

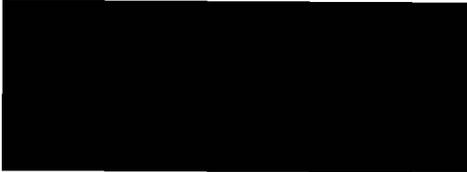
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
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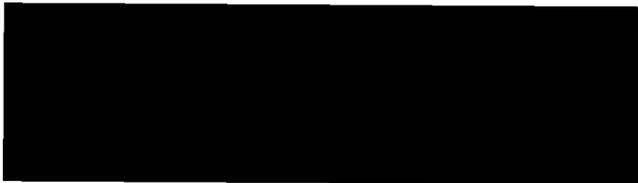
Office: TEXAS SERVICE CENTER Date:

NOV 27 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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 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 remanded for further consideration and entry of a new decision.

The petitioner is a design/import/export company. It seeks to employ the beneficiary permanently in the United States as an order clerk. As required by statute, a Form 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. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 10, 2007 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 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. 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$320 per week or \$16,640 annually.

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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of a bank statement from Chase Bank for the petitioner's owner showing a business line of credit of \$65,000 with \$6,375.44 usable, a letter from the petitioner's owner, dated October 3, 2007, an accounts receivable report, dated September 20, 2007, a bank statement for the petitioner's owner from Citibank for the period August 14, 2007 through September 16, 2007 showing a regular checking balance of \$1,300 and a super yield money market account of \$25,220.59, a statement from the Vanguard Group as of June 30, 2007 reflecting a total of \$41,256.87 in a retirement fund for the petitioner's owner, a statement from UBS Financial Services, Inc. for the period April 2007 through June 2007 for the petitioner's owner reflecting a balance of \$16,178.33, a statement from Citigroup Global Mkts Inc., for the petitioner's owner reflecting a value of \$6,112.98, a statement from [REDACTED], as of the month ending June 30, 2007, for the petitioner's owner, reflecting a value of \$11,299.47, a list of inventories by manufacturers as of September 30, 2007, a catalog listing the petitioner's products for the fall and winter of 2007 and 2008, a history of the petitioner, and several ads showing the petitioner's products in various national magazines and catalogs. Other relevant evidence includes copies of the petitioner's 2001 through 2006 Schedule C, Profit or Loss From Business, from the owner's Forms 1040. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 Schedule C reflects gross receipts of \$27,311. [REDACTED] paid of \$0, and a net profit of

The petitioner's 2002 Schedule C reflects gross receipts of \$21,571. [REDACTED] paid of \$0, and a net profit of

The petitioner's 2003 Schedule C reflects gross receipts of \$29,413. [REDACTED] paid of \$0, and a net profit of

The petitioner's 2004 Schedule C reflects gross receipts of \$25,428. [REDACTED] paid of \$0, and a net profit of

The petitioner's 2005 Schedule C reflects gross receipts of \$13,348. [REDACTED] paid of \$0, and a net profit of

The petitioner's 2006 Schedule C reflects gross receipts of \$30,452.² [REDACTED] paid of \$0, and a net profit of

The letter from the petitioner's owner states

¹ 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).

² It is noted that the director's request for evidence did not include a request for the monthly recurring personal expenses of the petitioner's owner. In addition, the request for evidence should have included a request for all pages of the 2001 through 2006 Forms 1040 for the petitioner's owner and not just the ones for any year the beneficiary did not receive the proffered salary, as the decision should be based in great part on the adjusted gross income of the petitioner's owner.

Since it has been unaffordable to “hire” employees what has really helped my company to survive over the years has been my decision of using independent domestic and international contractors. As reflected on my tax returns, I have used independents for many different jobs from sales, to artwork, to photography, bookkeeping, etc. I have also used overseas outsourcing to package and inspect my products.

While I don't have employees since much of my work is outsourced, if I am allowed to hire [the beneficiary] as an employee, I estimate that my company will be able to save on monies paid to outside companies/independent contractors and reduce outsourcing needs. Not only will it allow me more control on overseeing things, I expect the savings to exceed what I am paying the outside persons. Thus, I will have enough funds to afford to hire [the beneficiary].

The reason my accountant does not reflect the ending inventory on my tax return is because when the products arrive from overseas, they are shipped out immediately. Any inventory left over at end of year is usually damaged and a loss.

The publications featuring the petitioner's products include [REDACTED] *Gump's*, and *Aspen Sojourner*.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage based on its longevity (more than 18 years), its business line of credit, its account receivables, its owner's Citibank Super Yield Money Market account, its owner's Vanguard Group portfolio summary, its owner's UBS Financial Services, Inc. retirement account, its owner's Smith Barney account, its owner's Morgan Stanley retirement account, and its reputation as evidenced by its inclusion in national magazines and catalogs.

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, CIS 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, the petitioner has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, to demonstrate that it employed the beneficiary during the pertinent years of 2001 through 2006. Therefore, the petitioner has not established that it employed the beneficiary from the priority date of April 30, 2001 through 2006.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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. [CIS] 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* at 537.

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 (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 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor did not provide complete copies of her 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns. Therefore, the AAO is unable to determine how many family members the sole proprietor supported in 2001 through 2006. In addition, due to the lack of the complete tax returns, the AAO cannot determine the sole proprietor's adjusted gross income, and as explained in footnote 2, because the director failed to request the sole proprietor's monthly recurring personal expenses, the AAO is unable to determine if the sole proprietor could pay the proffered wage of \$16,640 and her monthly recurring expenses in the pertinent years (2001 through 2006) from the sole proprietor's adjusted gross income.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage based on its longevity (more than 18 years), its business line of credit, its account receivables, its owner's Citibank Super Yield Money Market account, its owner's Vanguard Group portfolio summary, its owner's UBS Financial Services, Inc. retirement account, its owner's Smith Barney account, its owner's Morgan Stanley retirement account, and its reputation as evidenced by its inclusion in national magazines and catalogs.

While all of counsel's assertions appear to be valid and do suggest that the sole proprietor has the ability to pay the proffered wage of \$16,640, all of the documentation submitted on appeal is dated either in the year 2006 or 2007. The petitioner must establish the ability to pay the proffered wage from the priority date of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

The director must afford the petitioner reasonable time to provide evidence of its ability to pay the proffered wage from the priority date of April 30, 2001, to include the sole proprietor's personal monthly recurring expenses, the complete Forms 1040 for the petitioner's owner including any and all Schedule Cs that are part of the Forms 1040, and any other evidence the director deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 10, 2007 decision is withdrawn. The petition is remanded to the director for further consideration and for entry of a new decision, which is to be certified to the AAO for review.