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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 07 010 51868

Office: TEXAS SERVICE CENTER Date: SEP 10 2008

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration and entry of a new decision.

The petitioner is a cleaners. It seeks to employ the beneficiary permanently in the United States as a shop and alteration tailor. 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 and 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 December 28, 2006 denial, 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 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 (DOL). See 8 CFR § 204.5(d). The priority date in the instant petition is September 19, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$17.13 per hour or \$35,630.40 annually.

¹ It is noted that counsel claims that the petitioner is "grandfathering" this visa petition from the petitioner to Hi-Tech Cleaners in order to secure the beneficiary's 245(i) status. However, 245(i) relates to adjustment of

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 appeal². Relevant evidence submitted on appeal includes the petitioner's brief and copies of the petitioner's previously submitted 2003 and 2004 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business. Other relevant evidence in the record includes a copy of the petitioner's 2005 Form 1040, including Schedule C and copies of the prior owner's 2001 through 2003 Forms 1040, including Schedule C. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2003 through 2005 Forms 1040 reflect adjusted gross incomes of \$33,071, \$52,733, and \$58,283, respectively.

The prior owner's 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$72,700, \$30,054, and \$73,049, respectively.

On appeal, the petitioner states:

In summary, the appeal should be sustained for 4 reasons. First, because the sole proprietor of [REDACTED], [REDACTED] also owns [REDACTED] whose profits in 2003 and 2004 could have covered shortfalls pertaining to [REDACTED] ability to pay the proffered wage. Second, because the adjusted gross income of the previous owner of [REDACTED] for the first 6 months of 2003, would have covered any shortfall. Third, business property assets listed on Schedule C could have been sold off in 2003 and 2004 to cover any shortfall. Fourth, depreciation reduces net profit as noted on Schedule C but the remaining assets still had real market value should the owner have wanted to [use] such items to cover shortfalls.

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, 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

status, and the "grandfathering" to a prior priority date must be dealt with at the time of filing of the Form I-485, Application to Register Permanent Residence or Adjust Status. Therefore, the priority date of the instant petition will be considered to be the date the current Form ETA 750 was accepted for processing by any office within the employment system of DOL or September 19, 2003.

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).

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 September 10, 2003, 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 to establish that the petitioner employed the beneficiary in any of the pertinent years (2003 through 2005). Therefore, the petitioner has not established that it employed the beneficiary in 2003 through 2005, and it is obligated to show that it had sufficient funds to pay the entire proffered wage of \$35,630.40 in 2004 and 2005.

The current sole proprietor of the petitioner claims to have assumed the ownership of the petitioner in July of 2003³ and asserts that the adjusted gross income of the previous owner could be used to establish the petitioner's ability to pay the proffered wage. However, the record of proceeding has no documentation that the prior owner petitioned for the current beneficiary; and, therefore, the prior owner is not obligated to establish its ability to pay the proffered wage in 2003. Likewise, since the current sole proprietor did not assume ownership (according to her statement) until July 2003, the current sole proprietor cannot be expected to establish its ability to pay the proffered wage prior to the purchase of the petitioner. Therefore, under the current circumstances, the AAO will prorate the proffered wage from the purchase of the petitioner in July 2003 in order to determine the proffered wage in 2003. Therefore, the petitioner is obligated to establish that it had sufficient funds to pay a prorated proffered wage of \$17,815.20 in 2003.

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 supported by federal case law. See *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. 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*

³ It is noted, however, that the petitioner has not provided any proof of the change in ownership and of how the change in ownership occurred.

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*, 719 F. Supp. 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 three in 2003 through 2005. In 2003 through 2005, the sole proprietor's adjusted gross incomes were \$33,071, \$52,733, and \$96,744, respectively. As the director failed to request a list of the sole proprietor's personal monthly recurring expenses, the AAO cannot determine if the sole proprietor had sufficient funds to support her family of three after paying the proffered wage of \$35,630.40 in 2004 and 2005 and \$17,815.20 in 2003.

On appeal, the sole proprietor asserts that she has established the ability to pay the proffered wage of \$35,630.40 based on the ownership of an additional cleaners, the adjusted gross income of the previous owner, the petitioner's depreciation, and the fact that business property assets listed on Schedule C could have been sold off in 2003 and 2004 to cover any shortfall.

From the outset, it should be noted that although both the director in her denial and the petitioner in her brief refer to the poverty guidelines, the AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses, and, therefore, they will not be considered when determining the ability to pay the proffered wage. The poverty guidelines are used for administrative purposes --- for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge.

With regard to the sole proprietor's ownership of an additional cleaners, the AAO will not consider the income from that cleaners as additional income as the income from that cleaners (shown on Schedule C) is carried forward to the first page of the tax return and is included in the sole proprietor's adjusted gross income that is considered when determining the petitioner's ability to pay the proffered wage of \$35,630.40.

As explained previously, the prior owner's adjusted gross income will not be considered as evidence of the petitioner's ability to pay the proffered wage in 2003 as the prior owner had no obligation to pay the proffered wage in 2003. The current sole proprietor is obligated to show that it had sufficient funds to pay the prorated proffered wage of \$17,815.20 from its own funds.

The petitioner's argument that its depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

With regard to the selling of the petitioner business property assets listed on Schedule C, the petitioner has not explained what those business property assets consist of. In most cases, the real property at the petitioner's premises are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary as they are not easily converted into cash. Therefore, the AAO will not usually consider the real property of the petitioner's premises when determining the petitioner's ability to pay the proffered wage of \$17,815.20 in 2003 and \$35,630.40 in 2004 and 2005.

The director must afford the petitioner reasonable time to provide evidence of its ability to pay the proffered wage, to include the sole proprietor's personal monthly recurring expenses, any additional funds available to pay the wage, and any other evidence the director deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 28, 2006 decision is withdrawn. The petition is remanded to the director to be adjudicated on its merits and for entry of a new decision which is to be certified to the AAO for review.