the sole proprietor's equity in the property, and the property's value have risen since 2000, and that the sole proprietor could have used the property as collateral for a loan to his business.

CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit, loans, and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Similarly, the petitioner did not provide any sample mortgage payments for the business property, or other documentation to evidence the assertions that the property's value, or the amount of personal equity that the sole proprietor had in the property to allow us to conclude that the petitioner could pay the proffered wage. *See also Matter of Soffici*, 22 I&N Dec. 158, 165.

Counsel also submitted documentation to show that the petitioner regularly purchases and pays its vendors. In support, the petitioner submitted an ad from the "yellow pages" phone book, selected invoices from 1999 to January 5, 2004 to exhibit that the petitioner paid its bills, photos of the petitioner's business, and letters from vendors with which the petitioner does business to attest that the petitioner paid its bills regularly.

While the documentation demonstrates that the petitioner has a legitimate business, the documentation does not demonstrate that the petitioner had additional or sufficient funds to pay the proffered wage in the years in question.

Counsel contends that based on *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), other factors must be taken into consideration, including the employer's past growth, as well as its reasonable expectations of future growth. In *Matter of Sonogawa* counsel provides that the petitioner's 1966 net profit was \$260, which would not reflect the ability to pay the beneficiary's \$6,240 annual wage. However, the Board of Immigration Appeals ("BIA") found that the petitioner's expectations of future profits were reasonable and, therefore, that the petitioner could pay the proffered wage. Further, counsel notes that the BIA took into account the petitioner's total circumstances, including its number of years in business, individuals employed, and that the petitioner had suffered a difficult year in relocating her business.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over eleven years; and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the prevailing wage. Additionally, the petitioner's financial status has been fairly considered in-depth above.

Additionally, counsel provides that in *O'Connor v. INS*, 1987 U.S. Dist. LEXIS 9114 (D. Mass., Sept. 29, 1987) that the immigration service [now CIS] failed to take into account all of the petitioner's personal assets, as well as evidence of substantial future growth.

In the present matter, the petitioner only asserted that it had additional assets through which to pay the proffered wage on appeal. Further, although raised on appeal, the sole proprietor did not adequately document the value of personal assets, through official appraisals, sale or mortgage documents to establish the accurate value of such personal assets, as well as a listing of the sole proprietor's liabilities. Without a full understanding of the petitioner's liabilities, the petitioner's future growth cannot be adequately assessed.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.