



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B6

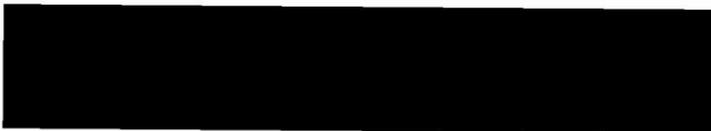


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 14 2008
SRC 06 136 51952

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

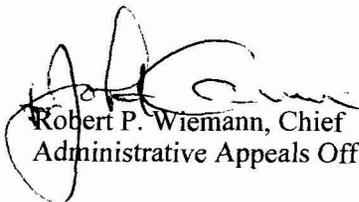
PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and
Nationality Act, 8 U.S.C. 1153(b)(3)

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 dismissed.

The petitioner is a jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a bookkeeping, accounting, and auditing 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 and 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 October 25, 2006, decision, 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)(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 either 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 C.F.R. § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$15.07 per hour or \$31,345.60 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 and a copy of the petitioner's purchase order from the Disney Theme Park, dated December 18, 2006. Other relevant evidence includes copies of the petitioner's 2001 through 2005 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, a listing of the petitioner's owner's personal monthly recurring expenses, a copy of an unaudited profit and loss statement for the period January 1, 2006 through October 2, 2006, a copy of the owner's IRA account for the period July 1, 2006 through August 31, 2006, copies of sales invoices, and a copy of a sales chart. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The purchase order from the Disney Theme Park, dated December 18, 2006, reflects an order valued at \$26,500.

The petitioner's 2001 through 2005 Forms 1040 reflect adjusted gross incomes of \$58,812, -\$62,439, -\$6,839, -\$453, and -\$1,932, respectively.

The petitioner's 2001 through 2005 Schedule Cs reflect net profits of \$67,717, -\$63,844, -\$6,868, -\$2,095, and -\$1,528, respectively.

The petitioner's owner listed her monthly personal recurring expenses as \$3,964.39 per month or \$47,572.68 annually.

The petitioner's owner's IRA reflects an amount of \$19,847.59 for the period of July 1, 2006 through August 31, 2006.

The petitioner's unaudited profit and loss statement for the period January 1, 2006 through October 2, 2006 reflects total income of \$109,473.71 and a net profit of \$10,389.05.²

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$31,345.60 based on its pending sales inventory, its outside services, and its owner's personal assets.

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 filed 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

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 The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's unaudited financial statement for the period January 1, 2006 through October 2, 2006 when determining the petitioner's ability to pay the proffered wage of \$31,345.60.

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 750, signed by the beneficiary on April 5, 2001, the beneficiary claims to have been employed by the petitioner from October 2000 to the present (April 5, 2001). Counsel has not, however, submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that the beneficiary was employed by the petitioner during those years. Therefore, the petitioner has not established that it employed the beneficiary in 2001 through 2005.

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. 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. [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 Chang*, 719 F. Supp. at 537.

The petitioner is organized as a sole proprietorship. 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). 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 supported a family of one in 2001 through 2005. The sole proprietor's adjusted gross incomes in 2001 through 2005 were \$58,812, -\$62,439, -\$6,839, -\$453, and -\$1,932, respectively. The sole proprietor's monthly personal recurring expenses were listed as \$47,572.68 per year. Therefore, the petitioner would have needed an adjusted gross income of \$78,918.28 annually to pay the proffered wage of \$31,345.60 and to provide for her personal recurring monthly expenses. The sole proprietor's adjusted gross incomes for the pertinent years, 2001 through 2005, were substantially less than the \$78,918.28 needed to pay the proffered wage and to meet the sole proprietor's personal recurring monthly expenses in 2001 through 2005. Therefore, the petitioner has not established its ability to pay the proffered wage of \$31,345.60 from the priority date in 2001 through 2005.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage based on its pending sales inventory, its payment for outside services, and the sole proprietor's personal assets (IRA account).

Counsel is mistaken. The petitioner is obligated to show that it has sufficient funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The fact that the petitioner has a purchase order for an additional \$26,500 in 2006 is not evidence that the petitioner had the ability to pay the proffered wage of \$31,345.60 from the priority date of April 25, 2001 and continuing until the beneficiary obtains lawful permanent residence. In addition, the purchase order of \$26,500 is far less than the amount needed of \$78,918.28 to pay the proffered wage of \$31,345.60 and the personal recurring monthly expenses of the sole proprietor of \$47,572.68.

Counsel contends that the petitioner's ability to pay outside services of \$39,464 in 2004 and \$32,818 in 2005 is further evidence of the petitioner's ability to pay the proffered wage of \$31,345.60. However, the record does not name these outside 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 outside workers involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If that worker performed other kinds of work, then the beneficiary could not have replaced him or her. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, counsel claims that the sole proprietor's IRA account should be considered when determining the petitioner's ability to pay the proffered wage. While the AAO will consider the sole proprietor's IRA account of \$19,847.59 for the period of July 1, 2006 through August 31, 2006, there is no evidence in the record regarding when the IRA account was opened or that it had sustained balances of approximately the same amount each year. Furthermore, even when adding the sole proprietor's total IRA fund to her adjusted gross incomes in 2001 through 2005, the result is still less than the \$78,918.28 needed to pay the proffered wage of \$31,345.60 and the sole proprietor's monthly personal recurring expenses of \$47,572.68.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.