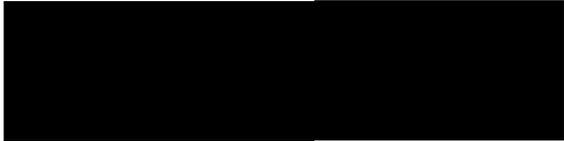


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



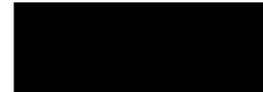
U.S. Citizenship  
and Immigration  
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DATE JUL 02 2012 OFFICE: TEXAS SERVICE CENTER

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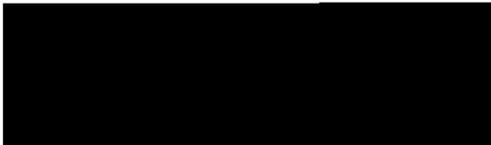


IN RE: Petitioner:  
Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 truck trailer and body repair business. It seeks to employ the beneficiary permanently in the United States as a truck trailer body repairer. 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 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 January 6, 2009 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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$3,600 per month (\$43,200 per year). The Form ETA 750 states that the position requires two years experience in the job offered or in the related position of auto body repair.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 1994 and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to work for the petitioner since March 1999.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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'l Comm'r 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 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 paid the beneficiary the full proffered wage from 2001 to 2007. The record contains an Internal Revenue Service (IRS) Form W-2 issued to the beneficiary by the petitioner indicating that in 2006, the petitioner paid \$24,000 in wages to the beneficiary. The petitioner must establish that it can pay the remainder, \$19,200, in 2006, to establish ability to pay for that year.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v.*

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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).

*Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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'r 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. *See 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 petitioner 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 a family of seven from 2001 to 2002. From 2003 to 2007, the petitioner supports a family of six. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's adjusted gross income (Form 1040, line 33) (loss) was (\$53,944).
- In 2002, the proprietor's adjusted gross income (Form 1040, line 35) was \$23,627.
- In 2003, the proprietor's adjusted gross income (Form 1040, line 34) was \$21,836.
- In 2004, the proprietor's adjusted gross income (Form 1040, line 36) was \$40,331.
- In 2005, the proprietor's adjusted gross income (Form 1040, line 37) was \$22,089.
- In 2006, the proprietor's adjusted gross income (Form 1040, line 37) was \$20,589.
- In 2007, the proprietor's adjusted gross income (Form 1040, line 37) was \$62,415.

From 2001 to 2005, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$43,200. It is improbable that the sole proprietor could support himself and his family from 2001 to 2005 on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 2006, the sole proprietor had sufficient adjusted gross income to pay the remainder of the proffered wage. It is improbable, however, that the sole proprietor could

support himself and his family in 2006 on \$1,389, which is what remains after reducing the adjusted gross income by the amount required to cover the deficiency of \$19,200. In 2007, although the sole proprietor had sufficient adjusted gross income to cover the proffered wage, the record contains no evidence of the sole proprietor's household expenses for 2007 and therefore, the AAO is unable to determine if the sole proprietor could support himself and his family on \$19,215, the amount remaining after deducting the proffered wage.

On appeal, counsel asserts that the petitioner has had the ability to pay the proffered wage and lists business and personal bank accounts as evidence of the petitioner's ability to pay the proffered wage.

The funds in the Comerica Bank account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. 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'l Comm'r 1967).

The record of proceeding contains some monthly and yearly statements from the sole proprietor's personal checking, time deposit, and cash deposit (CD) accounts covering the period 2001 through 2007. The record contains some monthly personal checking account statements for 2001 to 2008, but the statements do not provide average monthly balances. Therefore, the AAO is unable to determine the average monthly balance for the personal checking account. The record contains evidence of the annual balances for the petitioner's time deposits and CDs of \$3,600, \$11,481.50, \$3,844.13, \$18,638.77, \$6,274.45, and \$33,667.08 for the years 2001, 2002, 2003, 2004, 2007, and 2008, respectively. As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The average annual balances in the years 2001, 2002, 2003, 2004, 2007, and 2008 are not sufficient to cover the full proffered wage.

On appeal, counsel also asserts that the petitioner has had the ability to pay the proffered wage and lists 19 wheeler trailers and approximately \$45,000 worth of inventory as evidence of the petitioner's ability to pay the proffered wage. The record of proceeding contains vehicle registration documents from the Texas Department of Transportation in the sole proprietor's name. Although the record contains a letter from the sole proprietor indicating that the trailers have an approximate market value of \$45,000, the record contains no other evidence of the market value of any vehicles owned by the sole proprietor, or the petitioner's inventory. Moreover, it is unlikely that the sole proprietor would sell such significant business assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if 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 (5<sup>th</sup> 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).

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

Based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. Further, the petitioner has not established its historical growth since 1994, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.