

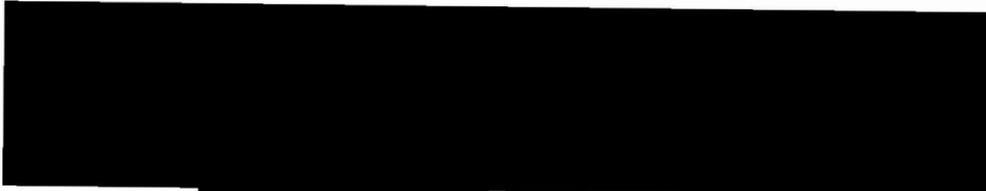
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 241 51775

Office: TEXAS SERVICE CENTER

Date:

NOV 13 2007

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 martial arts studio. It seeks to employ the beneficiary permanently in the United States as a fitness instructor. As required by statute, a Form ETA 9089, Application for Permanent 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 proffered wage from the priority date. 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 original October 24, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of June 25, 2001.

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 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 9089 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 June 25, 2001. The proffered wage as stated on the Form ETA 9089 is \$14.33 per hour or \$29,806.40 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 partial copy of the previously submitted 2001 Form 1040, U.S. Individual Income Tax Return, for the petitioner's owner, a copy of a mortgage statement for the petitioner's owner, dated February 23, 2001, reflecting a monthly payment of \$883.08, for the property at [REDACTED] (the owner's residence in 2001), a copy of a mortgage statement for the petitioner's owner, dated March 23, 2001, reflecting a monthly payment of \$883.55, for the property at [REDACTED], [REDACTED], copies of the petitioner's bank statements for the period December 31, 2003 through August 31, 2006, and a copy of a deposit notification, dated November 22, 2006, in the amount of \$25,008.00. Other relevant evidence includes copies of the petitioner's 2004 and 2005 Forms 1120, U.S. Corporation Income Tax Returns, copies of the 2001 through 2005 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business (2001 through 2004), for the petitioner's owner, a list of personal monthly recurring expenses for the petitioner's owner, and copies of personal bank statements for the petitioner's owner for the period February 7, 2006 through September 7, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's bank statements for the period December 31, 2003 through August 31, 2006 reflect balances ranging from a low of \$1,956.74 to a high of \$10,493.51.

The petitioner's 2004 and 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$1,811 and \$17,684, respectively. The petitioner's 2004 and 2005 Forms 1120 also reflect net current assets of \$500 and \$2,900, respectively.

The 2001 through 2005 Forms 1040 reflect adjusted gross incomes of \$57,812, \$87,044, \$93,683, \$88,153, and \$103,640, respectively.

The list of personal monthly recurring expenses of the petitioner's owner reflects expenses of \$4,670 per month or \$56,040 annually.

The personal bank statements of the petitioner's owner for the period February 7, 2006 through September 7, 2006 reflect balances ranging from a low of \$877.99 to a high of \$7,573.87.

On appeal, counsel asserts:

1. The petitioner's year 2001 tax return shows total income of \$61,049.00 (see tax return 2001, part 1040, Exhibit 1). The petitioner's house payment during the year 2001 is \$883.00 per month (See mortgage statements, March, April 2001, Exhibit 2). The petitioner's household income is \$22,800.00 year more than quoted in the Denial Decision discussing the year 2001. Add the \$22,800.00 to the \$42,908.00 mentioned in the denial discussing the year 2001 and you have \$65,708.00 household income after paying the proffered wage, and actually \$68,945.00 household income if the correct "Total income" is used.

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).

Again, the petitioner's 2001 house payment is \$883.00 month and not \$2,800.00 month quoted by the Service. The petitioner bought a new home late in the year 2002.

2. For the year 2004, the petitioner's tax Form 1120 figures cited by the Service are correct except that the net current assets are +\$500.00 (and not -\$698.00 quoted).

On appeal, counsel further states that the petitioner has established its ability to pay the proffered wage of \$29,806.40 based on its bank statements, the petitioner's owner's Forms 1040 (the owner is the sole shareholder), and the petitioner's long term viability and totality of circumstances.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 9089, signed by the beneficiary on July 19, 2006, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, as proof that the petitioner employed the beneficiary in the pertinent years (2001 through 2005). Therefore, the petitioner has not established that it employed the beneficiary from the priority 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. *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.

From March 3, 2004 through 2005, the petitioner was structured as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2004 and 2005 were \$1,811 and \$17,684, respectively. The petitioner could not have paid the proffered wage of \$29,806.40 out of its net income in those years.

From 2001 through March 3, 2004, the petitioner was structured as 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 supported a family of four in 2001 through March 3, 2004. The petitioner's owner's adjusted gross incomes in 2001 through 2004 were \$57,812, \$87,044, \$93,683 and \$88,153, respectively. In 2001, the sole proprietor's monthly recurring personal expenses were \$2,753.08 or \$33,036.96 per year. The petitioner could not have paid the proffered wage of \$29,806.40 and the sole proprietor's monthly recurring personal expenses from its adjusted gross income in 2001. ($\$29,806.40$ proffered wage + $\$33,036.96$ monthly expenses = $\$62,843.36$ or $\$5,031.36$ more than the adjusted gross income of $\$57,812$). In 2002 through 2004, the sole proprietor's monthly recurring personal expenses were \$4,670 or \$56,040 per year. The petitioner could have paid the proffered wage of \$29,806.40 and the sole proprietor's monthly recurring personal expenses from its adjusted gross incomes in 2002 through 2004. (2002: $\$29,806.40$ proffered wage + $56,040$ monthly expenses = $\$85,846.40$ or $\$1,197.60$ less than the adjusted gross income of $\$87,044$; 2003: $\$93,683$ adjusted gross income - $\$85,846.40$ expenses and wage = $\$7,836.60$; 2004: $\$88,153$ adjusted gross income - $\$85,846.40$ expenses and wage = $\$2,306.60$).

Nevertheless, with regard to the year 2005, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.² 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 a corporation's end-of-year 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. The petitioner's net current assets in 2005 were \$2,900. The petitioner could not have paid the proffered wage of \$29,806.40 from its net current assets in 2005.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage based on its bank statements, the petitioner's owner's Forms 1040 (the petitioner is the sole shareholder), and the petitioner's long term viability and totality of circumstances.

As a sole proprietor, the bank statements of the petitioner's owner (personal bank statements not business) could have been considered in the years 2001 through 2004, as the sole proprietor's assets and personal liabilities are considered as part of the petitioner's ability to pay. However, in the instant case, the petitioner did not submit any personal bank statements for the sole proprietor's owner for the year 2001, the year the petitioner has not established its ability to pay the proffered wage as a sole proprietor. In 2005, the petitioner was structured as a "C" corporation, and its bank statements cannot be considered when determining the petitioner's ability to pay the proffered wage of \$29,806.40. Even though the petitioner had one shareholder in 2005, 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." In addition, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered when determining the petitioner's net current assets.³

² According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ It is noted that counsel claims that if the petitioner had not incorporated in 2004, it would have established its ability to pay the proffered wage through the sole shareholder's Form 1040 in the year 2005. While counsel's statement is true, the fact of the matter is that the petitioner did incorporate and CIS must consider

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was established in 1995 and incorporated in 2004. The petitioner has provided tax returns for the years 2001 through 2005 with the returns for 2002 through 2004 establishing the petitioner's ability to pay the proffered wage of \$29,806.40. However, the returns for 2001 and 2005 do not establish the petitioner's ability to pay the proffered wage. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Furthermore, the petitioner's overall growth appears to be quite small in the 12 years it has been in business, and it does not appear to employ any workers with the exception of its owner. 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.

For the reasons stated above, the petitioner has not established its ability to pay the proffered wage of \$29,806.40 from the priority date of June 25, 2001 and continuing to the present.

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.

the record as it exists at the time the visa petition is filed. The petitioner may not become eligible to have the petition approved under a new set of facts beyond the information presented on appeal.