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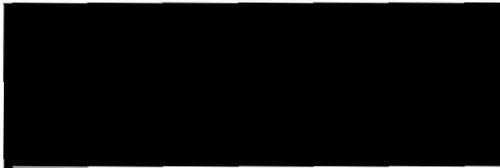
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 109 51997 Office: NEBRASKA SERVICE CENTER

Date: APR 15 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:



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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fashion design and custom tailoring business. It seeks to employ the beneficiary permanently in the United States as a custom tailor. 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 sole proprietor did not have sufficient adjusted gross income to pay both the beneficiary's proffered wage and the petitioner's household expenses. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's August 11, 2006 decision, the single issue in this case is whether or not the petitioner, as a sole proprietorship, has the ability to pay the proffered wage.

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.

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 September 12, 2003. The proffered wage as stated on the Form ETA 750 is \$30,000 per year. The Form ETA 750 states that the position requires three years of work experience in the proffered position, or three years as a tailor/fashion designer. Section 15, Part A, of the Form ETA 750 also lists the following special requirements for the job: training or experience with the operations of sewing machines, scissors, pressing machines.

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.

On appeal counsel does not submit a brief, but comments that the petitioner has already established its ability to pay the proffered wage and requests that the evidence already submitted to the record be reviewed. Counsel resubmits the petitioner's IRS Forms 1040 for tax years 2003 and 2005, and copies of the petitioner's bank account statements previously submitted to the record. Other relevant evidence in the record includes the sole proprietor's IRS Forms 1040 for tax years 2003, 2004, and 2005;² a list of the petitioner's monthly household expenses; and copies of the sole proprietorship's monthly bank statements for its MB bank account for February, April and May 2006. The petitioner also submitted its state income tax return for the state of Illinois, that included a Form 1098, Mortgage Interest Statement for tax years 2003 that indicated the sole proprietor paid \$11,737.94 in mortgage interest in 2003. 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 a sole proprietorship. On the petition, the petitioner claimed to have been established in 1993 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on September 8, 2003, the beneficiary did not claim to have worked for the petitioner.

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).

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. In 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).

² The sole proprietorship submitted its Form 1040 for tax year 2004 with the initial I-140 petition, and in response to the director's request for further evidence, dated May 1, 2006, submitted its tax returns for tax years 2003 and 2005, a list of itemized household expenses, and three of the sole proprietor's bank checking statements.

instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

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).

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 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 the instant case, the sole proprietor supports a family of three individuals. The tax returns reflect the following information for the following years:

	2003	2004	2005
Proprietor's adjusted gross income (Form 1040)	\$ 62,618	\$ 69,664	\$ 66,336
Petitioner's gross receipts or sales (Schedule C)	\$ 457,158	\$ 384,747	\$ 383,952
Petitioner's wages paid (Schedule C)	\$ 70,000	\$ 74,750	\$ 72,000
Petitioner's net profit from business (Schedule C)	\$ 74,854	\$ 91,224	\$ 82,176

In the priority year 2003, and during tax years 2004 and 2005, the sole proprietor's adjusted gross income was sufficient to cover the proffered wage of \$30,000. However, the sole proprietor also has to establish that he can both pay the proffered wage and pay his yearly household expenses.

In response to the director's request for further evidence, the petitioner submitted an itemized list of monthly household expenses that covered automobile payments, food, utility bills, clothing, property tax and miscellaneous items. In his decision, the director corrected the petitioner's calculations and noted that the petitioner's monthly household expenses totaled \$2,350, and that the petitioner had failed to include mortgage

interest payments included on the sole proprietor's tax returns for 2005. The AAO notes that the sole proprietor's yearly household expenses, based on the corrected figure of the monthly household expenses, total \$28,200. The AAO further notes that all of the sole proprietor's federal tax returns include an itemized deduction for home mortgage interest payments and that these payments are considered a household expense. In tax year 2003, the sole proprietor listed \$15,959 in home mortgage interest payments reported on Schedule A of its tax return; in tax year 2004, the sole proprietor identified \$19,113 in mortgage interest payments, and in tax year 2005, the sole proprietor identified \$12,426 in home mortgage interest on Schedule A. When the sole proprietor's home mortgage interest payments for tax years 2003, 2004, and 2005 are added to the sole proprietor's annual household expenses of \$28,200, the sole proprietor had the following amounts of yearly household expenses: \$41,159 in 2003, \$47,313 in 2004, and \$40,626 in 2005. The remaining amount of adjusted gross income available to pay the proffered wage after paying the sole proprietor's yearly household expenses would be \$21,459 in tax year 2003, \$22,351 in tax year 2004, and \$25,710 in tax year 2005.³ All of these sums fail to cover the proffered wage of \$30,000.

Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has 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.

With regard to the sole proprietor's additional financial assets, the AAO notes that the record of proceeding contains bank statements from the petitioner's MB checking accounts covering the months February, March and April 2006, with an average balance of \$5,369. However, the AAO notes that this account represents what appears to be the sole proprietor's business checking account, and that these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Further, the 2006 checking account statements would not be dispositive of the sole proprietor's ability to pay the proffered wages with savings or money market accounts during the 2003 priority year, or during tax years 2004 or 2005. The AAO also notes that the record contains a Form 1099-INT statement from Foster Bank that indicates the sole proprietor earned \$51.33 interest in tax year 2003 on a savings account; however, the record contains no further evidentiary documentation on any savings readily available to the sole proprietor during the relevant years that could establish the petitioner's ability to both pay his yearly household expenses and the proffered wage.

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.

³ The AAO calculated these figures by subtracting the amended annual household expenses from the adjusted gross income figures identified on the sole proprietor's tax returns, line 36, Form 1040.