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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  
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Services

**PUBLIC COPY**

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FILE:

SRC 07 058 51839

Office: TEXAS SERVICE CENTER

Date: JUN 15 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker 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 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an ornamental iron work company. It seeks to employ the beneficiary permanently in the United States as a special steel fabricator (welder). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 23, 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)(iii) 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 unskilled labor, not of a temporary or seasonal 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 processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$14.54 an hour (\$30,243.20 per year). No education is required in the proffered job. One year of experience is required in the job offered is required. No experience in a related occupation is required in the proffered job.

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> Counsel submits a brief on appeal. Relevant evidence in the record includes the sole proprietor's U.S. Individual Income Tax Return for 2001, the petitioner's corporate federal tax returns for 2001, 2002, 2003, 2004, 2005 and 2006, the beneficiary's Forms W-2 for 2001, 2002, 2003, 2004, 2005 and 2006, and a statement of incorporation from the Texas Secretary of State. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner was a sole proprietorship until 2001. On July 17, 2001, the petitioner incorporated and continues to be structured as a C corporation. On the Form I-140 petition, the petitioner claimed to have been established on March 1, 1994, to have a gross annual income of \$372,849.14, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on November 13, 2002, the beneficiary has claimed to have worked for the petitioner under the name Ray Burglar Bars from June 1995 to the date he signed the Form ETA 750.

On appeal, counsel asserts that according to generally accepted accounting principles, the petitioner has the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 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 petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

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<sup>1</sup> 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).

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$30,243.20 in 2001 or subsequently. The record includes copies of IRS Forms W-2 showing wages paid to the beneficiary for 2001, 2002, 2003, 2004, 2005 and 2006. In 2001, the petitioner paid the beneficiary wages in the amount of \$18,468.16. In 2002, the petitioner paid the beneficiary wages in the amount of \$21,567.75. In 2003, the petitioner paid the beneficiary wages in the amount of \$24,029.00. In 2004, the petitioner paid the beneficiary wages in the amount of \$24,204.67. In 2005, the petitioner paid the beneficiary wages in the amount of \$23,535.25. In 2006, the petitioner paid the beneficiary wages in the amount of \$23,044.17.

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 figures reflected on the petitioner's federal income tax returns, 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).

Counsel asserts that in 2001, the petitioner was a sole proprietor and had the ability to pay the proffered wage. In 2001, the petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (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, in 2001 the sole proprietor supports himself. The tax returns reflect the following information for 2001:

Proprietor's adjusted gross income (Form 1040)	\$17,059.00
Petitioner's gross receipts or sales (Schedule C)	\$354,769.00

Petitioner's wages paid (Schedule C)	\$50,786.00
Petitioner's net profit from business (Schedule C)	\$16,039.00

In 2001, the sole proprietorship's adjusted gross income of \$17,059.00 covers \$11,775.04 which is the difference between the \$18,468.16 wages paid to the beneficiary and the proffered wage of \$37,336.00. At that time, the sole proprietor supported only himself. The AAO notes that the record does not include a statement of household expenses for 2001. It is improbable that the sole proprietor could support himself on \$5,283.96 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. As such, the AAO finds that the petitioner has not demonstrated its ability to pay the proffered wage in 2001.

Counsel asserts that the petitioner could liquidate its assets and cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that overall fiscal circumstances of the owner of a sole proprietor should be considered when assessing ability to pay. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner incorporated on July 17, 2001. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 and Line 24 of the Form 1120-A, U.S. Corporation Income Tax Return. The record before the director closed on October 12, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005 and 2006 as shown in the table below.

- In 2001, the Form 1120 stated net income of \$0
- In 2002, the Form 1120 stated net income of -\$3,758.00
- In 2003, the Form 1120 stated net income of -\$2,139.00
- In 2004, the Form 1120 stated net income of \$8,732.00
- In 2005, the Form 1120 stated net income of \$4,228.00
- In 2006, the Form 1120 stated net income of -\$8,564.00

Therefore, for the years 2001, 2002, 2003, 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$30,243.20 or the difference between wages actually paid and the proffered wage per year. The AAO notes that for 2004 the petitioner's stated net income of \$8,732.00 was sufficient to cover \$6,038.53 which is the difference between the \$24,204.67 wages actually paid and the proffered wage. The petitioner therefore has demonstrated its ability to pay the proffered wage for 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 for Form 1120 and on Part III, lines 1 through 6 for Form 1120-A and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18 for Form 1120 and on lines 13 through 14 for Form 1120-A. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2005 and 2006, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$1,000.00.
- In 2002, the Form 1120 stated net current assets of \$1,111.00.
- In 2003, the Form 1120 stated net current assets of \$3,733.00
- In 2005, the Form 1120 stated net current assets of \$2,299.00
- In 2006, the Form 1120 stated net current assets of -\$355.00.

Therefore, for the years 2001, 2002, 2003, 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

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<sup>2</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.

Counsel asserts that in the fall of 2001, the country was in a state of uncertainty and suffering economic problems. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

Counsel asserts that USCIS should take into consideration the amounts the petitioner's sole shareholder received as compensation of officers for 2002 through 2005. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock and performs the personal services of the practice. According to the petitioner's 2002 IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$17,680.00. According to the petitioner's 2003 IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$24,400.00. According to the petitioner's 2005 IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$24,500.00. The AAO notes that no W-2 Forms for [REDACTED] were submitted into the record. We note here that the compensation received by the company's owner during these years was not a fixed salary and amounted to less than \$25,000.00 per year.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel asserts that the beneficiary will replace subcontractors who have his same duties. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the subcontractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the subcontractors who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

Counsel argues that the petitioner is a substantial business with a cash flow which is many multiples in excess of the proffered wage. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the present case, the petitioner is a company that had been in business for seven years at the time the Form ETA 750 was filed. The petitioner had \$0 in gross receipts and paid out \$0 in wages and salaries during the year in which the priority date was established.

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001, 2002, 2003, 2005 and 2006 were uncharacteristically unprofitable years for the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.