U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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FILE: LIN 06 176 52638 Office: NEBRASKA SERVICE CENTER Date: APR 0 6 2009

IN RE: Petitioner: [redacted]

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter 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 a cook. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that the petitioner has had the continuing ability to pay the proffered wage.[1]

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 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the

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[1] 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.

DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on December 4, 2003. The proffered wage is set forth as $11.47 per hour, which amounts to $23,857.60 per annum. The beneficiary signed Part B of the ETA 750 on November 12, 2003, indicating that she had not been employed by the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on May 30, 2006, indicates that the petitioner was established on October 06, 2003, employs 12 workers, claims a gross annual income of $484,395 and a net annual income of $45,833.

The petitioner was initially structured as a sole proprietorship, but became a corporation as of March 12, 2004. 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). According to the attorney's transmittal letter submitted with copies of tax returns and state online printouts supporting the incorporation filing date of the petitioner as October 6, 2003, the corporation did not take over operation of the restaurant until April 2004.

In support of its continuing financial ability to pay the proffered wage of year as of the December 4, 2003, priority date, the petitioner provided copies of its sole proprietor's U.S. Individual Income Tax Return for 2003, 2004 and 2005.[2] They reflect that the sole proprietor filed as a single person in 2003, declaring no dependents. In 2004, he filed as head of household, declaring two dependents. The 2003 and 2004 returns also contain the following information:

	2003	2004
Wages	n/a	$12,327
Taxable interest	n/a	$ 29
Business Income	$46,110	$15,396
Capital Gain or (loss)	-$ 3,000	$ 3,000
Rental Real Estate	$ 6,182	$15,101
Adjusted Gross Income[3]	$45,597	$38,924

The petitioning corporation also provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2004 and 2005. On appeal, the petitioner offered a copy of its 2006 corporate tax return. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns for 2004, 2005 and 2006 contain the following information:

	2004	2005	2006
Net Income[4]	$34,701	$ 45,883	$45,523

[2] In 2005, he and spouse [redacted] filed separately as married persons, having married in 2004, according to a copy of a marriage certificate submitted to the record.
[3] Adjusted gross income is shown on line 34 in 2003 and on line 36 in 2004.

Current Assets	$14,784	$32,247	$43,717
Current Liabilities	$ 4,679	$ 4,542	$ 4,377
Net Current Assets	$ 10,105	$27,705	$39,340

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, U.S. Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its 2004, 2005 and 2006 federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of bank statements from Bank of America for July 2005, and for January, February, and March 2006. Copies of bank statements Key Bank for December 2005 were also submitted, as well as a copy of corporate minutes from a directors special meeting conducted on June 23, 2005; a copy of a corporate redemption agreement dated August 1, 2005; and a copy of a subscription agreement dated October 1, 2005; and a copy of corporate minutes from a special meeting of the directors conducted on October 1, 2005. The June 23, 2005, corporate minutes indicated that [redacted] withdrew as a shareholder of the corporation. The redemption agreement reflected the withdrawal of and the redemption of her 50% share of stock for $75,000 paid by the company. The copy of corporate minutes from October 1, 2005, indicated that [redacted] (former sole proprietor) withdrew as a secretary of the corporation and was replaced by [redacted]. Fifty percent of the stock formerly held by [redacted] was issued to [redacted] in exchange for payment of $90,000 from [redacted] to [redacted] as a gift. The subscription agreement dated October 1, 2005, memorializes the payment to the corporation on behalf of [redacted] subscriber to 50% of the corporation's stock and states the terms for subscription.

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[4]In cases where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income may be found on line 17e (2004-2005) of Schedule K and on line 18 for a 2006 corporate tax return. Here, because additional income, credits, and deductions were reported, the petitioner's net income is found on line 17e for 2004 and 2005 and on line 18 of Schedule K for 2006. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The director denied the petition on April 4, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage of $23,857.60 based on the fact that the petitioner had filed three other petitions in 2006. The director noted that this had been raised in the request for evidence in order to determine whether the petitioner could meet its obligation to demonstrate its ability to pay the proffered salaries for all sponsored beneficiaries as of their respective priority dates until they obtain lawful permanent residence. The director declined to rely on the individual assets of the corporate petitioner's two shareholders. The director further stated:

> . . .[T]he petitioner had submitted four applications for labor certification to an office of the Department of Labor. Since all four applications were certified by the [DOL] and the petitioner subsequently submitted four petitions to USCIS accompanied by those certifications, this meant that it had assumed responsibility for maintaining its ability to pay the total of the wages offered on those applications. However, the petitioner's tax return for 2005, showing a net income of $45,883 and net current assets of less than that, indicates that the petitioner only had the financial ability to support no more than two of the petitions which it filed. Since two of the petitions were approved prior to the filing of the instant petition, and since the petitioner did not move to withdraw either of those petitions, USCIS concludes that the petitioner's financial ability in 2005 must be earmarked for the two approved petitions. . . Therefore, the instant petition cannot be approved.

On appeal, the petitioner, through counsel, contends that the personal holdings of and his spouse should be considered, as anybody can pierce the corporate veil for the purpose of pursuing a monetary claim against a corporation. Counsel asserts that the shareholders of the corporation had committed their assets to the corporation before the corporation filed its immigration petition for the beneficiary. Counsel also attaches a copy of a review of the petitioning restaurant published in the *Portland Tribune* on October 6, 2006 and a copy of an online 2006 search listing of Portland Chinese food restaurants showing the petitioner to be the third favorite. On appeal, counsel also provides copies of the individual tax returns for [redacted] and [redacted] for 2005 and 2006.

Counsel further submits a copy of another document purporting to be the minutes of a special directors meeting from December 20, 2005, signed by the [redacted] and his spouse, [redacted] whereby the business plan of actively continuing to petition alien cooks from China is agreed upon and where [redacted] and [redacted] agree to "jointly commit a loan of $45,000 to the company, without interest, in cash any time upon call by the corporation." They further agree that "whether the business plan is successful or not, the investment will be provided regardless." Attached to this document is another document that appears to summarize goals of a business plan but provides no detail.

The AAO does not find counsel's assertions persuasive. It is noted that the copy of a special directors meeting minutes relating the two married shareholders' agreement as of December 20,

2005, provided for the first time on appeal, is somewhat disingenuous in that it was not included among the other corporate minutes provided to the underlying record. Moreover, there is no indication that such a loan commitment and/or investment was evident within the figures reported on the 2006 corporate tax return. Additionally, the resolution would show a commitment of funds after the priority date. The petitioner must establish its ability to pay from the priority date onwards. A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Although counsel asserts that a creditor may seek satisfaction from the individual shareholders of a corporation in pursuing a monetary claim, it remains that the petitioner and named employer on the I-140 is a corporation and must establish its own continuing ability to pay the proffered salary. Counsel cites no legal authority compelling USCIS to view the value of a shareholder's individually held assets as indistinguishable from that of the corporation when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

> The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.
>
> The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.
>
> A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.
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> In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is concluded that neither [redacted] or [redacted] personal holdings will be considered in determining

the corporate petitioner's ability to pay the proffered wage for the last eight months of 2004, and the years 2005 or 2006.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As mentioned above, the record shows that the petitioner has not employed the beneficiary.

If there is no evidence that a petitioner may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, USCIS will 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 Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that USCIS 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. 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 (line 12). 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). Such petitions often include a summary of household expenses. In this case, this summary was not provided.

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, the job offer as evidenced by the ETA 750 was extended by the petitioner when it had been incorporated but did not actually assume operation of the restaurant until April 2004. The operation and business income was reported by [redacted] on his individual tax return. His individual tax returns for 2003 and 2004 reflected that the proffered wage of $23,857.60 was 52 percent of his adjusted gross income in 2003 and 61 percent of his adjusted gross income in 2004, without even considering any household expenses. Even if prorated for the portion of 2004 that he operated the restaurant as a sole proprietorship, the percentages remain the same. The record does not identify any cash or cash equivalent assets readily available and held by [redacted] during this specific period that could have been applied to the proffered wage and does not establish the ability to pay the proffered salary.

It is noted that counsel presented some evidence of the restaurant's positive reputation in Portland, Oregon. It is noted that in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates 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 *Sonegawa* 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 petitioner had 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the present case, the petitioner has consistently reported modest net income, even during 2006 where it appears that it received positive reviews. Looking at the record, as well as the petitioner's sponsorship of other beneficiaries during this period and corresponding burden to demonstrate the ability to pay the proffered wage for all sponsored aliens as of each respective priority date, we do not conclude that this is analogous to the circumstances set forth in *Sonegawa* or that the petition merits approval on this basis.

From May 2004 onward, the petitioner was operated as a corporation. Relevant to the corporate tax return covering the remaining eight months of 2004 and the subsequent periods, as indicated by the director, the other three petitions filed by the petitioner must be considered. One petition with a priority date of December 4, 2003 was received on June 12, 2006. It was approved on February 5, 2007. Although the record did not indicate the wages of this beneficiary, neither the petitioner's net income of $34,701 nor its net current assets of $10,105 could cover payment of an additional

proffered wage such as the beneficiary's proposed wage of $23,857.60. The petitioner has not established its ability to pay the proffered wage in this year.

The petitioner filed two other petitions in 2006, each with a priority date of October 26, 2005 and October 27, 2005, respectively. These petitions were approved on April 10, 2006 and March 9, 2006, respectively. The 2005 corporate net income or net current assets could accommodate approximately two petitions with a similar salary as the beneficiary's proposed wage offer but not an additional petition. As concluded by the director, the petitioner's financial ability in 2005 was earmarked for these beneficiaries. The petitioner has not established its ability to pay the proffered wage to the additional beneficiary in this case.

Although the petitioner's 2006 corporate tax return suggests that it could cover the beneficiary's proffered wage through either its net income or net current assets, this observation is dependent upon whether and to what extent the other two beneficiaries' salaries as the petitioner's employees are already reflected within the petitioner's $84,398 salaries and wages shown on line 8 of the 2006 corporate tax return. The regulation at 8 C.F.R 204.5(g)(2) requires the ability to pay the proffered wage to be established beginning at the priority date and continue until the respective beneficiary obtains lawful permanent residence status. As it is, only one additional salary similar to the beneficiary's could be paid out of either the petitioner's net income or net current assets in 2006. Without evidence identifying all employees salaries and their respective wages paid that year, it may not be concluded that the petitioner has demonstrated the ability to pay this beneficiary's proffered wage in 2006.

As 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 December 4, 2003.

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.