

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: WAC 02 171 53203 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2007

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a facility that boards and cares for the elderly.¹ It seeks to employ the beneficiary permanently in the United States as a residence supervisor.² As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the sole proprietor had not established its ability to pay the proffered wage as of the 1998 priority year and continuing through tax years 1999, 2000, and 2001. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's April 11, 2006 decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

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 processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 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

¹ A document from the state of California Department of Social Services licensing division submitted to the record describes the sole proprietor as "residential-elderly", with capacity to care for six nonambulatory residents, age 60 years and older, Hospice Waiver Granted 2-17-99.

² The Department of Labor had initially classified the proffered position as Administrator, Health Care Facility. Occupational Code [REDACTED]. Following a request by the sole proprietor for an amendment of the classification, the DOL approved the sole proprietor's requested amendment and changed the Form ETA 750, Part A official endorsement section to identify the proffered position as Residence Supervisor, occupation Code [REDACTED]. The front cover letter of the Form ETA 750 still reflects the initial classification.

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 January 2, 1998. The proffered wage as stated on the Form ETA 750 is \$\$15.78 an hour, or \$32,822.40 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered or in the related occupation of caregiver.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³ On appeal, counsel submits copies of three Transfer Certificates of Title for Philippine parcels of land in the Philippines, along with four Declaration of Real Property documents that contains real estate assessments, one of which clearly corresponds to a parcel of land identified in the submitted Certificates of Title. Counsel also submits a letter dated April 2, 2003, written by [REDACTED] Vice President for Marketing, Rural Bank of Oroquieta (Mis. Occ.), Inc, Oroquieta City, the Philippines. In his letter, [REDACTED] states that [REDACTED] and/or [REDACTED] Limbaring have an existing investment account in the amount of one million three hundred thirty two thousand five hundred pesos, (1,332,500) and a savings deposit in the amount of one hundred twenty six thousand one hundred seventeen and 61/100 pesos (126,117.61) pesos with the Rural bank of Oroquieta. Counsel also submits a Internet printout from the website www.xe.com that indicates one Philippine peso was equal to .0190499 U.S. dollars.

Counsel resubmits a letter dated September 26, 2002, written by [REDACTED] Personal Financial Representative, Washington Mutual Bank, Costa Mesa, California. In her letter, [REDACTED] stated that the sole proprietor and her spouse had a checking and savings account with the bank that were opened in January 2002. [REDACTED] further stated that the balance in the joint checking account was \$1,769.37, and the balance in the joint savings account was \$10,040.91. The letter is accompanied by what appears to be two printouts that reiterate the sole proprietor's account numbers and balances.

With the initial petition and in response to the director's request for further evidence(RFE), the petitioner submitted the sole proprietor's Forms 1040, U.S. Individual Income Tax Return, along with sole proprietor's state of California Form 8453 California Individual Income Tax Declaration for e-file for tax years 1998, 1999, 2000, and 2001. The petitioner in response to the director's RFE, also submitted a two-page document entitled "Transaction Summary" which appears to be a record from March 31, 2002 to September 20, 2002 of transactions made in the sole proprietor's Credit Union bank account. Finally in response to the director's RFE, the sole proprietor submitted two additional bank statements. The first statement was for a joint checking account for the month of August 2002 with Washington Mutual Bank and indicates an ending balance of \$2,971.14. The second bank statement is for a standard checking account from Bank of America for the period of time August 14, 2002 to September 11, 2002 that indicates the sole proprietor's ending balance of \$1,039.56. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in August 28, 1997 and to have a gross annual

³ 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).

income of \$64,650, and a net annual income of \$4,694. With regard to the number of employees, the I-140 petition appears to have initially indicated three employees, although this number was apparently whited out and replaced with the number one (1). On the Form ETA 750B, signed by the beneficiary on December 15, 1997, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that CIS erred in its determination that the sole proprietor did not have the ability to pay the proffered wage. Counsel notes that the sole proprietor's and her spouse's personal income taxes, investments and financial statements indicate that the sole proprietor had and continues to have substantial assets. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the proposition that even if the sole proprietor's net profits were not commensurate with the proffered wage, the petition could still be approved. Counsel also states that the director did not take into account the sole proprietor's continued growth and states that a review of the sole proprietor's income tax returns establishes that the sole proprietor's income has steadily increased from 1998 to the present.

Counsel also states that the sole proprietor owns several properties in the Philippines acquired between 1985 and 1997. Counsel asserts that the rental revenues from these properties could be used as additional funds to pay the proffered wage or the properties could be sold and the proceeds used to pay the proffered wage. Counsel notes that although the market value of these properties may have increased since the sole proprietor acquired them, if they were sold at their original assessed values, the sole proprietor would receive \$29,087.19 in U.S. dollars using an exchange rate of 1 Philippine peso to .0190499 U.S. dollar. Counsel further states that the sole proprietor's personal savings account has a balance of over \$11,000.⁴ Finally counsel states that the sole proprietor's bank account with the Rural Bank of Oroquieta (MIA. Occ.), Inc., in the Philippines has \$27,789.52 in U.S. dollars using the same exchange rate established by the xe.com website.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 employed and paid the beneficiary the full proffered wage from the priority date in 1998 onwards.

⁴ Counsel refers to the combined balances of the sole proprietor's and her spouse's joint checking and savings account with Washington Mutual as of September 26, 2002.

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 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 six. The tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Proprietor's adjusted gross income (Form 1040)	\$ 29,707	\$ 40,534	\$ 37,414	\$ 51,020
Petitioner's gross receipts or sales (Schedule C)	\$ 64,800	\$ 66,400	\$ 63,900	\$ 64,650
Petitioner's wages paid (Schedule C)	\$ 13,200	\$ 9,000	\$ 10,600	\$ 0
Petitioner's net profit from business (Schedule C)	\$ -6,016	\$ 677	\$ 749	\$ 4,694

In 1998, the sole proprietorship's adjusted gross income of \$29,707 fails to cover the proffered wage of \$32,822.40. It is improbable that the sole proprietor could support herself and five dependents, on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. With regard to tax years 1999, 2000, and 2001, the sole proprietorship has sufficient adjusted gross income to pay the proffered wage; however, the sole proprietor would have the following sums with which to pay the yearly household expenses of himself and five other dependents: \$7,711.60 in 1999, \$4,591.60 in 2000, and \$18,197.60 in 2001.

The AAO notes that the director did not require nor did the sole proprietor provide a list of itemized monthly expenses to further establish the sole proprietor's ability to pay both the proffered wage and to pay for her yearly household expenses for a family of six. Nevertheless, the sums noted above do not appear sufficient to pay the yearly household expenses for a family of six.

Therefore, from the date the Form 9089 was filed with Citizenship and Immigration Services, the petitioner identified on the instant I-140 petition had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel cites *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1998 or any other tax years in question were uncharacteristically unprofitable years for the petitioner. Based on the I-140 petition submitted to the record, as of the time of filing, the petitioner may have only one employee, a decline from the number of employees described by counsel in his letter submitted to the Department of Labor in response to a DOL Notice of Findings dated January 31 2001.⁵ Furthermore, the petitioner was only in business for five years prior to filing the instant petition. The sole proprietor has not provided any further evidence as to the sole proprietor's reputation in the elderly care and hospice industry in California. Thus, the AAO does not view the sole proprietor's overall circumstances to be analogous to those of the petitioner in *Sonogawa*.

On appeal, counsel also asserts that the sole proprietor has experienced continued growth and states that this is an indicator of the sole proprietor's ability to pay the proffered wage. Counsel notes that the sole proprietor's income has steadily increased from 1998 to the present. Counsel's statements are not persuasive. The AAO notes that in tax year 2000, both the sole proprietor's adjusted gross income and net profits declined from the figures noted in the sole proprietor's tax return for tax year 1999. Further, the sole proprietor's net profits in tax year 2001 was probably increased significantly on the sole proprietor's Schedule C because sole proprietor reported no wages paid that year. The AAO thus does not regard the sole proprietor's increases in either adjusted gross income or net profits from the years 1998 to 2001 as significant enough to support the sole proprietor's long-term ability to pay the proffered wage and cover her household expenses.

Counsel on appeal also states that the sole proprietor's properties in the Philippines should be considered as a source of additional funds available to pay the proffered wage. Counsel's assertions are not viewed as persuasive for several reasons. First, the record contains no evidence that the sole proprietor would be willing and able to sell these properties to provide additional funds for the proffered wage and yearly household

⁵ In this letter, counsel described the sole proprietor's three employees, as an orderly, a care provider, and the sole proprietor who was performing the duties of a board and care manager, despite being employed fulltime as an accountant.

expenses. Counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The sole proprietor would have to submit evidence that she is willing and able to sell these properties. More importantly, if the suggested value of the sole proprietor's properties in the Philippines were used to establish the sole proprietor's ability in the 1998 priority year to both pay the deficit between the sole proprietor's adjusted gross income and the proffered wage and also pay the sole proprietor's yearly household expenses, these funds would not longer be available to establish any further ability in the following tax years of 1999, 2000, or 2001 to pay the proffered wage and the yearly household expenses.

With regard to the sole proprietor's checking and savings accounts with Washington Mutual and with the Philippine bank identified in the record, the AAO notes that the record reflects the Washington Mutual accounts were opened in tax year 2002. Therefore these funds cannot be used to establish the sole proprietor's ability to pay the proffered wage and her household expenses during the 1998 priority year and during tax years 1999, 2000, and 2001. With regard to the sole proprietor's investment and savings account with the Rural Bank of Oroquieta in the Philippines, [REDACTED] letter provides no date when the accounts were established. Therefore it is not possible to determine whether any of the investment or savings accounts funds would have been available to pay the remaining amount of the proffered wage not covered by the sole proprietor's adjusted gross income and the sole proprietor's yearly household expenses in the 1998 priority year. The AAO also notes that if these funds were available, and could be used to establish the sole proprietor's ability to pay the proffered wage and her yearly household expenses during the 1998 priority year, once spent, the funds would not have been available to establish the sole proprietor's ability to pay the proffered wage and her household expenses in any subsequent year in question.

Finally, the sole proprietor's 2002 statement for her joint checking account with Bank of America is not dispositive of the sole proprietor's ability to pay the proffered wage. 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). In the instant petition, the sole proprietor needs to establish her ability to pay the proffered wage as of the 1998 priority date and onward. The 2002 Bank of America checking account statement would not establish the sole proprietor's ability to pay the proffered wage and her household wages during the 2001 priority date year or during tax years 1999, 2000, or 2001, based on her checking account balance. Furthermore if such savings or checking accounts were to be considered, the average balance should be sufficient to cover the full or remaining proffered wage as each month's balance could alone support the full proffered wage for a year. The petitioner's cash assets as reflected in its savings, and checking are not significant enough to shift this decision in the petitioner's favor.

The analysis used above would also be applicable to any consideration of any additional funds available in the sole proprietor's claimed Credit Union banking account. The AAO further notes that the Transaction Summary submitted to the record by counsel in his response to the director's RFE dated July 16, 2002 would need to be more conclusively identified as the sole proprietor's bank account prior to giving it any evidentiary weight.

In sum, the AAO does not find the documentation of the sole proprietor's U.S checking or savings account or foreign bank accounts and properties to establish that the sole proprietor had sufficient additional funds available to pay both the proffered wage and the sole proprietor's yearly household expenses as of the 1998 priority date and onward.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner 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.