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U.S. Citizenship  
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FILE:

[REDACTED]  
LIN 04 122 53476

Office: NEBRASKA SERVICE CENTER

Date: **MAY 28 2008**

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:

[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.

*Kerai S. Poulos for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a dry cleaner/tailoring business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.<sup>1</sup> 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. The director 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 December 15, 2004 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

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. See 8 CFR § 204.5(d). The priority date in the instant petition is December 6, 2000. The proffered wage as stated on the Form ETA 750 is \$23,000 annually.

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<sup>1</sup> The petitioner requests that the beneficiary be substituted for the individual (who appears to be the beneficiary's mother) named on the approved labor certification.

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 appeal<sup>2</sup>. Relevant evidence submitted on appeal includes counsel's brief, copies of the petitioner's previously submitted 2000 through 2002 Forms 1040, including Schedule C, Profit or Loss from Business, copies of the petitioner's 2003 and 2004 Forms 1040, including Schedule C, copies of the petitioner's 2004 and 2005 payroll journals showing the wages paid to the beneficiary in 2004 and 2005, a copy of the beneficiary's 2004 Form 1040, and a copy of the petitioner's statement of net worth as of December 31, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2004 Forms 1040 reflect adjusted gross incomes of \$25,480, \$22,315, \$14,967, \$36,041, and \$34,351, respectively.

The petitioner's 2000 Schedule C reflects gross receipts of \$161,502, wages paid of \$3,206, and net profit of \$40,469.

The petitioner's 2001 Schedule C reflects gross receipts of \$151,787, wages paid of \$2,208, and net profit of \$33,241.

The petitioner's 2002 Schedule C reflects gross receipts of \$155,374, wages paid of \$0, and net profit of \$46,235.

The petitioner's 2003 Schedule C reflects gross receipts of \$142,502, wages paid of \$0, and net profit of \$45,386.

The petitioner's 2004 Schedule C reflects gross receipts of \$123,643, wages paid of \$7,020, and net profit of \$52,238.

The petitioner's 2004 and 2005 payroll journals show wage paid to the beneficiary of \$17,055.00 in 2004 and \$23,000.12 in 2005.

The petitioner's statement of net worth as of December 31, 2005 reflects current assets of \$5,500, fixed assets of \$757,500, current liabilities of \$511,000, and net worth of \$252,000.<sup>3</sup>

On appeal, counsel states:

Rather, the denial of the petition was based on a finding that the petitioner has not established its ability to pay the proffered wage to the beneficiary. In reaching this conclusion, the Service relied solely on a review of petitioner's individual adjusted gross income for each tax year. By so doing, the Service failed to review the totality of petitioner's tax returns, and specifically, the individual profit for the petitioning business. The Service's analysis was incomplete and the Service's ultimate denial of the visa petition was erroneous.

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<sup>2</sup> 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).

<sup>3</sup> It is noted that the petitioner does not state the components of its net worth.

Counsel continues by pointing out that the losses incurred by the petitioner during the relevant years (2000 through 2004) were due to the petitioner's other businesses (farm and buildings owned), that the beneficiary has been paid at the proffered wage rate since obtaining her employment authorization card, that the petitioner's ample assets serve as additional evidence of its financial viability (rental property and farm business), that the petitioner's net worth should be considered when determining the petitioner's ability to pay the proffered wage, and that the petitioner may reasonable assume that its business will continue to increase with the employment of the beneficiary. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985) in support of his contentions.

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 March 17, 2004, the beneficiary does not claim the petitioner as a past or present employer. However, on appeal, the petitioner has submitted payroll journals for the beneficiary for the years 2004 and 2005. Therefore, the petitioner has established that it employed the beneficiary in 2004 and 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$23,000 and the actual wages paid to the beneficiary of \$17,055 in 2004 and \$23,000.12 in 2005. The difference was \$5,945 in 2004. The petitioner paid the beneficiary more than the proffered wage of \$23,000 in 2005 by \$0.12. Therefore, the petitioner has established its ability to pay the proffered wage in 2005. However, since the petitioner has not established that it employed the beneficiary in 2000 through 2003, the petitioner must establish that it had sufficient funds to pay the entire proffered wage of \$23,000 in those years.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 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 Chang* 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 (7<sup>th</sup> 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 2000 through 2002 and a family of two in 2003 and 2004. The petitioner's owner's adjusted gross incomes in 2000 through 2004 were \$25,480, \$22,315, \$14,967, \$36,041, and \$34,351, respectively. As the petitioner's owner failed to provide a list of his personal monthly expenses,<sup>4 5</sup> the AAO is unable to determine if the petitioner had sufficient funds to pay the

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<sup>4</sup> It is also noted that the director failed to request the sole proprietor's personal monthly recurring expenses, but instead referred to the U.S. Federal Poverty Guidelines when making his decision. The AAO does not, however, recognize the Poverty Guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses, and, therefore, they will not be considered when determining the ability to pay the proffered wage. The poverty are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge.

<sup>5</sup> It is further noted that in the director's decision, the director attempted to prorate the proffered wage for the remaining three weeks form the priority date of December 6, 2000 to the end of 2000. However, CIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than

difference of \$5,945 between the proffered wage of \$23,000 and the actual wage paid to the beneficiary of \$17,055 in 2004 or the full proffered wage of \$23,000 in 2000 through 2003. The petitioner has established its ability to pay the proffered wage of \$23,000 in 2005.

On appeal, counsel claims the losses incurred by the petitioner during the relevant years (2000 through 2004) were due to the petitioner's other businesses (farm and buildings owned), that the beneficiary has been paid at the proffered wage rate since obtaining her employment authorization card, that the petitioner's ample assets serve as additional evidence of its financial viability (rental property and farm business), that the petitioner's net worth should be considered when determining the petitioner's ability to pay the proffered wage, and that the petitioner may reasonably assume that its business will continue to increase with the employment of the beneficiary.

The petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). Therefore, even though the petitioner has paid the beneficiary at the proffered wage rate since she obtained her employment authorization card, the petitioner has not established its ability to pay the proffered wage from the priority date of December 6, 2000 until she obtained that card.

On appeal, counsel contends that the petitioner's owner's personal assets and net worth establishes that the petitioner had sufficient funds to pay the proffered wage of \$23,000 in 2000 through 2003 and the difference of \$5,945 between the proffered wage of \$23,000 and the actual wages paid to the beneficiary of \$17,055 in 2004. Again, as the AAO will not consider the poverty guidelines, and since the petitioner's owner has not supplied a list of his/her monthly personal expenses, the AAO cannot determine if the petitioner had sufficient funds to pay the difference of \$5,945 between the proffered wage of \$23,000 and the actual wages paid to the beneficiary of \$17,055 in 2004 or the entire proffered wage of \$23,000 in 2000 through 2003. In addition, the rental property and farm business (which incurred losses in all of the pertinent years) are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary as they are not easily converted into cash. The petitioner has not submitted any evidence of the current value of the properties or of any outstanding loans. With any property sale, any outstanding loans would have to be repaid before a cash payout could be made. Therefore, the AAO will not consider the real estate property of the petitioner's owner when determining the petitioner's ability to pay the proffered wage of \$23,000. Furthermore, the sole proprietor has not submitted any evidence detailing what his/her net worth is based on. A simple dollar amount is of no value when determining the petitioner's ability to pay the proffered wage.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985) to support his contention that the petitioner may reasonably assume that its business will continue to increase with the employment of the beneficiary.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of*

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we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

*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 this case, the petitioner has provided its tax returns for 2000 through 2004, with none of those tax returns establishing the petitioner’s ability to pay the proffered wage of \$23,000 in 2000 through 2003 or the difference of \$5,945 between the proffered wage of \$23,000 and the actual wage paid to the beneficiary of \$17,055 in 2004 and support a family of six in 2000 through 2002 or a family of two in 2003 and 2004. In addition, the tax returns 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 or of any temporary and uncharacteristic disruption in its business activities. Furthermore, the tax returns show decreasing gross receipts in each succeeding year since 2000 with the exception of 2002 which had an increase in gross receipts of approximately \$3,500.

Without the petitioner’s owner’s monthly personal expenses, the AAO is unable to determine if the petitioner had sufficient income to pay the proffered wage of \$23,000 in 2000 through 2003 or the difference of \$5,945 between the proffered wage of \$23,000 and the actual wage paid to the beneficiary of \$17,055 in 2004 and support a family of six in 2000 through 2002 or a family of two in 2003 and 2004.<sup>6</sup> Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The record in this matter raises an additional issue that was not addressed in the decision of denial.

On appeal, counsel has submitted a copy of the beneficiary’s 2004 Form 1040 which lists no wages or salaries, but business income of \$17,055 and one-half self-employment tax of \$1,205. Schedule C was not submitted with the Form 1040. The beneficiary and the petitioner’s owner share the same address and the same last name. Thus, it appears that the owner of the petitioner and the beneficiary are related.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of*

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<sup>6</sup> It is noted that the petitioner’s owner failed to submit any bank statements, CDs, mutual funds, bonds, etc. that would aid in determining the petitioner’s ability to pay the proffered wage.

*Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court’s dismissal of the alien’s appeal from the Secretary of Labor’s denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien’s ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary appears to be related to the owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

Because this ground was not included as a basis of the decision of denial, however, and the petitioner has not been afforded an opportunity to address it, this decision will not be based, even in part, on this ground. If the petitioner seeks to overcome this decision on motion, however, it should address this issue.

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