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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 09 2009
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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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 operates a dry cleaning and alteration business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification certified by the U.S. Department of Labor (DOL).[1] 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.[2] The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated February 23, 2007, 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.

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[1] The AAO notes that the Form ETA 750 was originally filed by CWJA Enterprise, Inc. for [redacted]. The petitioner has indicated that it bought CWJA Enterprise, Inc. in January 2003 and that the beneficiary is now being substituted for [redacted]. The AAO notes that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by 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 C.F.R. §§ 656.3(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 U.S. Citizenship and Immigration Services (USCIS) 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 became 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.

[2] The AAO notes that the Nebraska Service Center did not make a determination in its decision as to whether or not Sunset Cleaners qualifies as a successor-in-interest to CWJA Enterprise, Inc. based upon the evidence contained within the record of proceeding.

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 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.

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 DOL. *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 DOL 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 April 30, 2001.[3] The proffered wage as stated on the Form ETA 750 is $16.00 per hour ($33,280.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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

[3] It has been approximately eight years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, Form ETA 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

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 appeal.[4]

Relevant evidence in the record includes copies of the following documents: CWJA Enterprise, Inc.'s original Form ETA 750 Application for Alien Employment Certification approved by the DOL; CWJA Enterprise, Inc.'s U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001 and 2002; the sole proprietor's IRS Forms 1040 for 2000 to 2003; the sole proprietor's bank statements from 2004 to 2006[5]; the petitioner's unaudited federal asset reports for 2003 to 2005 and letters from the petitioner's accountant dated February 14, 2007 and March 15, 2007 indicating that the petitioner has the ability to pay the proffered salary[6]; the sole proprietor's affidavit dated February 13, 2007 stating that his family's monthly expenses total $5,985.36 and copies of the sole proprietor's mortgage statements, bills, and insurance premiums; and documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship.[7] On the petition, the petitioner claimed to have been established in 1999 and to employ two workers currently. According to the tax returns in the record, the petitioner's and CWJA Enterprise, Inc.'s fiscal years are based on a calendar year. The net annual income and gross annual income stated on the petition were $58,896.00 and $232,994.00 respectively. On the Form ETA 750, signed by the beneficiary on December 17, 2006, the beneficiary did not claim to have worked for the petitioner. She stated that she was in F-2 dependent status and that she was currently unemployed.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

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[4] The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

[5] The AAO notes that the sole proprietor generally had less than $2,000.00 in his bank accounts.

[6] There is no indication that the financial statements submitted were audited, and they were not accompanied by an auditor's report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[7] The AAO notes that CWJA Enterprise, Inc. was structured as an S corporation.

Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner 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 instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date.

In this case, the labor certification was issued to CWJA Enterprise, Inc. on behalf of [redacted] but the Form I-140 petition was filed by Sunset Cleaners on behalf of [redacted]. CWJA Enterprise, Inc. and Sunset Cleaners are separate businesses with separate tax identification numbers. The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and that it continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the petitioner must demonstrate that the predecessor entity had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership in January 2003. Moreover, the petitioner must establish the financial ability of the successor enterprise to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does contain a bill of sale evidencing that the petitioner obtained title to the assets of the predecessor entity after execution of the agreement. There is also an indication that the petitioner agreed to assume a lease for the premises that is the subject of the agreement and an indication that the petitioner owns the premises. The AAO therefore concludes that Sunset Cleaners qualifies as a successor-in-interest to CWJA Enterprise, Inc.

If the petitioner does not establish that it paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross

sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

CWJA Enterprise, Inc.'s tax returns demonstrate the following financial information concerning its ability to pay:

- In 2001, the IRS Form 1120S stated net income of $56,531.00.[8]
- In 2002, the IRS Form 1120S stated net income of $23,463.00.

CWJA Enterprise, Inc. did not have sufficient net income to pay the proffered wage for 2002. CWJA Enterprise, Inc. demonstrated its ability to pay in 2001 since its net income is greater than the proffered wage.

If the net income the petitioner demonstrates it had available during the 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, USCIS 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, USCIS 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.[9] A

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[8] The AAO notes that where an S corporation's income is exclusively from a trade or business, USCIS 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* IRS, Instructions for Form 1120S, 2001, at http://www.irs.gov/pub/irs-prior/f1120s--2001.pdf and Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-prior/f1120s--2002.pdf (last visited April 30, 2009). The petitioner had income from sources other than from a trade or business in 2001 and 2002, so USCIS takes the net income figure from Schedule K for those years.

[9] 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.

corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120S and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- CWJA Enterprise, Inc.'s net current assets during 2002 were $10,420.00.

Based on CWJA Enterprise, Inc.'s net current assets, it cannot demonstrate its ability to pay the proffered wage for 2002.

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 IRS Form 1040 federal tax returns 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 of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of four. The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the IRS Form 1040 stated adjusted gross income of $25,226.00.[10]
- In 2004, the IRS Form 1040 stated adjusted gross income of $15,450.00.[11]
- In 2005, the IRS Form 1040 stated adjusted gross income of $34,678.00.[12]

In 2003 and 2004, the sole proprietor's adjusted gross income fails to cover the proffered wage of $33,280.00. In 2005, the sole proprietor's adjusted gross income is only $1,398.00 greater than the

[10] The AAO notes that adjusted gross income is listed on line 34 of the IRS Form 1040.
[11] The AAO notes that adjusted gross income is listed on line 36 of the IRS Form 1040.
[12] The AAO notes that adjusted gross income is listed on line 37 of the IRS Form 1040.

proffered salary. The sole proprietor stated in his affidavit dated February 13, 2007 that his family's monthly expenses total $5,985.36. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that the predecessor entity had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership in January 2003 or that the petitioner had the ability to pay the proffered wage from the date of the change in ownership.

On appeal, counsel asserts that CWJA Enterprise, Inc. had enough net income in 2001 to pay the proffered wage and enough combined net income and net current assets to pay the proffered wage in 2002.[13] Counsel states that the petitioner had ample total assets to pay the proffered wage in 2003 and that the petitioner had ample net current assets to pay the proffered wage in 2004 and 2005.[14]

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients

[13] The AAO notes that counsel advocates combining CWJA Enterprise, Inc.'s net income with its net current assets to demonstrate its ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage – one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the business is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

[14] The AAO notes that if it were to consider the petitioner's total assets as ability to pay evidence, this would not constitute an accurate representation of the petitioner's financial status, as these assets would not be balanced by the petitioner's liabilities.

included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 to 2005 were uncharacteristically unprofitable years for the petitioner or CWJA Enterprise, Inc.

The evidence submitted fails to establish that the petitioner and CWJA Enterprise, Inc. have 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.