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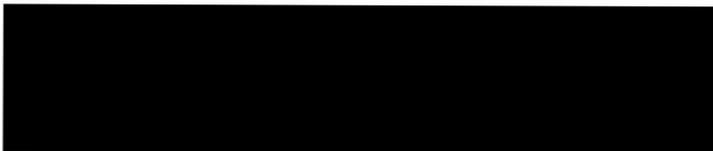
Office: TEXAS SERVICE CENTER

Date: **AUG 06 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center based on the petitioner's failure to establish that it had the continuing ability to pay the proffered wage from of the priority date of the visa petition, April 30, 2001. The Administrative Appeals Office (AAO) remanded the petition to the director to issue a request for evidence (RFE) related to the petitioner's ability to pay the proffered wage, and then for the director to render a determination on the merits of the petition. The director issued a RFE. The petitioner provided a response and new evidence. The director stated that the petitioner had not overcome the ground for denial on the issue of ability to pay the proffered wage and certified his decision to the AAO for review. The director's decision on remand will be upheld; the appeal will be dismissed. The director's decision is therefore affirmed, and the petition will remain denied.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director, on remand, determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

On certification, the petitioner submitted a bank statement for the petitioner, a vehicle list showing a value of \$35,000, and a copy of a real property list showing a value of \$2,995,000 less mortgages of \$250,000.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

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.

On January 7, 2008, after the visa petition was remanded to the director for further consideration and entry of a new decision, the director issued a RFE and requested additional evidence of the petitioner's continuing ability to pay the proffered wage from the priority date of the visa petition. The director specifically requested:

Submit at least one of the following for the petitioner of the I-140:

- A copy of the petitioner's 2001, 2002, 2003, 2004, 2005, and 2006 annual federal tax return, including copies of all schedules, or
An audited financial statement for 2001, 2002, 2003, 2004, 2005, and 2006, or
An annual report for 2001, 2002, 2003, 2004, 2005, and 2006.

In addition, please provide evidence of the petitioner's current assets including, but not limited to investments, cash in bank accounts, stock, bonds, etc.

Please provide evidence of the petitioner's current liabilities including, but not limited to, lease payments, mortgage payments, vehicle payments, insurance payments, utility payments, employment expenses, child care expenses, etc.

If the petitioner has paid the beneficiary a wage during 2001, 2002, 2003, 2004, 2005, and 2006, submit evidence of the amount paid.

The petitioner was given twelve weeks to submit the requested evidence. In response, counsel submitted copies of the sole proprietor's 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, copies of the 2002 through 2007 Forms W-2CM, Wage and Tax Statements, for the Commonwealth of the Northern Mariana Islands, issued by GR Construction Co., Inc. in Saipan, MP, on behalf of the beneficiary, copies of the sole proprietor's property tax statements, copies of the petitioner's annual incorporation reports for 2001 through 2008 in Saipan, MP, and copies of the petitioner's 2007 Forms GRT, Monthly Gross Receipts, Use, Occupancy, Liquid Fuel, Automotive Surcharges, Tobacco and Alcoholic Beverage Tax Returns, for the Government of Guam. The

director determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary from the priority date, and on May 15, 2008, the director denied the visa petition and certified his decision to the AAO.

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 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 [U.S. Citizenship and Immigration Services (USCIS)].

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 C.F.R. § 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 \$11.34 per hour or \$23,587.20 annually.

The petitioner's 2001 through 2006 Forms 1040 reflect adjusted gross incomes of \$17,860, \$51,970, \$63,872, \$56,067, \$67,410, and \$59,408, respectively.

The 2002 through 2007 Forms W-2CM for the Commonwealth of the Northern Mariana Islands, issued by GR Construction Co., Inc., on behalf of the beneficiary, reflect wages paid to the beneficiary of \$1,015.20, \$7,729.30, \$6,008.35, \$8,798.15, \$6,634.80, and \$7,945.20, respectively.¹

¹ The AAO notes that the sole proprietor lists, on Form I-140 and on Schedule C of his Forms 1040, its Federal Employer Identification Number (FEIN) as [REDACTED], the FEIN for "GR Construction Co." in Guam. However, the Forms W-2CM show a corporate name of "GR Construction Co., Inc." Saipan and a FEIN as [REDACTED]. From the record, it appears that the Saipan company is incorporated and the Guam company operates as a sole proprietorship. Pursuant to the regulation at 20 C.F.R. § 656.3, "An employer must possess a valid Federal Employer Identification Number (FEIN)." If the two companies have separate tax identification numbers, they would be separate employers. Therefore, the AAO will not consider the wages paid to the beneficiary by the Saipan, MP entity when determining the petitioner's ability to pay the proffered wage of \$23,587.20 in Guam. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the

The petitioner's 2007 Forms GRT reflect gross receipts of \$535,000 and taxes due of \$21,400.

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, USCIS 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, USCIS 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 30, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted the 2002 through 2007 Forms W-2CM, issued by the Saipan, MP entity on behalf of the beneficiary, as evidence that the petitioner employed the beneficiary in 2002 through 2007 in Saipan, MP. As noted below, the Saipan entity has a different tax ID number and those wages would not demonstrate the petitioner's ability to pay the proffered wage. In addition, USCIS records indicate that the petitioner filed additional immigrant petitions for at least three other beneficiaries with the same priority date year of 2001. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$23,587.20 and all of the wages of the additional sponsored beneficiaries from their respective priority dates.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539

proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 27, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available.

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 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 supports a family of two. The sole proprietor's tax returns reflect the following information for the following years:

Proprietor's adjusted gross income (Form 1040, line 34):

- In 2001, the Form 1040 had an adjusted gross income of \$17,860
- In 2002, the Form 1040 had an adjusted gross income of \$51,970
- In 2003, the Form 1040 had an adjusted gross income of \$63,872
- In 2004, the Form 1040 had an adjusted gross income of \$56,067
- In 2005, the Form 1040 had an adjusted gross income of \$67,410
- In 2006, the Form 1040 had an adjusted gross income of \$59,408

In 2001, the sole proprietor's adjusted gross income of \$17,860 fails to cover the proffered wage of \$23,587.20 in 2001. It is improbable that the sole proprietor could support a family of two on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

While the sole proprietor's 2002 through 2006 Forms 1040 appear to be sufficient to pay the proffered wage of \$23,587.20, the petitioner is also obligated to show that it had sufficient funds to pay the beneficiary in addition to the remaining sponsored beneficiaries with the same priority date year as well as support a family of two. In the instant case, the sole proprietor failed to submit a list of his personal monthly recurring expenses; and therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the beneficiary the proffered wage of \$23,587.20, the wages of the remaining sponsored beneficiaries with the same priority date year, and support a family of two.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or the sole proprietor's adjusted gross income.

On certification, the sole proprietor submitted a bank statement for the petitioner dated June 13, 2008, a vehicle list showing a value of \$35,000, and a copy of a real property list showing a

value of \$2,995,000 less mortgages of \$250,000. As noted above, the sole proprietor failed to submit a list of his personal monthly recurring expenses.

The petitioner's bank statement reflects a savings account (opened on 11/27/89) with a balance of \$34,122.25 and a loan (opened 10/30/07) with a balance of \$18,099.65. The sole proprietor did not submit his personal bank statements. Business bank account statements may only be utilized as part of a "totality of circumstances" analysis.

With regard to the sole proprietor's real property, the sole proprietor's real property 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. Therefore, the AAO will not usually consider the sole proprietor's real property (including vehicles) when determining the petitioner's ability to pay the proffered wage of \$23,587.20.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Form I-140, Immigrant Petition for Alien Worker, filed by the petitioner on March 6, 2006, indicates that the business was established in 1988. The sole proprietor has provided tax returns for 2001 through 2006, with none of the tax returns establishing the petitioner's ability to pay the proffered wage of \$23,587.20, the additional wages of the remaining sponsored beneficiaries with the same priority date year,² and support a family of two.

² The number of immigrant petitions that the sole proprietor has filed for other workers does not suggest that the petitioner has the available funds to pay the instant beneficiary the proffered wage or the other sponsored workers and support a family of two.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition which it has not done. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). 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, the additional salaries for the additional petitions from the same priority date year and continuing to present, and support a family of two.

For the reasons discussed above, the petition may not be approved.³

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 director's decision of May 15, 2008 is affirmed, and the petition is denied.

³ Although not a part of this decision, the AAO notes that the experience letter submitted on behalf of the beneficiary by North Pacific Builders, Inc. differs from the experience listed by the beneficiary on Form ETA 750B. The letter submitted by North Pacific Builders, Inc. states that the beneficiary was employed by North Pacific Builders, Inc. from November 23, 1995 up to October 3, 2000. The ETA 750B, signed by the beneficiary on April 30, 2001, states that the beneficiary was employed by North Pacific Builders, Inc. from January 1996 to the present (April 30, 2001). This discrepancy must be resolved in any further proceedings before USCIS. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.