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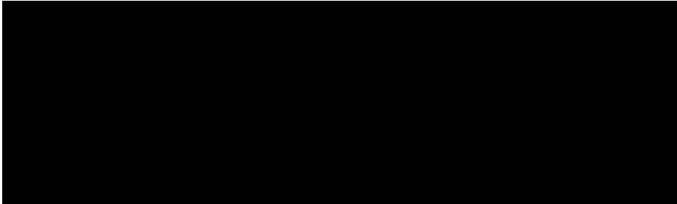


FILE: LIN 07 067 52300 Office: NEBRASKA SERVICE CENTER Date: **JUL 14 2008**

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of The Department of Labor. . *See* 8 CFR § 204.5(d). Therefore, 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).

Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the ETA 750 is \$6.29 per hour, which amounts to \$13,083.20 per year.<sup>1</sup> On Part B of the ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Form I-140, the petitioner states that it was established in October 1999, currently employs two workers, and reports an annual gross income of \$129,678.

The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$13,083.20 per year as of the priority date and in response to the director’s request for additional evidence, the petitioner provided copies of its W-3, Transmittal of Wage and Tax Statements for 2004, 2005 and 2006, copies of the beneficiary’s Wage and Tax Statements (W-2s) for 2004 and 2006, and copies of the sole proprietor’s U.S. Individual Income Tax Return for 2001, 2002, 2003, 2004, and 2005. The tax returns reflect that the sole proprietor filed jointly with his spouse and claimed two dependents in 2001 and three dependents in 2002, 2003, 2004 and 2005. The returns also contain the following information:

	2001	2002	2003	2004	2005
Wages	n/a	\$ 5,400	\$ n/a	\$ n/a	\$19,876
Taxable interest	\$547	\$ 646	\$ 180	\$ 167	\$ n/a
Business Income	\$21,102	\$23,667	\$17,607	\$13,444	\$14,330
Adjusted Gross Income <sup>2</sup>	\$20,158	\$ 1,672	\$16,208	\$11,911	\$31,942

It is noted that in 2003, 2004, and 2005, the sole proprietor’s business income represented the combined net profit (or loss) from two businesses reported on Schedule C, Profit or Loss from Business. The petitioning business reported net profits of \$22,149, \$24,059, and \$32,049, respectively, in 2003, 2004 and 2005. The other business, “Nan Dollar,” reported net losses of (\$4,542), (\$10,615), and (\$17,719), respectively in those years.

The petitioner also provided a summary of the sole proprietor’s household living expenses that totaled \$14,794.37 annually. In addition, the W-2s provided by the petitioner indicate that the petitioner paid the beneficiary the following wages:

Year	Wages
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<sup>1</sup> This calculation is based on a standard 40-hour week although the petitioner indicated on the ETA 750 that the basic hours per week would be 45.

<sup>2</sup> Adjusted gross income is shown on line 33 of the Form 1040 in 2001; line 35 in 2002; line 34 in 2003; line 36 in 2004 and on line 37 in 2005.

2004	\$4,500
2006	\$2,923.66

The director examined the petitioner's income and household expenses as well as wages shown to be paid to the beneficiary which were supplied to the record and concluded that the petitioner had not established its ability to pay the proffered wage beginning as of the priority date. He denied the petition on February 12, 2007.

On appeal, the petitioner, through counsel, provides a copy of the sole proprietor's individual tax return for 2006, another copy of the beneficiary's 2006 W-2 and an affidavit from the sole proprietor. The 2006 tax return reflects the following information:

Wages	\$18,841
Taxable interest	\$ 246
Business Income	\$34,000
Adjusted Gross Income <sup>3</sup>	\$50,593

The sole proprietor's affidavit summarized his monthly household expenses, which approximate the list of expenses previously supplied and affirms that the petitioner is able to pay the beneficiary's proposed wage offer. Counsel also contends on appeal that the petitioner has demonstrated its ability to pay the proffered wage. Counsel asserts that the petitioning business has increased its sales and income and that the petitioner plans to close the Nan Dollar business and concentrate on the restaurant business.

Counsel's assertions are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, there is evidence of the beneficiary's employment in 2004 and 2006. In 2004, the beneficiary's wages of \$4,500 were \$8,583.20 less than the proffered wage. In 2006, his wages of \$2,923.66 were \$10,159.54 less than the proffered wage.

CIS will also 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the

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<sup>3</sup> Adjusted gross income is shown on line 37.

Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is a sole proprietorship, additional factors will be considered. 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.<sup>4</sup> 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, Profit or Loss from Business and are carried forward to the first page of the tax return (line 12) and included within the calculation of the adjusted gross income. Sole proprietors must show that they can cover their existing business expenses as well as show that they can sustain themselves and their dependents and pay the proffered wage out of their adjusted gross income or other available funds. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). Such petitions often include a summary of household expenses. In this case, the petitioner indicated that the sole proprietor's household expenses were approximately \$14,800 per year.

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 this case, even though the sole proprietor's family is smaller than the household described in *Ubeda*, it is noted that the beneficiary's salary of \$13,083.20 represented approximately 65% of the sole proprietor's adjusted gross income in 2001. After payment of household expenses of approximately \$14,800, the remaining \$5,358 was not sufficient to cover the proffered wage. The petitioner did not demonstrate its ability to pay the proffered salary in this year.

In 2002, the sole proprietor's adjusted gross income was \$11,411.20 less than the proffered wage even without considering household expenses. The petitioner has not demonstrated its ability to pay the proffered salary in 2002.

In 2003, the beneficiary's proposed salary of \$13,083.20 represented approximately 81% of the sole proprietor's adjusted gross income of \$16,208. Moreover, after payment of household expenses, the remaining \$1,408 could

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<sup>4</sup> Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. This is usually based on a review of Schedule L of a corporate tax return, but may be taken from an audited financial statement submitted by a corporate petitioner or a sole proprietor.

not meet the proffered wage or establish the petitioner's financial ability to pay the proffered wage in this year.

In 2004, even without considering payment of the \$8,583.20 difference between the beneficiary's actual wages of \$4,500 and the proffered wage, the sole proprietor's adjusted gross income of \$11,911 was \$2,889 less than the annual household expenses and insufficient to demonstrate the additional burden to pay the proposed wage offer.

In 2005 and 2006, the sole proprietor's reported adjusted gross income of \$31,942 and \$50,593, respectively, was sufficient to cover the \$13,083 proffered wage in 2005 and the \$10,159.54 shortfall between the wages paid and the certified wage in 2006, as well as the sole proprietor's household expenses of \$14,800 in each year and demonstrate its ability to pay in those two years.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning as of the priority date. (Emphasis added.) In this case, the petitioner failed to demonstrate its ability to pay the proffered wage in 2001, 2002, 2003, and 2004. The priority date is April 30, 2001.

Additionally, the assertion that the petitioner's increasing net profits support an approval of the petition is not convincing in this matter. As explained above, as the petitioner is a sole proprietorship and not a separate entity from the sole proprietor's other assets and liabilities, its reported revenue is not viewed in isolation but is included with the other business income reported on the sole proprietor's individual tax return. In that context, the net business income decreased from approximately \$21,100 in 2001 to \$14,330 in 2005. It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the sole proprietor's adjusted gross income was consistently modest during the relevant period and failed to demonstrate sufficient funds to cover the proffered wage and household expenses from 2001 through 2004. Other than noting that the other business operated at a loss in 2003 and 2004, there is little evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* that have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*. As stated above, counsel suggests that the sole proprietor's plans to close the other business will automatically result in its consistent ability to cover the proffered wage justifies the petition's approval. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date of April 30, 2001.

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.