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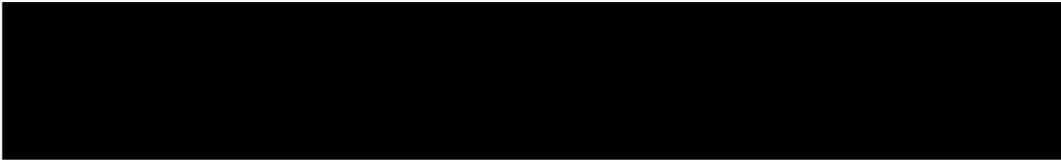
FEB 27 2008

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-05-208-50089

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“director”), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a restaurant, and seeks to employ the beneficiary permanently in the United States as a financial analyst. 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 May 25, 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 professional, or as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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 June 7, 2002. The proffered wage as stated on the Form ETA 750 is \$65,000 per year based on a 40 hour work week. The labor certification was approved on May 20, 2005. The petitioner filed an I-140 Petition for the beneficiary on July 12, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1999; gross annual income: \$253,146.00; net annual income: "confidential"; and current number of employees: 6.

On February 16, 2006, the director issued a Request for Evidence ("RFE") for the petitioner: to submit the petitioner's 2002 and 2005 federal tax returns, as the petitioner had only submitted its 2003, and 2004 returns, or to alternatively submit audited financial statements or annual reports; if the petitioner employed the beneficiary to submit Form W-2; to provide documentation related to the sole proprietor's monthly expenses to include housing, food, car payments, insurance, utilities, credit card, house cleaners, nannies, gardeners and other monthly recurring expenses; to submit quarterly wage statements filed with the state; and to submit copies of the beneficiary's federal tax returns, as well as the phone number for the beneficiary's consulting company, where the beneficiary had authorization to work. The petitioner responded. On May 25, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. 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 April 30, 2003, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not claim to have employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary.

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).

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, and three children and resides in Lodi, California. The tax returns reflect the following information:

Tax Year	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2005	\$33,480	\$459,565	\$76,570	\$40,181
2004	\$35,094	\$377,534	\$59,901	\$36,872
2003	\$42,291	\$327,660	\$37,343	\$48,280
2002	\$23,781	\$301,170	\$50,986	\$28,759

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 (\$65,000), the owner would be left with the following amounts through which to support his family: 2005: -\$31,520; 2004: -\$29,906; 2003: -\$22,709; and 2002: -\$41,219. The sole proprietor would not be able to pay the proffered wage and support his family on negative income.

Further, the sole proprietor submitted an estimate of his family personal expenses. The monthly expenses listed included housing, food, car payment, insurance, utilities, water, gas, cable, phone, internet, credit card, clothing, and gardening. The petitioner's monthly expenses totaled \$12,824, which would be equivalent to \$153,888 per year. The petitioner additionally listed \$865 in additional annual expenses² for a total of \$154,753.³

² Some of the sole proprietor's expenses marked "annual" might be questioned, as the list included "car insurance (annual): \$325." The \$325 figure would more likely seem to be monthly than annual. However, based on the petitioner's estimate we have calculated in only \$325. Similarly, health insurance was listed as \$240 "annually," but also seems more likely to be a monthly figure. The sole proprietor's estimate might, therefore, be on the lower end.

³ On appeal, the sole proprietor amended his monthly housing expenses to \$2,549. The sole proprietor did not indicate that the previous amount of \$7,875 was in error. Further, the sole proprietor did not indicate that the reduction was effective as of a certain date, or based on paying off a mortgage or loan. Based on the reduced housing expenses, as of June 20, 2006, the date of the sole proprietor's signature, the sole proprietor's monthly expenses would be \$7,498.99 per month, or \$90,852.88, including the annual amounts listed for health, home, and car insurance.

If the proffered wage were added to the sole proprietor's estimated expenses, the sole proprietor would need to demonstrate that it had between \$155,852.88⁴ to \$219,753 to pay the family's expenses and the proffered wage for each year. Based on the tax returns provided, the sole proprietor is unable to support such expenses.

The petitioner also provided Forms 941 Quarterly Wage Payments for the first two quarters of 2001, and for each quarter of 2004 and 2005. The Forms 941 reflect employment of between six to nine employees, and quarterly wages paid to each. In general, wages already paid to others are not available to prove the petitioner's ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The Forms 941 do not reflect any payments to the beneficiary, and, therefore, would not establish the petitioner's ability to pay the proffered wage.

Similarly, the petitioner provided copies of its monthly payroll for 2005. Wages paid to others would not demonstrate the petitioner's ability to pay the proffered wage. Further, the payroll statements do not exhibit any payments made to the beneficiary, and accordingly would not demonstrate the petitioner's ability to pay the proffered wage.

The petitioner also provided copies of bank statements for eight months of 2005, and for the time period January to May 31, 2006.^{5,6} 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. 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. Further, the petitioner has not provided bank statements for all the relevant years, only parts of some years. The bank statements would represent only the amount that the petitioner had in its account in those months, and would, therefore, be insufficient to demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date, June 2002, until the beneficiary obtains permanent residence, or to show sufficient sustained assets through which the sole proprietor could support himself and his family and pay the proffered wage. *See Ubeda v. Palmer*, 539 F. Supp. at 647.

On appeal, counsel provides that CIS erred in its determination that the petitioner could not pay the proffered wage in failing to consider "the petitioner's business structure as a sole proprietorship and examining other factors relevant to the Petitioner's financial ability." Counsel provides that the petitioner has over \$400,000

⁴ The lower estimate accounts for the sole proprietor's reduced housing expenses, although we note that the date of reduction in expenses is not entirely clear.

⁵ [REDACTED] has two locations, one is the petitioning entity, and the second location, based on the sole proprietor's tax returns is formed as a partnership and has a different tax identification number. As the record does not contain Forms 1065 for the partnership, we cannot assess whether the cash available for the second location is greater than that entity's liabilities, and, we will, therefore, only consider the bank statements relevant to the petitioning entity's location at [REDACTED]

⁶ The petitioner also submitted bank statements for January to October 2001, however, as the priority date is June 2002, the petitioner's 2001 bank statements are not relevant to the petitioner's ability to pay. The petitioner did not provide any statements for 2002, 2003. Further, the petitioner only submitted statements for the months March through September 2004, but these statements relate to the second separate location formed as a partnership.

in assets and cash through which it can show its ability to pay. Further, counsel provides that the petitioner's business has a good reputation and is expanding, and has continued expectations of business growth and increased profits.

In support, the petitioner provided documentation related to the petitioning entity, including a ten-year lease for the petitioner's premises, as well as the petitioner's Seller's Permit, dated May 2004, along with a lease for the second location at [REDACTED] Stockton, California.⁷ The petitioner also provided property profiles for two properties that the sole proprietor owns, as well as additional bank statements, and a copy of a restaurant review.

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and contends that in that case the petitioner's expectations of its increase and profits were reasonable expectations and that the petitioner could demonstrate its ability to pay. Counsel provides that the petitioner had one location, and then expanded to a second location based on the success of the first outlet, and that the petitioner has plans "to build upon its reputation and create a chain of restaurants in Northern California" under the same name. Therefore, the petitioner needs the beneficiary's expertise as a financial analyst to support the petitioner's expansion. Counsel provides that the petitioner's "substantial annual increases in gross receipts and payroll as stated on the Petitioner's tax returns and the opening of the second restaurant demonstrate a reasonable expectation of increased business and profits." Counsel further cites *In re: X*, EAC-92-096-51031 (AAU Dec. 18, 1992)⁸ in support where the petitioner established its ability to pay through a substantial increase in gross receipts and payroll, along with evidence supporting its expectation of growth in future demand.

While the sole proprietor's tax returns do reflect that the petitioning business's gross receipts have increased, based on the sole proprietor's self-prepared personal estimate of expenses, combined with the proffered wages to be paid, the sole proprietor's income after expenses reflected in his AGI is insufficient to support his family and pay the proffered wage in any year. Therefore, even accounting for a reasonable expectation of future increases in gross receipts, the sole proprietor cannot demonstrate his ability to pay to support his family and pay the proffered wage. Further, counsel did not provide any evidence to support the petitioner's expectation of future growth, such as any estimated projections regarding the costs or timeframes for business expansion.

Counsel further provides that in *Matter of Sonogawa*, the Commissioner considered the length of time that the petitioner had been in business, the number of the petitioner's employees, as well as the petitioner's reputation in the industry and other factors. In support, the petitioner has attached a restaurant review from a paper.⁹ Counsel provides that the petitioner has been in business since 1999, that between the two locations,

⁷ As noted above, based on the sole proprietor's tax returns, the second location was established as a partnership with a different tax identification number.

While 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, the record does not contain information related to second location's income generated, its assets or liabilities, so that we cannot properly assess the relevance of the second location to the sole proprietor's ability to pay the proffered wage. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

⁸ While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, counsel cites to a non-precedent decision. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

⁹ It is unclear from the copy where the article was published.

the petitioner employs eleven workers, and that the petitioner has demonstrated that it can pay its rents and employees on a timely basis.

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. If we examined the totality of the petitioner's business and the sole proprietor's tax returns to support payment of the proffered wage, the sole proprietor's AGI, and the business' net profit are less than the proffered wage in each of the relevant years. Further, the wages paid to all employees are in total are less than the proffered wage, except for in 2005. Therefore, we would not conclude that the sole proprietor can pay the proffered wage and support himself and his family. See *Ubeda v. Palmer*, 539 F. Supp. at 647.

Further, counsel contends that the petitioner is structured as a sole proprietor, and that personal assets can be considered. Counsel provides that the sole proprietor has over \$400,000 in assets, including: bank statements for both restaurants showing \$56,852 as of May 31, 2006; a certificate of deposit ("CD") in the amount of \$42,000; and two homes that the sole proprietor owns, one appraised at \$459,000 with a mortgage of \$241,000 remaining, and a second appraised at \$475,000, with a mortgage remaining of \$279,907.

Related to the bank statements, as noted above, the petitioner did not provide bank statements for all the relevant years, so that we cannot determine that the bank statements would reflect the continuing ability to pay the proffered wage. The amount that the petitioner has in its bank account on May 31, 2006 would not reflect its continuing ability to pay the proffered wage from June 2002 continuing to the present, but instead would reflect the amount that the petitioner had in its bank account on May 31, 2006. Further, counsel combines the amounts for both locations, the location of the petitioner, formed as a sole proprietorship, and for the second location, formed as a partnership. Without the full tax returns for the second location, the partnership, we cannot determine whether the cash assets would be used to pay any liabilities that the petitioner may have.

Further, the bank statements provided reflect that the sole proprietor held \$15,450 in an investment CD as of May 31, 2006. It is unclear from where counsel obtained the figure of \$42,000 for the CD, as she does not list the particular monthly statement that reflects this figure. Additionally, even if we accepted that the sole proprietor had a CD valued at \$42,000, it would be still less than the proffered wage of \$65,000. If the CD were used to pay the proffered wage, it would only cover part of one year's wage, and nothing would remain of the CD for payment of the wages in any other year as the petitioner must demonstrate its continued ability to pay the proffered wage for multiple years from June 7, 2002 onward. None of the evidence demonstrates

that the sole proprietor can pay the proffered wage in any year and support himself and his family based on the sole proprietor's own estimate of expenses. *See Ubeda v. Palmer*, 539 F. Supp. at 647.

Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. 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).

Additionally, based on the sole proprietor's own estimate, even with the subsequently provided reduced housing expenses, the petitioner's self-estimate of monthly expenses is substantial. If we accept the figure provided, and added in the proffered wage, the sole proprietor would need to demonstrate between \$150,000 to over \$200,000 in available assets to support himself and his family and pay the proffered wage in each year. None of the documentation provided, or any expectation of future profits would support this amount. Accordingly, the petitioner has failed to demonstrate its ability to pay the proffered wage.

Further, although not raised in the director's decision, from the documentation submitted, it appears that the beneficiary may be related to the sole proprietor's wife, and therefore, related to the petitioner through marriage. Accordingly, unless this relationship was properly disclosed to DOL, the bona fides of the position may be in question and might have been denied on this basis as well. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 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

Documentation within the record related to the sole proprietor's property lists the sole proprietor as [REDACTED], [REDACTED] or as [REDACTED]. The sole proprietor's spouse is listed on documents related to the property as [REDACTED]. The beneficiary has the same surname and similar first name [REDACTED]. It, therefore, appears likely that the beneficiary's sister is married to the sole proprietor.

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 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 Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Unless this relationship was properly disclosed to DOL, the bona fides of the position may be in question.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.