

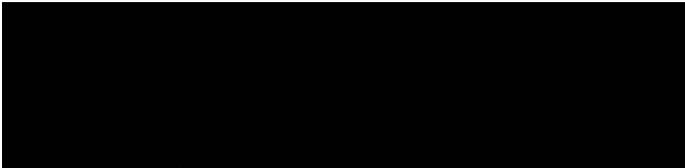
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
SRC-07-096-53722

Office: TEXAS SERVICE CENTER

Date: JUN 05 2009

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.

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, 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook—Chinese cuisine. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. 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 and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 20, 2007 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 either 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 labor certification was accepted for processing by 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 the labor certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was accepted by the DOL on October 17, 2006. The proffered wage as stated on the labor certification is \$11.20 per hour (\$23,296.00 per year). The labor certification states that the position requires twenty-four (24) months of experience in the job offered.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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 2001 and to currently employ 10 workers. On the labor certification, signed by the beneficiary on January 9, 2007, the beneficiary did not claim to have been employed by the petitioner.

On appeal, counsel asserts that the director failed to consider the totality of the circumstances in determining the petitioner's ability to pay the proffered wage. Specifically, counsel claims that the director did not take into consideration the impact of a fire at the petitioner's restaurant "which tremendously damaged the [p]etitioner's net income for the year 2006." In support of his appeal, counsel submits the sole proprietor's Forms 1040, U.S. Individual Income Tax Return, for 2005 and 2006; a letter from the sole proprietor claiming that his restaurant was closed from September 2006 until February 2007 due to a fire; a check in the amount of \$22,138.53 payable to Lucky Star Chinese Restaurant from Acceptance Indemnity Insurance Company; and a fire incident report. Other evidence in the record includes a letter confirming the beneficiary's experience as a cook, and the beneficiary's qualification certificate for the occupation of "Chinese style chef." The record does not contain any evidence of the sole proprietor's household monthly expenses.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later based on it, 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, U.S. Citizenship and Immigration Services (USCIS) 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, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

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<sup>1</sup>The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

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 claimed to have employed 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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual IRS Forms 1040. 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 wages 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 (7<sup>th</sup> 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 and his spouse. The sole proprietor's tax returns reflect adjusted gross income for 2006 of \$9,541.<sup>2</sup> This amount is not sufficient to cover the proffered wage of \$23,296.00. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the proffered wage.<sup>3</sup>

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<sup>2</sup>Adjusted gross income is reported on Line 37 of Form 1040.

<sup>3</sup>The record also includes the sole proprietor's 2005 Form 1040, which states that the sole proprietor had adjusted gross income of \$45,469.00. As the priority date in this case is October 17, 2006, the petitioner's income in 2005 will be considered generally in evaluating the petitioner's ability to pay the offered wage. However, this tax return does not establish the sole proprietor's continuing ability to pay the proffered wage from the priority date. Since the record does not contain any evidence of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole

It is further noted that the record is devoid of evidence establishing the petitioner's net current assets.<sup>4</sup> Accordingly, it has not been established that the petitioner has the ability to pay the proffered wage from assets during the relevant time period.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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*, USCIS 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. USCIS 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The petitioner claims it was established in 2001 and has 10 employees. The petitioner had gross sales of \$345,916.00 in 2005 and \$236,691.00 in 2006. This, by itself, is not sufficient to demonstrate the continuing ability to pay the proffered wage beginning from the priority date.

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proprietor could have sustained himself and his spouse in 2005 with a remaining balance of \$22,173.00 after paying the proffered wage. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 petitioner also claims that it suffered an uncharacteristic loss in 2006 which resulted in it being unable to establish that it was able to pay the proffered wage.<sup>5</sup> The record includes a letter from the sole proprietor claiming that his restaurant was badly damaged in a fire, resulting in the closing of the restaurant from September 2006 until February 2007, which, in turn, negatively impacted the sole proprietor's net income for 2006; a check from Acceptance Indemnity Insurance Company for \$22,138.53, payable to the petitioner; and a fire incident report, which the sole proprietor claims was issued by the police department. According to the fire incident report, on September 4, 2006, an accidental kitchen fire resulted in damage to over half of the sole proprietor's restaurant.

The petitioner has established that it suffered an uncharacteristic loss in 2006. However, the petitioner has not provided sufficient evidence to establish that, barring the loss, it would have been able to pay the proffered wage. The petitioner only provided one additional tax return. The petitioner did not submit any evidence of his household's monthly expenses. Further, the petitioner did not submit evidence of his restaurant's reputation or the historical growth of his business. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup>On appeal, counsel claims that the director did not consider the impact of the fire on the petitioner's net income. This is not the case. In the denial, the director states:

In addition, [USCIS] recognizes that the [p]etitioner sustained a loss due to a fire at [its] establishment on September 4, 2006. Counsel sites in the Response to Additional Evidence the *Matter of Sonegawa*. [USCIS] has thoroughly reviewed all of the evidence presented in this case and has concluded that the circumstances surrounding the [petitioner's] loss and inability to establish [its] ability to pay the beneficiary the proffered wage does not parallel *Sonogawa*.