

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

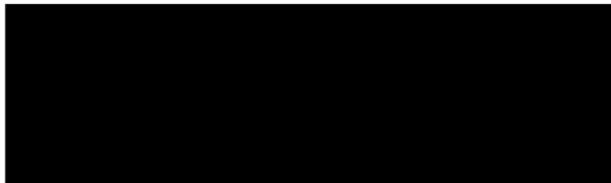
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



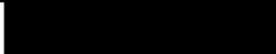
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 10 2007**

WAC 06 101 50646

IN RE:

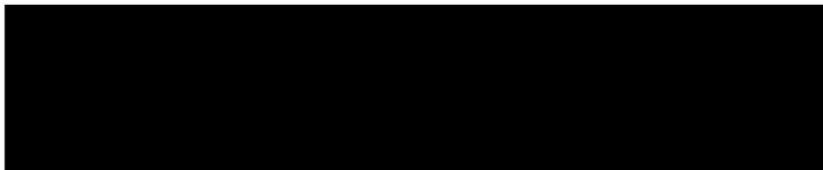
Petitioner:



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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a diamond exporter and importer. It seeks to employ the beneficiary permanently in the United States as a buyer. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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.

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.

As set forth in the director's May 18, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. 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 9089, Application for Permanent Employment Certification, as certified by the DOL 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 9089 was accepted on November 21, 2005. The proffered wage as stated on the Form ETA 9089 is \$20.12 per hour (\$41,849.60 per year). The Form ETA 9089 states that the position requires two years of experience in the job offered or two years of experience as a jewelry designer.

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.¹ On appeal, counsel submits a brief, an appraisal of real property dated June 10, 2006 located at 939 Leyland Drive, Diamond Bar, California 91765, mortgage loan documents issued by Provident Funding to [REDACTED] the sole proprietor, in connection with the property located at 939 Leyland Drive, Diamond Bar, California 91765, the petitioner's monthly bank statements dated November 30, 2005 through May 31, 2006, issued by Wells Fargo Bank, the petitioner's previously submitted balance sheet dated November 30, 2005 and an affidavit of [REDACTED] dated June 14, 2006. Other relevant evidence in the record includes the sole proprietor's IRS Forms 1040, U.S. Individual Income Tax Returns, including Schedules C, for 2004 and 2005, and the petitioner's monthly balance sheets for January 2005 through October 2005. 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 1998, to currently employ one worker, to have a gross annual income of \$853,671.00 and to have a net annual income of \$54,153.00. On the Form ETA 9089, signed by the beneficiary on February 6, 2006, the beneficiary did not claim to have worked for the petitioner. The record before the director closed on May 16, 2006, with receipt by the director of the petitioner's response to the director's request for evidence.

On appeal, counsel asserts that the director should have prorated the proffered wage to take into the account the priority date of November 21, 2005, that the petitioner's November 2005 balance sheet evidences sufficient net current assets to pay the proffered wage, and that the sole proprietor has sufficient personal assets to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 2005 onwards.

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

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).

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 three. The sole proprietor's adjusted gross income was \$41,574.00 in 2005. Therefore, in 2005, the sole proprietorship's adjusted gross income of \$41,574.00 fails to cover the proffered wage of \$41,849.60. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as audited monthly income statements or pay stubs, the petitioner has not submitted such evidence for the period from November 21, 2005 through December 31, 2005.

Further, counsel's reliance on unaudited financial records is misplaced.² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Further, the statements indicate that they were prepared without audit. Unaudited financial statements are the representations of the sole proprietor. The unsupported representations of the sole proprietor are insufficient to demonstrate the ability to pay the proffered wage.

² On appeal, counsel asserts that the petitioner's November 2005 balance sheet evidences sufficient net current assets to pay the proffered wage.

Counsel also asserts on appeal that the sole proprietor has sufficient personal assets to pay the proffered wage. Counsel submits an appraisal of real property dated June 10, 2006 located at 939 Leyland Drive, Diamond Bar, California 91765, and mortgage loan documents issued by Provident Funding to Jayesh Vadecha, the sole proprietor, in connection with the property located at 939 Leyland Drive, Diamond Bar, California 91765. The sole proprietor also submits an affidavit on appeal indicating that he has over \$600,000.00 of equity in his personal residence that he is willing to convert to equity using a line of credit or other means to pay the proffered wage. Counsel also submits the petitioner's monthly bank statements dated November 30, 2005 through May 31, 2006, issued by Wells Fargo Bank as evidence of the petitioner's ability to pay the proffered wage.

Although the proprietor states that he would be willing to convert the equity in his personal residence to pay the proffered wage, this office finds it unlikely that the petitioner would sell his own residence, where he lives with his wife and two children, to pay the wages of an employee. Moreover, if the proprietor were to obtain a line of credit, CIS gives less weight to loans and debt as a means of paying salary since the debts will increase the proprietor's liabilities and will not improve his overall financial position. 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).

Further, the funds in the petitioner's bank account represent what appear to be the petitioner's business checking account. Therefore, some of these funds are shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner stated on the petition that it was established in 1998. The petitioner's 2004 and 2005 Schedules C indicate that its net profit fell from \$54,153.00 in 2004 to \$45,884.00 in 2005 and that its gross receipts fell from \$853,671.00 in 2004 to \$675,099.00 in 2005. These figures do not establish the

petitioner's historical growth. Although the petitioner indicated on the petition that it employed one worker, the petitioner's tax returns do not show salaries paid or costs of labor incurred in 2004 or 2005. The petitioner has not established that it suffered any uncharacteristic expenditures or losses in 2005 and has not demonstrated its reputation within the industry. Further, the petitioner's December 2005 bank statement shows an ending balance of \$7,281.79. Even if this office were to consider these funds as available funds with which to pay the proffered wage, it is improbable that the proprietor could pay the proffered wage and his household expenses on \$7,006.19, which is the balance remaining after subtracting the proffered wage from the sum of the proprietor's adjusted gross income for 2005 and the balance remaining in his business checking account at the end of 2005.³

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.

³ Although the proprietor did not submit a list of his household expenses for 2005, his tax return for 2005 indicates that he paid \$6,365 in home mortgage interest. Other expenses to be considered include, but are not limited to, the following: food, car payments, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, and any other recurring monthly household expenses. If the petitioner further pursues this matter, evidence regarding the sole proprietor's household expenses must be presented.