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U.S. Citizenship
and Immigration
Services

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FILE: WAC 06 004 51283 Office: CALIFORNIA SERVICE CENTER Date: OCT 25 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an automotive services technician and mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 1, 2006 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(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 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$843.20 per week or \$43,846.40 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 declaration, dated September 18, 2006, from [REDACTED] the petitioner's owner, a copy of the petitioner's City of Los Angeles Tax Registration Certificate, issued on February 24, 2001, and an itemized list of the petitioner's net business income as determined by counsel. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1040 including Schedule C, Profit or Loss from Business, copies of the petitioner's bank statements for the period December 27, 2000 through June 27, 2005, an itemized list of the petitioner's owner's monthly personal recurring expenses, and copies of the beneficiary's 2002 through 2005 Forms W-2, Wage and Tax Statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1040 reflect adjusted gross incomes of \$30,832, \$33,613, \$36,089, and \$33,275, respectively.

The petitioner's 2001 Schedule C reflects gross receipts of \$244,729, wages paid of \$15,600, net profit of \$13,866, and wages paid for outside labor of \$6,942.

The petitioner's 2002 Schedule C reflects gross receipts of \$250,347, wages paid of \$15,600, net profit of \$16,113, and wages paid for outside labor of \$6,580.

The petitioner's 2003 Schedule C reflects gross receipts of \$218,737, wages paid of \$15,600, net profit of \$17,261, and wages paid for outside labor of \$11,100.

The petitioner's 2004 Schedule C reflects gross receipts of \$233,357, wages paid of \$15,600, a net profit of \$24,747, and wages paid for outside labor of \$3,571.

The beneficiary's 2002 through 2005 Forms W-2 reflect wages earned by the beneficiary from the petitioner of \$15,600 for each year.

The petitioner's bank statements for the period December 27, 2000 through June 27, 2005 reflect balances ranging from a low of \$766.86 on June 25, 2003 to a high of \$47,946.70 on December 27, 2000.

The personal recurring monthly expenses of the petitioner's owner were listed as \$4,505 per month or \$54,060 annually.

On appeal, counsel states the petitioner has established its ability to pay the proffered wage of \$43,846.40 based on its longevity, its net current assets, the totality of the circumstances, and the wages paid for outside services.

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.

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).

See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claims to have been self-employed from July 1998 to the present. However, counsel has submitted the 2002 through 2005 Forms W-2, issued by the petitioner on behalf of the beneficiary, in support of the beneficiary's claims. Therefore, the petitioner has established that it employed the beneficiary from 2002 through 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$43,846.40 and the actual wages paid to the beneficiary of \$0 in 2001, \$15,600 in 2002, \$15,600 in 2003, \$15,600 in 2004, and \$15,600 in 2005. Those differences were \$43,846.40 (the proffered wage) in 2001 and \$28,246.40 in 2002 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.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal

liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

In the instant case, the sole proprietor supported a family of four in 2001 and a family of three in 2002 through 2004. The petitioner's owner's adjusted gross incomes in 2001 through 2004 were \$30,832, \$33,613, \$36,089, and \$33,275, respectively. The personal recurring expenses of the petitioner's owner are listed as \$54,060. Both the owner's personal expenses and the proffered wage of \$43,846.40 are more than the petitioner's adjusted gross incomes in all of the pertinent years (2001 through 2004).

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$43,846.40 based on its longevity, its net current assets, the totality of the circumstances, and the wages paid for outside services.

Counsel insists that CIS consider the petitioner's bank statements and its inventory at the end of the year when determining the petitioner's ability to pay the proffered wage. However, the bank statements represent the sole proprietor's business checking account, and these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis (To be explained later in this discussion). In addition, bank statements usually show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.²

Counsel contends that the petitioner's inventory at year end is a net current asset and should be considered when determining the petitioner's ability to pay the proffered wage of \$43,846.40. However, CIS may not consider only that portion of the petitioner's current assets that the petitioner chooses and not also consider its current liabilities. (Net current assets = Current assets – Current liabilities). In addition, if counsel would like the AAO to consider the petitioner's net current assets, the petitioner would be obligated to submit regulatory-prescribed documentation, such as audited financial statements, showing all of its and its owner's assets and liabilities, both current and long term as the petitioner and the sole proprietor do not exist as entities apart. In this case, the petitioner has not done so.

Counsel asserts that the wages paid for outside services should be considered when determining the petitioner's ability to pay the proffered wage of \$43,846.40 as "all of the contract laborers were performing work that [the] alien beneficiary would have performed as described in the approved alien labor certification." Counsel is correct in this instance. However, even when adding the wages paid to the contract workers of \$6,942 in 2001, \$6,580 in

² Had the petitioner submitted the owner's personal bank statements, those bank statements could have been considered when determining the petitioner's ability to pay the proffered wage of \$43,846.40 as the sole proprietor's personal assets can be considered in the determination of the ability to pay the wage.

2002, \$11,100 in 2003, and \$3,571 in 2004, the result is not sufficient to pay the proffered wage of \$43,846.40 in 2001 or the difference of \$28,246.40 between the proffered wage of \$43,846.40 and the actual wages paid to the beneficiary of \$15,600 in 2002 through 2004. Furthermore, the petitioner has not provided any evidence that it had sufficient funds to pay the personal monthly recurring expenses of its owner of \$54,060 per year.

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 1998. The petitioner has provided tax returns for the years 2001 through 2004. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$43,846.40 and the owner's personal monthly recurring expenses of \$54,060 yearly. 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. The petitioner has not submitted any evidence of its owner's assets or liabilities beyond that of the business. 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 and to support a family of four in 2001 and a family of three in 2002 through 2004.

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.