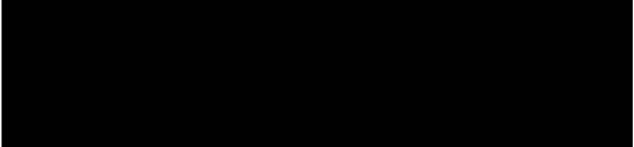




U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC 05 198 52701

Office: CALIFORNIA SERVICE CENTER

Date: MAY 01 2007

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker or 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, Chief
Administrative Appeals Office

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

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sewing machine operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) provides:

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, the day 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). Here, the Form ETA 750 was accepted for processing on June 13, 1990. On Item 4 of the ETA 750A the name of the employer is "[REDACTED]". The proffered wage as stated on the Form ETA 750A is \$4.86 per hour, which amounts to \$10,108.80 per annum. The petitioner named on the Immigrant Petition for Alien Worker (I-140) is "[REDACTED]". It indicates through counsel that it is the successor-in-interest to "[REDACTED]" and that it also wishes to substitute its beneficiary for the original one identified on the ETA 750A. On the Form ETA 750B, signed by the current beneficiary on April 7, 2003, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, filed on June 30, 2005, the petitioner claims to have been established on May 1, 1990, to currently employ seventy-five workers and to have a gross annual income of \$1,180,000. With the petition, the petitioner provided a copy of a bill of sale indicating that [REDACTED] acquired [REDACTED] from [REDACTED] copies of the county fictitious business name statements filed on behalf of [REDACTED] on April 20, 1990 and December 22, 1994; a copy of a Los Angeles tax registration certificate issued to [REDACTED] and [REDACTED] on April 28, 1990; a certificate of registration from the California Garment Manufacturing Industry issued to [REDACTED], effective on February 23, 2005; a copy of the articles of incorporation for Accru Fashion, Inc. dated October 20, 1998 and recorded with the California Secretary of State on October 21, 1998; a copy of an incomplete domestic stock corporation statement dated October 2, 2000; and a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2003. It reflects that the corporate petitioner files its federal tax returns using a fiscal year running from October 1st to September 30th of the following year. Thus, the 2003 tax return covers the period from October 1, 2003 to September 30, 2004. The return contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	2003
Taxable Income before NOL	-\$ 56,580
Deduction (Form 1040)	
Current Assets (Sched. L)	\$ 3,235
Current Liabilities (Sched. L)	\$222,077
Net current assets	-\$ 218,842

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On December 7, 2005, the director requested the petitioner to submit evidence of its continuing ability to pay the proffered salary beginning at the priority date, in the form of federal tax returns, audited financial statements, or annual reports. The director also requested that the petitioner provide evidence to demonstrate that it is a successor-in-interest to the original employer named on the labor certification consisting of documentation to show how the change of ownership occurred and that the

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner assumed all rights, duties, obligations, and assets of the original employer. The director further instructed the petitioner to submit the original labor certification as it had only provided a copy with the petition.

In response, the petitioner, through counsel, did not submit the original labor certification. It did, however, provide copies of its federal income tax returns. Copies of the returns provided for 1993, 1994, 1995, 1996, and 1997 indicate that the petitioner was operated as a sole proprietorship. The returns were incomplete and consisted only of Schedule C, "Profit or Loss from Business." The 1990 tax return was omitted. The 1991 return consisted of a partial copy of Schedule C and page 2 of the Form 1040. The sole proprietor's adjusted gross income reported on line 32 was -\$17,264. The 1992 tax return was omitted. The sole proprietor's 1998 tax return covering the first ten months of 1998 was also omitted.

The petitioner submitted copies of its corporate tax returns for 1998 through 2004, which collectively cover the fiscal period from October 1, 1998 to September 30, 2005. The corporate tax returns contain the following information:

Year	1998	1999	2000	2001
Taxable Income before NOL	-\$ 3,903	-\$24,750	-\$63,551	-\$ 71,152
Deduction (Form 1040)				
Current Assets (Sched. L)	\$ 5,015	\$34,867	\$38,127	\$ 9,976
Current Liabilities (Sched. L)	\$25,568	\$11,617	\$56,210	\$101,363
Net current assets	-\$ 20,553	\$23,250	-\$18,083	-\$ 91,387

Year	2002	2004
Taxable Income before NOL	-\$ 2,971	\$ 59,524
Deduction (Form 1040)		
Current Assets (Sched. L)	\$ 10,049	\$ 64,457
Current Liabilities (Sched. L)	\$109,989	\$ 276,271
Net current assets	-\$ 99,940	-\$ 211,814

The director denied the petition on May 9, 2006. Noting that the petitioner's failure to provide complete copies of the sole proprietor's tax returns for 1991 and 1993 through 1997, the director determined that the petitioner had not established its continuing financial ability to pay the proffered salary. The director also reviewed the corporate tax returns for 1998 through 2004 and concluded that, with the exception of 1999 where the petitioner's net current assets of \$23,250 were sufficient to cover the proposed wage offer, the petitioner failed to demonstrate its continuing ability to pay the proffered wage.

On appeal, counsel resubmits copies of the corporate petitioner's federal income tax returns and more complete copies of the sole proprietor's individual tax returns for 1993 through 1998. The sole proprietor is Kie Bong Kim

During these years, he filed as a single person with no dependents. These tax returns reflect the following:

Year	1993	1994	1995
Gross Income (Sched. C)	\$523,186	\$357,054	\$1,038,352
Total Expenses (Sched. C)	\$510,690	\$335,471	\$1,020,899
Net Profit or (loss) (Sched. C)	\$ 12,496	\$ 21,583	\$ 17,453
Business Income or (loss) (Form 1040)	\$ 12,496	\$ 21,583	\$ 17,453
Adjusted Gross Income (Form 1040)	\$ 11,613	\$ 20,058	\$ 16,220

Year	1996	1997	1998
Gross Income (Sched. C)	\$1,380,932	\$1,405,280	\$1,595,394
Total Expenses (Sched. C)	\$1,407,291	\$1,364,460	\$1,549,482
Net Profit or (loss) (Sched. C)	-\$ 26,359	\$ 40,820	\$ 45,912
Business Income or (loss) (Form 1040)	-\$ 26,359	\$ 40,820	not provided
Adjusted Gross Income (Form 1040)	-\$ 26,359	\$ 11,577	\$ 38,130 ²

Counsel emphasizes the petitioner's gross receipts as stated on Schedule C of the sole proprietor's tax returns for 1993 through 1997. He also calculates the petitioner's "cash flow" by adding depreciation (Schedule C, Part II, Item 13) back to the business net profit or loss and concludes that the petitioner's individual tax returns for 1993, 1994, 1995, 1997 and 1998 show the ability to pay the proffered wage. He indicates that similar calculations taken from the corporate returns result in the petitioner's demonstrated ability to pay in 1999 and 2004.

Counsel's assertions are not persuasive. CIS will initially review whether a petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed the alien.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary

² The petitioner did not provide page 1 or page 2 of the sole proprietor's 1998 federal income tax return. The federal adjusted gross income is taken from a copy of the sole proprietor's state tax return.

during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman* and *Ubeda v. Palmer*)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

As discussed above, the petitioner was a sole proprietorship until 1998; a business in which an individual 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. As noted above, 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). Because the overall circumstances of a sole proprietor are part of the review of the ability to pay a certified wage, sole proprietors often provide summaries of their monthly household expenses. In this case, the petitioner failed to provide such information and the director failed to request it.

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.

The priority date is June 13, 1990. As no financial documentation pertinent to this year was provided, the petitioner has not established its ability to pay the proffered wage.

As indicated earlier, the sole proprietor's complete tax return for 1991 was not provided. His adjusted gross income reported on line 32, page 2 of the Form 1040 was -\$17,264. This was not sufficient to pay the proffered wage or establish the petitioner's ability to pay in this year.

No financial documentation was provided for 1992. The petitioner's ability to pay has not been demonstrated for this year.

For the following years, the proffered wage of \$10,108.80 represented the following proportion(s) of the sole proprietor's adjusted gross income:

1993	87% of adjusted gross income
1994	50% " "
1995	62% " "
1996	proffered wage exceeded gross income
1997	87% of adjusted gross income

Even without considering actual household expenses, it is unlikely that the sole proprietor could have provided for himself and paid the certified wage in 1993-1997.

In 1998, the sole proprietor's adjusted gross income of \$38,130 could have paid the proffered wage for the first ten months if viewed proportionately, however the petitioner's corporate tax return for that fiscal year indicated losses of both taxable income before the NOL deduction and the net current assets. It cannot be concluded that the petitioner demonstrated the ability to pay the proffered wage in this year.

Although the calculation is imprecise when comparing the fiscal year corporate tax returns to a calendar year of wages, in this case, it may be concluded that neither the petitioner's net income nor its net current assets could pay the proffered wage in 2000, 2001, 2002, or 2003. The petitioner's net income of -\$63,551, -\$71,152, -\$2,971, and -\$56,580 could not cover the certified wage in each of those years. The petitioner's net current assets were indicated at -\$18,083, -\$91,387, -\$99,940, and -\$218,842, respectively. Neither resource was sufficient to cover the proposed wage offer of \$10,108.80 during those years.

In 1999, the petitioner's taxable income of \$23,250 before the NOL deduction was sufficient to pay the proffered salary. The petitioner's reported taxable income of \$59,524 before the NOL deduction was also sufficient to pay the proffered wage in 2004. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Out of the fourteen years

discussed above, the petitioner demonstrated its ability to pay the proffered wage in 1999 and 2004. The AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the priority date of the petition.

Beyond the decision of the director, the record raises a question as to whether the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm. 1986).³ In this matter, the labor certification was first accepted for processing by the DOL on June 13, 1990. The address of [REDACTED] is listed at Item 6 as “[REDACTED], Los Angeles, CA 90014.” The bill of sale submitted to the record as evidence that the petitioner acquired all the obligations and liabilities from the seller refers to all the “business assets, furniture, fixture, equipment, and ownership of the business, namely: [REDACTED] located at Los Angeles, CA 90014.” It further states that the “transfer becomes effective as of March 31, 1990. **Buyer** agrees to assume all obligations and liabilities from **Seller**. **Buyer** further agrees to take over the responsibility of sponsoring the alien employees for whom **Seller** has obtained certified permanent labor certifications from the US Department of Labor.” (Emphasis in original).

If the petitioner acquired the business stated on the bill of sale on March 31, 1990, it does not specify the same business located at the address specified in the labor certification, which is [REDACTED] and not [REDACTED] and which is located at [REDACTED] rather than [REDACTED]. The result is that the petitioner cannot be considered as a successor-in-interest. Even if this question was resolved through credible evidence, and the two entities were considered to be as they are represented, then it is observed that this labor certification would not support the I-140 because the predecessor company continued to submit a labor certification to the DOL when ownership had already been transferred to the petitioner. The date of first acceptance by the DOL, or priority date, is June 13, 1990, which is two and one-half months after this business ([REDACTED]) was purportedly sold to the petitioner. Based on the record as it currently stands, it cannot be concluded that, for the purpose of filing an I-140, the petitioner can be considered to be the successor-in-interest to the employer named on the labor certification. In addition to the petitioner’s failure to demonstrate its ability to pay the proffered wage, this conclusion forms an alternative and independent basis to deny the petition.

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 In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 at 483.