identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 07 2007

SRC-06-136-50224

In re: Petitioner:
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:

[redacted]

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 Director, Texas Service Center ("director"), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is a Chinese restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food ("Specialty Cook"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's August 3, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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).[1]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

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

[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).

> 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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 10, 2002.[2] The proffered wage as stated on Form ETA 750 is $9.45 per hour, which is equivalent to $19,656 per year, based on a 40-hour work week. The labor certification was approved on June 21, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 27, 2006. On the I-140 petition, the petitioner listed the following information: date established: 2000; gross annual income: $367,142; net annual income: $27,685; current number of employees: 6.

On April 27, 2006, the director issued a Request for Additional Evidence ("RFE"), which requested that the petitioner indicate whether it was submitting the I-140 petition on behalf of the present beneficiary, or on behalf of the beneficiary initially listed on Form ETA 750A. The RFE requested that the petitioner submit Form ETA 750B on behalf of the present beneficiary. The RFE also requested that the petitioner provide evidence of its ability to pay the beneficiary the proffered wage in the form of federal tax returns, annual reports, or audited financial statements. The petitioner responded. Following consideration of the petitioner's response, on August 3, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. The beneficiary did not list on Form ETA 750B that he was employed with the petitioner. Rather, Forms ETA 750B and Form I-140

---

[2] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The Kooritzky decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

exhibit that the beneficiary presently resides outside the U.S. The petitioner is, therefore, unable to establish its ability to pay the proffered wage based on prior wages paid to the beneficiary.

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. 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). 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 petitioner initially operated as a sole proprietorship until October 26, 2002, and then incorporated as an S corporation in late 2002 in connection with a reorganization to establish a successor-in-interest. The petitioner initially listed on Form ETA 750 is [redacted] Antonio, Texas. The petitioner listed on Form I-140 is [redacted] Restaurant" with the same address. The petitioner submitted documentation to show that it was the successor-in-interest to Lee's Garden. To show that the new entity is a successor in interest to the original business, which filed the labor certification, it must establish that it has assumed all the rights, duties, and obligations of that business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner submitted an Agreement to exhibit that the new entity purchased the rights, duties, and obligations of the initial company.

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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists only income from its business and so its net income is found on line 21:

Tax year	Net income or (loss)
2005	$27,685
2004	$12,759
2003	$33,017

The petitioner's net income would allow for payment of the beneficiary's proffered wage of $19,656 in 2003, and 2005, but not in 2004. For the year 2002, the petitioner was formed 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 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 2002, the sole proprietor supported himself, his wife, and two children and resided in San Antonio, Texas. The 2002 tax return reflects the following information:

Tax Year	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2002	-$26,028	$320,594	$36,764	$31,256

If we reduced the sole proprietor's adjusted gross income (AGI) by the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with negative adjusted gross income in the amount of -$45,684 in 2002, which would not establish that the petitioner could pay the proffered wage and support himself and his family.[3]

Therefore, the petitioner's tax returns would not establish its ability to pay the proffered wage in 2002, or 2004.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Tax year **Net current assets**

[3] The sole proprietor did not submit a list of estimated monthly family expenses, or other information related to the sole proprietor's personal assets to show that the sole proprietor could support himself and his family and pay the proffered wage.

2005	-$10,935
2004	-$15,159
2003	$22,505

Similarly, the petitioner's federal tax returns show that the petitioner would lack the ability to pay the proffered wage in 2004 based on net current assets as well. We cannot calculate the petitioner's net current assets in 2002, as the petitioner, then formed as a sole proprietorship, was not required to file Schedule L.

The petitioner additionally provided business checking account statements for the years 2003, 2004, and 2005, as well as for the first four months of 2006. We note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

If we were to examine the statements specifically, the balances range from a low balance of -$379.31 in October 2005 to a high balance of $10,654.81 in May 2005. More specifically, for the year 2004, the statements exhibited a low balance of $5.70 in September 2004, and a high balance of $5,048.22. Further, in six months out of the year in 2004, the petitioner had under $1,000 in its account, and for an additional three months had between $1,000 to $1,500 in its bank account. Based on the statements submitted, we would not conclude that the petitioner had the ability to pay the proffered wage in 2004.

On appeal, counsel notes that CIS properly concluded that the petitioner can pay the proffered wage in 2003 and 2005. However, counsel provides that CIS has ignored the 2002 tax return submitted on behalf of the sole proprietorship, and provides that the 2002 return reflected a net profit of $31,256.

Regarding the sole proprietor's 2002 net profit, as set forth above, the sole proprietor must show that it can pay the proffered wage and support the sole proprietor and his family. The petitioner has not demonstrated this based on the sole proprietor's 2002 AGI.

For the year 2004, counsel suggests that the petitioner can pay if the petitioner's net income and depreciation in the amount of $9,808 were considered.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, *available at* http://www.irs.gov/pub/irs-pdf/i4562.pdf. Therefore, depreciation is a real cost of doing business. The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage whether considered individually, or combined with other factors.

The petitioner additionally references the bank statements that it provided. As addressed above, no bank statements were provided for 2002, and in 2004, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. On appeal, the petitioner asserts that the 2006 statements provided through April 2006 would exhibit the petitioner's ability to pay for that year. As the petitioner has only provided the first four months for 2006, we would not conclude that these statements would exhibit the ability to pay for the entire year.

The petitioner additionally provided a letter from an accountant, which provides that:

> After reviewing [the petitioner's] annual reports, federal tax returns, and financial statements, I have determined that [the petitioner] had the ability to pay [the beneficiary] the proffered wages as of October 10, 2002 and has continually maintained the financial ability to do so since then. Additionally based on my analysis I have projected that [the petitioner] will continue to maintain this financial ability to pay.

The accountant does not elaborate on his analysis, for example, what elements have led him to conclude that the petitioner has the ability to pay the proffered wage. Accordingly, we are not convinced that the petitioner can demonstrate that it can pay the proffered in the years 2002 or 2004.

Based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.