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**U.S. Citizenship
and Immigration
Services**

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B/C

FILE: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 06 182 50749

Date: **MAY 28 2008**

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:

SELF REPRESENTED

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.

Kenai S. Poulos for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, on August 22, 2006. The petitioner submitted a motion to reopen and reconsider, which the director denied on October 5, 2006. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and dress making business. It seeks to employ the beneficiary permanently in the United States as a specialty dressmaker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 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 record also indicates that the petitioner filed two previous I-140 petitions on behalf of the beneficiary both of which the Texas Service Center denied. (SRC 03 166 50980, denied on January 19, 2005, and SRC 06 062 51325 denied on January 13, 2006.) The procedural history in this case and the two prior petitions and denials 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 August 22, 2006 denial of the petitioner's I-140 petition and her October 5, 2006 denial of the petitioner's motion to reopen (MTR), 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 U.S. Department of Labor. 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 U.S. Department

of Labor 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11 per hour (\$22,800 per year).¹ The Form ETA 750 states that the position requires six years of grade school, three years of high school, one year of training as a seamstress, and five years of work experience in the proffered position.

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.² On appeal, the petitioner submits a brief and resubmits materials previously submitted on motion. These materials include the beneficiary's IRS Forms 1040 for tax years 2003, 2004 and 2005. The petitioner also submits a letter from the beneficiary dated September 14, 2006. In her letter the beneficiary states that the purpose of the letter is to explain why her income tax returns were not filed in the years 2001 and 2002 and why she amended her income tax return for tax year 2003. The beneficiary states that in tax year 2001 she failed to file her taxes and claim her earned income credit because she did not have a valid social security number. The beneficiary notes that the sum of \$13,637 noted on the 2001 W-2 Form is equal to seven months of work. The beneficiary explains then that she also did not file her taxes in tax year 2002 for the same reason. The beneficiary then stated she filed her original individual income tax return showing adjusted gross income of \$5,904 based on her work during the last four months of 2003, after she received her employment authorization document and a valid social security number. The beneficiary states that she is doing an amended U.S. tax return for tax year 2003 and reimbursing the U.S. government \$1,594 based on the increase of her self-employment income.. The petitioner also submitted a W-2 Form for the beneficiary for tax year 2001 that indicates the beneficiary earned \$13,637.50, and a Form 1099-MISC for tax year 2002 that indicates the beneficiary received \$21,120 in compensation.³

The record also contains the following evidence:

Copies of the petitioner's federal income tax returns Form 1120S, for tax years 2001 to 2004;

¹ The AAO calculated this proffered wage by multiplying the \$11 hourly wage stated on the ETA Form 750, Part A, by 2080 annual work hours. The AAO also notes that neither the I-140 or the ETA Form 750 explicitly state a yearly wage. Rather, the I-140 petition states a weekly salary of \$440, which, when multiplied by 52 weeks, also equals \$22,800 yearly.

² 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).

³ Although these two documents were submitted on motion, the director did not mention the beneficiary's W-2 Form or 1099 MISC form in her denial of the petitioner's motion to reopen or reconsider. The record is not clear why the director did not accept these two documents as new evidence. For this reason, the AAO will examine these two documents more fully further in these proceedings.

Copies of the beneficiary's Form W-2 Wage and Tax statement for tax years 2004 and 2005 that indicate the petitioner paid the beneficiary \$21,854 in 2004 and \$22,412.25 in 2005;

Forms 941, Employer's Quarterly Federal Tax Report, for all four quarters of tax years 2001 to 2004;

IRS Forms 1040, U.S. Individual Income Tax Return, for the petitioner's owner, for the years 2001-2004;

Bank statements from Bank of America for the petitioner's owner, from January 2001 to December 2005;

Statements with regard to the petitioner's owner's Bank of America certificates of deposit;

A letter from [REDACTED], CPA, of Lashbrook, Wollard, and Fasano, P. A., Fort Lauderdale, Florida, dated November 29, 2005. In his letter, Mr. [REDACTED] stated that because the petitioner is an S corporation and 100 percent owned by the petitioner's owner, the petitioner has the ability to access sufficient resources from the personal assets of the petitioner's owner. Mr. [REDACTED] stated that the petitioner's owner's personal tax returns and her investments in Banc of America Investments Service, Inc. is evidence of the petitioner's owner's ability to access her personal assets if necessary. Mr. [REDACTED] also noted that the firm had reviewed the payroll records of the petitioner, and noted that the petitioner had never failed to report and pay all wages, and submit all reports to the proper agencies.

A copy of a letter to the Texas Service Center dated April 30, 2001 from the petitioner's owner that states the petitioner offers permanent full time employment to the beneficiary as a custom dressmaker with an annual salary of \$21,120.

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 is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987, and to have a gross annual income of \$116,797. The petitioner did not identify its number of current workers, although the Forms 941, Employer's Federal Quarterly Tax Reports indicate that the petitioner had a fluctuating number of two to four employees during the relevant period of time considered in these proceedings. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed that she worked as an independent designer and maker of children and adult clothes for an alteration business since 1996 to the date she signed the ETA Form 750.

On appeal, the petitioner's owner asserts that the proffered wage is \$21,120, rather than the minimum proffered wage of \$22,880 as stated by the director in her decision. The petitioner's owner states that the petitioner has the ability to pay the proffered wage, and that the absence of the beneficiary, because of her extraordinary skills as a dressmaker, would substantially impact the petitioner's operations.

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, Citizenship and Immigration Services (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).

The director's statements in her denial of the instant petition with regard to examining the petitioner's owner's assets and Banc of America investment statements for evidence of the petitioner's ability to pay the proffered wage are correct. The petitioner is a corporation, and not a sole proprietorship. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." For this reason, the petitioner's owner's reliance on the balances in her personal bank account and her income tax returns is also misplaced. Although petitioners that are structured as sole proprietorships can use financial instruments such as certificate of deposits, as evidence of readily available financial resources with which to pay the proffered wage, petitioners structured as corporations cannot utilize this source of additional finances.

Further, the AAO notes that the proffered wage for the position identified on the ETA Form 750 is \$22,800. While the petitioner in its cover letter to the instant petition states a salary of \$21,200, the proffered wage identified on the Form ETA 750, Part A, is the dispositive figure for the proffered wage. As previously stated, the weekly salary of \$440, noted on the instant I-140 petition, also equates to the \$22,800 proffered wage.

The AAO would also note that the use of the beneficiary's amended or unamended income tax returns, is not appropriate. With regard to the beneficiary's 2003 amended tax return, the record does not reflect any acceptance by the Internal Revenue Service (IRS) of the beneficiary's increased adjusted gross income. Further, the beneficiary's tax return for 2003 only reflects wages received by the beneficiary, and does not necessarily represent the wages paid by the petitioner to the beneficiary.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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.

With regard to wages paid by the petitioner to the beneficiary, as stated previously, the petitioner on motion submitted a W-2 Form for the beneficiary for tax year 2001 and a Form 1099-MISC for tax year 2002. The petitioner did not submit either a W-2 Form or a Form 1099-MISC for tax year 2003. While the director noted the submission of the beneficiary's tax returns in her decision to deny the petitioner's motion to reopen or reconsider the petition, the director made no comment on the additional W-2 Form or Form 1099-MISC submitted to the record. The AAO will examine these two documents in these proceedings.

With regard to the W-2 Form for tax year 2001 submitted by the petitioner on motion and on appeal, the AAO notes that this form indicates the petitioner paid the beneficiary \$13,637.50, which the beneficiary in her letter describes as seven months of employment. However, the petitioner's Forms 941 for tax year 2001 do not indicate that the beneficiary was one of the petitioner's employees. Thus, the record contains a discrepancy

between the beneficiary's submitted W-2 Form and the petitioner's Forms 941 for tax year 2001 for which the petitioner provides no clarification. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further clarification, the AAO gives no evidentiary weight to this document. Thus, with regard to the 2001 priority year, the petitioner has submitted no documentation to establish it paid a salary equal to or greater than the proffered wage, and has to establish its ability to pay the entire proffered wage of \$22,800 from its net income or net current assets.

With regard to the IRS Form 1099-MISC for 2002, the petitioner's Form 1120S for 2002 lists \$7,736 paid to subcontractors via Forms 1099 and \$2,954 paid to "Corp." subcontractors, while the petitioner's Form 1099-MISC for the beneficiary indicates the petitioner paid the beneficiary non-employee compensation of \$21,120 in tax year 2002. Thus, the record contains a discrepancy between the petitioner's 2002 income tax return and the beneficiary's 2002 Form 1099-MISC. Again, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further clarification, the AAO also gives no evidentiary weight to this document in these proceedings. Thus, in tax year 2002, the petitioner has not established it paid the beneficiary a salary equal to or greater than the proffered wage of \$22,800. It has to establish its ability to pay the entire proffered wage of \$22,800 in the 2002 priority year from its net income or net current assets.

The AAO does note that the petitioner has submitted no documentation, such as a Form 1099-MISC or a W-2 Form for the beneficiary's claimed wages in tax year 2003, although the petitioner's Forms 941 for tax year 2003, indicate wages of \$5,903.56 for tax year 2003. In addition, the beneficiary claims in her letter to the record submitted on motion and on appeal, that she earned \$5,904.⁴

In the instant case, the petitioner has established that it employed and paid the beneficiary the following wages: \$5,903.56 in 2003; \$21,854 in 2004; and \$22,412.25 in 2005.⁵ The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Based on the W-2 Forms for tax years 2003, and 2004, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$22,800 in the years 2003 to 2004 based on its net income or net current assets, namely \$16,896.44, and \$964.⁶ As previously discussed, the petitioner has provided no credible evidence as to wages or compensation paid to the beneficiary in tax years 2001 and 2002, and has to establish its ability to pay the entire proffered wage of \$22,800 in tax years 2001 and 2002, based on its net income or net current assets.

⁴ The beneficiary appears to have rounded up the figure of \$5,903.56 as reported on her W-2 Form. The AAO will utilize the W-2 statement figure of \$5,903.56 in these proceedings.

⁵ As reported on the beneficiary's Forms W-2 Wage and Tax statements for tax years 2004 and 2005 previously submitted to the record.

⁶ It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated June 7, 2005. At this time, the petitioner's 2005 income tax return would not have been available. Therefore the AAO will not examine whether the petitioner had sufficient net income or net current assets in tax year 2005 to pay the difference between the beneficiary's actual 2005 wages and the proffered wage.

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, CIS 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. 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. [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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$22,800 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁷ of -\$3,337.
- In 2002, the Form 1120S stated a net income of -\$1,301.
- In 2003, the Form 1120S stated a net income of -\$1,081.
- In 2004, the Form 1120S stated a net income of -\$178.

⁷ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for the relevant years, the petitioner's net income is found on line 21, ordinary business income (loss), page one of Form 1120S.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay either the entire proffered wage in tax years 2001 and 2002, or the difference between the beneficiary's actual wages and the proffered wage of \$22,800 in tax years 2003 and 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 net current assets during 2001 were \$12,176.
- The petitioner's net current assets during 2002 were \$12,614.
- The petitioner's net current assets during 2003 were \$12,554.
- The petitioner's net current assets during 2004 were \$10,610.

As stated previously, the petitioner established that the beneficiary earned the following wages in tax years 2003 and 2004: \$5,903.56; and \$21,854. As stated previously, the difference between these wages and the proffered wage is \$16,896.44, and \$964, respectively. Thus, the petitioner had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage of \$22,800 only in tax year 2004. As stated previously, the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 and 2002; however, in these two relevant years, the petitioner did not have sufficient net current assets to pay the entire proffered wage of \$22,800.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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, except for tax year 2004.

The petitioner's owner asserts in her brief accompanying the appeal that there is another reason to determine that the petitioner has the ability to pay the proffered wage, namely, the impact of the beneficiary's employment based on her dressmaking skills, on the petitioner's business. However, the record contains no evidence of the impact of the beneficiary's employment on the petitioner's business, or how to gauge the impact of the beneficiary's dressmaking skills on the petitioner's past, current or future business operations.

⁸According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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's owner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.