

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

[Redacted]

FILE:

SRC 04 202 51429

Office: TEXAS SERVICE CENTER Date: OCT 06 2006

IN RE:

Petitioner:
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: SELF-REPRESENTED

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

CC:

[Redacted]

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 jeweler. It seeks to employ the beneficiary permanently in the United States as a repair technician/jeweler. 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, noting that the evidence in the record was unclear as to whether the petitioner is the same as the business that filed the ETA 750.

It is noted that counsel has not provided a Form G-28, Notice of Appearance as Attorney or Representative, with the petitioner's signature consenting to counsel's representation in these proceedings. However, as the director has recognized counsel in previous correspondence, a copy of the AAO's decision will be forwarded to counsel.

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 March 9, 2005 denial, one of the issues 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 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). 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 letter from the petitioner's certified public accountant (CPA), a copy of the petitioner's Form SS-4, Application for Employer Identification Number (EIN), a copy of the petitioner's Articles of Incorporation for [REDACTED] copies of the petitioner's 2001 and 2002 Schedule Cs, Profit or Loss From Business, and copies of the petitioner's 2003 and 2004 Forms 1120S, U.S. Income Tax Return for an S Corporation. Other Relevant evidence includes a complete copy of the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The CPA's letter states:

Please be advised that in 2001 [REDACTED] was operating with gross revenues of \$309,550.00 and a net profit of \$25,235.00 after taking out \$20,000.00 in wage expenses. In my professional opinion this demonstrates ample income to support [REDACTED] in 2001 as the company intends on hiring [REDACTED] the sole employee and therefore leaving \$45,235.00 as the surplus for this hire. In 2002, the tax return for [REDACTED] shows net income of \$62,010.00. This amount is enough to cover [REDACTED] income requirement. In 2003 the company did have some difficulties as did most United States companies as the economic environment became very soft. However, in 2004 the climate had improved and the 2004 tax return shows ordinary income of \$58,565.00 which is an amount that clearly supports [REDACTED] income.

The Form SS-4 shows the petitioner applying for a new EIN for [REDACTED] traded as New York Jeweler, and also shows the petitioner as having a prior EIN for [REDACTED]

The petitioner's Articles of Incorporation for [REDACTED] reflect one shareholder, [REDACTED]

The petitioner's 2001 Form 1040 reflects an adjusted gross income of \$53,486, and Schedule C reflects gross receipts of \$309,550, wages paid of \$20,000, and a net profit of \$25,235.

The petitioner's 2002 Schedule C reflects gross receipts of \$193,931, wages paid of \$6,250, and a net profit of \$62,010. The complete Form 1040 was not submitted; therefore, there is no evidence of the petitioner's adjusted gross income in 2002.

The petitioner's 2003 and 2004 Forms 1120S reflect ordinary incomes or net incomes of -\$13,475 and \$58,666, respectively. The petitioner's 2003 and 2004 Forms 1120S also reflect net current assets of \$1,957 and \$3,011, respectively.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$30,000 based on its net profits, and on the beneficiary becoming the sole employee of the business.

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).

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 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 22, 2001, the beneficiary did not include the petitioner as a past or present employer. In addition, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 2001 through 2004. Therefore, the petitioner has not established that it employed the beneficiary in 2001 through 2004.

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.

In 2001 and 2002, the petitioner operated 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 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 supported a family of four in 2001 and an undetermined number in 2002 (the complete Form 1040 was not submitted which would have shown the family number). In 2001, the petitioner's adjusted gross income of \$53,486 was \$23,486 more than the proffered wage of \$30,000. While it appears that the petitioner has funds to pay the proffered wage in 2001, the petitioner failed to provide, and the director failed to request, a list of its monthly personal expenses. Therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the beneficiary the proffered wage of \$30,000 and to support a family of four.

The petitioner failed to provide its complete 2002 Form 1040; therefore, the petitioner's adjusted gross income for 2002 is unknown. The AAO is unable to determine if the petitioner had sufficient funds to pay the proffered wage of \$30,000 and to support a family of four from the petitioner's adjusted gross income in 2002.

In 2003 and 2004, the petitioner operated as an S corporation. Therefore, 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 2003 and 2004 were \$1,957 and \$3,011, respectively. The petitioner could not have paid the proffered wage of \$30,000 in 2003 or 2004 from its net current assets.

Counsel contends that in 2001 the petitioner had a net profit of \$25,235 after "taking out \$20,000 in wage expenses." Counsel further contends that since the company intends to hire the beneficiary as its sole employee, there would be \$45,235 as the surplus for this hire. The record does not, however, name the worker, state his/her wages, verify his/her full-time employment, or provide evidence that the petitioner has replaced or will replace him/her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the individual currently employed involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and

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.

termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel claims that the petitioner's 2002 taxes show a net income of \$62,010, and that this amount is enough to cover the beneficiary's income requirement. While the petitioner's Schedule C from its Form 1040 does show a net income of \$62,010, there is no indication that the petitioner realized an adjusted gross income of this amount, since the complete 2002 taxes were not supplied. In a sole proprietorship, the petitioner's ability to pay the proffered wage is based on its adjusted gross income, not just the business income, as the petitioner must also have sufficient funds to support his family after paying the beneficiary's wage.

Counsel asserts that in 2003, the petitioner had some difficulties as the economy had rapidly declines and the employment rate increased. However, the petitioner has not provided any verifiable evidence of how the economic decline and employment rate increase specifically affected its business or why such a decline would not show the petitioner was unable to pay the proffered wage. In 2003, the petitioner realized a net income of -\$13,475 and net current assets of \$1,957. The petitioner could not have paid the proffered wage of \$30,000 from either its net income or its net current assets in 2003

Counsel contends that in 2004 the petitioner's taxes show an ordinary business income of \$58,666, more than enough to support the beneficiary's income requirements. Counsel is correct. The petitioner's net income of \$58,666 is \$28,666 more than the proffered wage of \$30,000. The petitioner has established its ability to pay the proffered wage in 2004.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, 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 Sonegawa*, 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 the instant case, the petitioner has provided only three complete tax returns and one Schedule C (2002), which are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The second issue in these proceedings is whether the petitioner has established that it is the same business as the one that filed the ETA-750.

In an undated letter, the petitioner states:

New York Gold has operated in North Carolina since 1997. The company recently changed names to New York Jewelry and the address to [REDACTED]. The business is still located in the Durham, North Carolina area (where the job was advertised for labor certification) and is in the exact same business (i.e. jewelry). The only changes are the name and physical location. These changes have not altered this business in any way, shape, or form, and the job market is the same.

In response to a Notice of Intent to Deny, the petitioner submitted a letter, dated January 3, 2005, stating that due to liability concerns, the owner incorporated the business under the name of Sadiq, Inc. and doing business at New York Jeweler. The petitioner submitted a copy of Form SS-4, Application for Employer Identification Number, for [REDACTED]. That Form shows that the business was started or acquired on June 19, 2002 and that the applicant had applied for an employer identification number for [REDACTED] in June 1998 in Memphis, Tennessee. [REDACTED] employer-identification number (EIN) was 56-2080957.

On appeal, counsel states:

The Notice of Intent to Deny dated 12/6/2004 asked that we submit documented evidence that New York Jewelry is the same business as [REDACTED] at a different address. That evidence was sent on January 3, 2005, and that evidence with all due respect clearly demonstrated by documented evidence that [REDACTED] New York Jewelry are the same entity. The service was sent a letter by the owner explaining the reason for the change, an Application for Employer Id. Number, and Articles of Incorporation. The service states that no mention of [REDACTED] was made in the documents submitted that reference New York Jewelry and [REDACTED] **this is not correct.** The application for a new Employer Tax Id. Number that was submitted clearly shows all of the evidence needed to demonstrate that [REDACTED] and New York Jewelry are the same business (see attachment). On line 1, the form states that [REDACTED] is the legal name of the corporation – the articles of incorporation were supplied. Line 2 states that New York Jewelry is the trade name. Line 17a was checked with a “yes” meaning that a previous tax id. Number was issued and line 17b states that the prior trade name was [REDACTED]. The business is still the same – retail jewelry as stated in line 14 and the location is still in the Durham North Carolina market area. The prior tax Id. Number for [REDACTED] was [REDACTED] and the new entity was given the number [REDACTED]. The only reason for the change was to protect the owner as to potential liability issues. The business itself remained the same.

Counsel is mistaken. While the Application for Employer Id. Number does provide the information as counsel claims, nowhere on the application does it confirm that [REDACTED] and New York Jewelry are one and the same. Line 17a, which was marked “yes,” asks, “Has the applicant ever applied for an employer

identification number for this or any other business?" Although Line 17b does list [REDACTED] as the trade name shown on the prior application, it doesn't necessarily equate to being the same entity as New York Jewelry. The petitioner has not provided any verifiable evidence that [REDACTED] and New York Jewelry are the same. There is also no evidence that [REDACTED] no longer exists, and although the petitioner claims to have incorporated due to liability concerns, there is no explanation for the change of address. As such, the petitioner has not established that [REDACTED] and New York Jewelry are one and the same.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do 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