

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

86



FILE: [REDACTED]  
SRC 06 230 51629

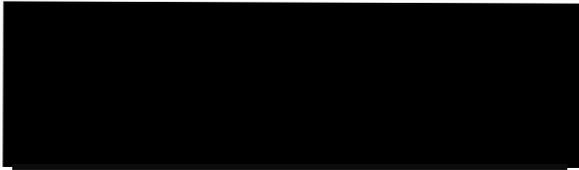
Office: TEXAS SERVICE CENTER Date:

OCT 27 2008

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**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 laundry and alteration 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 19, 2006 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:

---

<sup>1</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 September 22, 2002. The proffered wage as stated on the Form ETA 750 is \$12.75 per hour or \$26,520 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 appeal<sup>2</sup>. Relevant evidence submitted on appeal includes counsel's brief, copies of the petitioner's previously submitted 2002 through 2005 Forms 1040, including Schedule C, Profit or Loss from Business, and a copy of the previously submitted list of personal monthly recurring expenses for the sole proprietor for 2005. Other relevant evidence includes copies of the sole proprietor's bank statements for the period June 13, 2006 through October 11, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 through 2005 Forms 1040 reflect adjusted gross incomes of \$36,450, \$38,554, \$48,001, and \$79,635, respectively.

The sole proprietor's personal monthly recurring expenses for 2005 reflect monthly expenses of \$6,519.24 or \$78,230.88 annually.

The sole proprietor's bank statements for the period June 13, 2006 through October 11, 2006 reflect checking account balances ranging from a low of -\$720.26 to a high of \$3,817.76. The bank statements also reflect saving account balances ranging from a low of \$221.96 to a high of \$311.09. The bank statements further reflect three IRA accounts with ending balances as of October 11, 2006 of \$2,248.23, \$2,059.55, and \$2,249.34.

On appeal, counsel states:

The Service improperly interpreted the evidence submitted by the petitioner and erroneously applied the monthly expenses of October of 2006 to the year of 2002, 2003, and 2004. . . . If

---

<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).

the Service correctly interpret the evidence and apply it to the right year, the evidence will demonstrate that the petitioner has [the] ability to pay the proffered wages.

The petitioner moved to [a] more luxurious home in 2005. Therefore, the mortgage interest of \$3,983.56 should be applied to the year of 2005, not the year of 2002, 2003, and 2004.

\* \* \*

Also, the amount of \$6,519.00 is the monthly expenses of October 2006. According to the petitioner's Schedule A from his 1040 of 2005, he paid the mortgage interest at \$39,284.00. However, the petitioner paid \$5,933.00 in 2004, \$2,727.00 in 2003, and \$1,346.00 in 2002 as the home mortgage interest. These facts clearly indicate that the petitioner moved [to] the more luxurious home in 2005. Therefore, the amount of \$6,519.00 is not the right monthly expenses for the year of 2002, 2003, and 2004 and this number should be applied only to the year of 2005.

\$720.00 is the monthly expenses in the year of 2002. . . . As a result, the monthly expenses for 2002 were \$722.17 (\$112.17 (mortgage interest) + 160.00 (contribution) + \$50.00 (school) + \$300.00 (food) + \$100.00 (clothing)). Therefore, the yearly expenses of 2002 were \$8,666.04 and the proffered wage is \$26,520.00 and the total is \$35,186.04, which is less than the adjusted gross income in 2002, \$36,450.00. . . .

\$987.17 was the monthly expenses in the year 2003. The monthly expenses for the year of 2003 were \$987.17 under the same logic of the year of 2002. So, the monthly expenses for 2003 were \$987.17 (\$227.17 (mortgage interest) + \$160.00 (contribution) + \$200.00 (school) + \$300.00 (food) + \$100.00 (clothing)). Therefore, the yearly expenses of 2003 were \$11,846.04 and the proffered wage is \$26,520.00 and the total is \$38,366.04, which is less than the adjusted gross income in 2003, \$38,554.00. . . .

\$1,354.42 was the monthly expenses in the year of 2004. The monthly expenses for the year of 2004 were \$1,354.42 at the same logic of the year of 2002. So, the monthly expenses for 2004 were \$1,354.42 (\$494.42 (mortgage interest) + \$160.00 (contribution) + \$200.00 (school) + \$400.00 (food) + \$100.00 (clothing)). Therefore, the yearly expenses of 2004 were \$16,253.04 and the proffered wage is \$26,520.00 and the total is \$42,773.04, which is less than the adjusted gross income in 2004, \$48,001.00. . . .

\$4,133.67 was the monthly expenses in the year of 2005. The monthly expenses for the year of 2005 were \$4,133.67 at the same logic of the year of 2002. So, the monthly expenses for 2005 were \$4,133.67 (\$3,273.67 mortgage interest) + \$160.00 (contribution) + \$200.00 (school) + \$400.00 (food) + \$100.00 (clothing)). Therefore, the yearly expenses of 2005 were \$49,604.04 and the proffered wage is \$26,520.00 and the total is \$76,124.04, which is less than the adjusted gross income \$79,635.00. . . .

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 June 28, 2006, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary that would show that the petitioner employed the beneficiary in any of the pertinent years (2002 through 2005). Therefore, the petitioner has not established that it employed the beneficiary from the priority date of September 22, 2002 through 2005, and, thus, must establish that it had sufficient funds to pay the entire proffered wage of \$26,520 from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 federal case law. See *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*, 719 F. Supp. 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 five in 2002 through 2005. The sole proprietor's adjusted gross incomes in 2002 through 2005 were \$36,450, \$38,554, \$48,001, and \$79,635, respectively. The sole proprietor originally listed his monthly personal recurring expenses as \$6,519.24 per month or \$78,230.88 annually. Therefore, the sole proprietor could not have paid the proffered wage of \$26,520 and supported a family of five with monthly personal recurring expenses of \$78,230.88 annually from his adjusted gross incomes in 2002 through 2005.

On appeal, counsel claims that only the sole proprietor's mortgage interest, contribution, school, food, and clothing should be considered private expenses because other expenses such as healthcare, life insurance, internet, electric, water, cellular phone, loan, and etc. are business expenses. Counsel also claims that the sole proprietor's monthly expenses were \$722.17 in 2002, \$987.17 in 2003, \$1,354.42 in 2004, and \$4,133.67 in 2004.

Counsel is mistaken. The sole proprietor's entire mortgage, not just the mortgage interest, is considered part of his personal monthly recurring expenses. In addition, the sole proprietor does not live in his cleaning establishment, but in a separate home. Therefore, any expenses for electric, gas, water, phone, etc. connected to his home cannot be considered as business expenses, but are, instead, also part of the sole proprietor's personal monthly recurring expenses. Therefore, the AAO will not accept counsel's contention that the sole proprietor's monthly expenses were \$722.17 in 2002, \$987.17 in 2003, \$1,354.42 in 2004, and \$4,133.67 in 2005. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The sole proprietor has not submitted any probative evidence that would lead the AAO to conclude that his personal monthly recurring expenses are not as originally listed.

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 Sonogawa*, 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 Sonogawa*, 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 2002 through 2005, with none of those tax returns establishing the petitioner's ability to pay the proffered wage of \$26,520 and support a family of five in 2002 through 2005. 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.

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.

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.