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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAR 31 2008**
EAC 04 156 54499

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, Vermont 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 janitorial service company. It seeks to employ the beneficiary permanently in the United States as an janitorial service supervisor. 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 February 17, 2005 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 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 April 30, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960 annually.

¹ Counsel claims that the labor certification was filed in April 2001 and was a 245(i) case. However, the record does not show a filing of a labor certification in 2001. There is evidence of a filing in 1998, but that filing was for an office manager, not a janitorial supervisor. The current labor certification shows that it was accepted for processing by DOL on April 30, 2003.

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 counsel's brief, copies of the 2003 through 2005 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, copies of the sole proprietor's 2002 and 2004 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, and copies of the beneficiary's 2003 through 2005 Forms 1040. Other relevant evidence in the record includes a partial copy of the sole proprietor's 2001 Form 1040, a copy of the sole proprietor's 2003 Form 1040, and copies of three pay stubs issued by the petitioner to the beneficiary for the periods ending October 15, 2004, October 31, 2004, and November 15, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2003 through 2005 Forms W-2 issued by the petitioner on behalf of the beneficiary reflect wages earned by the beneficiary of \$19,822 in 2003, \$30,900 in 2004, and \$33,300 in 2005.

The beneficiary's 2003 through 2005 Forms 1040 corroborate the wages earned by the beneficiary during those years.

The sole proprietor's 2001 through 2004 Forms 1040 reflect adjusted gross incomes of \$6,118.45 in 2001, \$1,321.60 in 2002, \$26,826.82 in 2003, and \$30,673 in 2004³.

On appeal, counsel states:

The only question is the ability of the employer to pay the stated salary of \$12 per hour. The employer's tax return for 2003 was requested; we submitted other returns as well. The attached Schedules C of [the petitioner] show:

Gross income on line 7	"wages" on line 26
2002 -- \$119,678	\$43,299
2003 -- \$121,932	\$55,394
2004 -- \$169,896	\$57,401

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).

³ It is noted that the sole proprietor's 2001 and 2002 Forms 1040 are for the two years preceding the priority date of April 30, 2003, and, therefore, have little evidentiary value when determining the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Therefore, the AAO will not consider the sole proprietor's 2001 and 2002 Forms 1040 except when determining the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

[The beneficiary's] W-2 forms for the years 2003, 2004 and 2005 show that his average earnings from [the petitioner] were over the required \$12 per hour:

2003 -- \$19,822	
2004 -- \$30,900	
2005 -- \$33,300	Average earnings per year were over \$28,000.

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 August 28, 2003, the beneficiary claims to have been employed by the petitioner from October 2000 to the present (August 28, 2003). In addition, counsel has submitted the 2003 through 2005 Forms W-2 issued by the petitioner on behalf of the beneficiary. Therefore, the petitioner has established that it employed the beneficiary in 2003 through 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$24,960 and the actual wages paid to the beneficiary in each of the pertinent years (2003 through 2005). In 2003, the difference between the proffered wage of \$24,960 and the actual wages paid to the beneficiary of \$19,822 is \$5,138. In 2004 and 2005, the beneficiary was compensated more than the proffered wage (\$30,900 and \$33,300, respectively). Therefore, the petitioner has established its ability to pay the proffered wage of \$24,960 in 2004 and 2005.

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. 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 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* 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 six in 2003. In 2003, the sole proprietor's adjusted gross income was \$26,826.82. This income does not appear to be sufficient to pay the proffered wage of \$24,960 and support a family of six in 2003. However, although not requested by the director, the record of proceeding does not contain a list of the sole proprietor's personal monthly recurring expenses, and, therefore, the AAO cannot determine if the sole proprietor had sufficient funds to support his family of six after paying the difference of \$5,138 between the proffered wage of \$24,960 and the actual wages paid to the beneficiary of \$19,822 in 2003.

On appeal, counsel points to the petitioner's gross income, wages paid, and the beneficiary's earnings to show that the petitioner has established its ability to pay the proffered wage of \$24,960.

Since the petitioner has shown its ability to pay the proffered wage in 2004 and 2005 and since it has been in business since 1982, more than 26 years, it appears that the petitioner may have been able to pay the difference of \$5,138 between the proffered wage of \$24,960 and the actual wages paid to the beneficiary of \$19,822 in 2003. However, without a list of the sole proprietor's monthly recurring personal expenses and additional documentation, the AAO is unable to determine if the petitioner had sufficient funds to cover that difference and support a family of six.

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 February 17, 2005 decision is withdrawn. The petition is remanded to the director for further consideration and for entry of a new decision, which is to be certified to the AAO for review.