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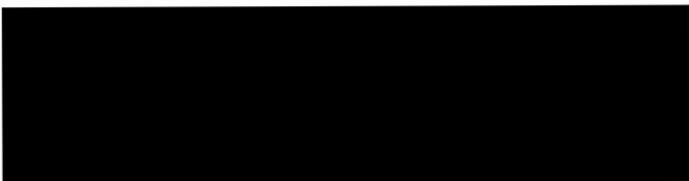
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6



FILE: LIN 07 072 52828 Office: NEBRASKA SERVICE CENTER

Date: AUG 26 2009

IN RE: Petitioner:  
Beneficiary:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail clothing business.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the evidence submitted to the record did not establish that the petitioner listed on the certified Form ETA 750 has authorization to conduct business for the current petitioner, listed on the instant I-140 petition. The director stated that “a documentary confusion” existed as to what entity was the actual petitioner. The director determined that the petitioner identified on the certified ETA Form 750 was not compatible with the petitioner listed on the I-140 petition, and denied the petition accordingly.

The record shows that the appeal is properly filed and 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director’s July 16, 2007 denial, the single issue in this case is whether or not the petitioner that filed the Form ETA 750 is the same entity as the business that filed the I-140 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 nature, for which qualified workers are not available in the United States.

The regulation 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

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<sup>1</sup> The petitioner’s Form I-140 identified the petitioner as [REDACTED] while the certified I-140 petition identified the petitioner as [REDACTED] Prince, William, Virginia. A 2003 Form 1040, U.S. Individual Federal Tax Return, jointly filed by [REDACTED] and [REDACTED] with accompanying Schedules C, indicates that [REDACTED] was a sole proprietorship and that Diors Fashions was one business owned by the sole proprietorship when it filed the Form ETA 750 on April 9, 2003. The petitioner also submitted its Forms 1040 for tax years 2004 and 2005, with accompanying Schedules C, while filing a Form 1120S, U.S. Corporate Tax Return for an S Corporation, in tax year 2006. The AAO will discuss these tax returns more completely further in these proceedings.

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 20 C.F.R. § 656.3<sup>2</sup> states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 9, 2003. The proffered wage as stated on the Form ETA 750 is \$12.43 an hour, \$25,854.40 per year. The Form ETA 750 states that the position requires three years of prior work experience in the proffered position.

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 appeal.<sup>3</sup> Counsel submits a brief and the following evidence:

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<sup>2</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

<sup>3</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).

1. A translated copy of the petitioner's Korean family register that indicates [REDACTED] is the family head and that his wife is [REDACTED]. This document also indicates that Mr. [REDACTED] and [REDACTED] have two children;
2. A copy of a document entitled "Written Consent in Lieu of The First Meeting of the Board of Directors" dated August 2, 2005. This document indicates that the directors of GD Fashion, Inc consent to various resolutions with regard to Articles of Incorporation;
3. A copy of a County of Prince William, 2007 Business license for Glory and Dior, 2700 Potomac Mills Circle, #969, Woodbridge, Virginia. This document indicate the owner of Glory and Dior is GD Fashion Inc, P.O. Box 668, Annandale, Virginia.;
4. A copy of a temporary license agreement dated February 8, 2007 between Potomac Mills Operating Company, L.L.C. and Glory and Dior, d/b/a Glory and Dior, 5801 Duke Street, E-140, Alexandria, Virginia for a period of time from February 6, 2007 to January 31, 2008. This license agreement identify the prospective business conducting business at Potomac Mills Shopping Center as "Glory and Dior," FEIN [REDACTED] with the business unit type identified as "TLA" and the space number identified as "780."

Other relevant evidence in the record includes the Forms 1040, U.S. Individual Income Tax Return jointly filed for tax years 2003 to 2005 by [REDACTED] and [REDACTED]. The 2003 tax return is accompanied by Schedules C for the following businesses: Diors Fashions, 2700 Potomac Mill Cir. #960 Employer ID Number (EIN) [REDACTED]; Diors Fashions II, 5801 Duke Street, B-104, Alexandria, EIN [REDACTED]; and Glory Fashions 5801 Duke Street, B-216, Alexandria, Virginia EIN [REDACTED]

The 2004 tax return is accompanied by Schedules C for the following businesses: Diors Fashions, 2700 Potomac Mill Center #960, EIN [REDACTED]; Diors Fashions II, 5801 Duke Street, B-104, Alexandria, Virginia, EIN [REDACTED]; Glory Fashions, 5901 Duke Street, B-216, Alexandria, Virginia 22304, EIN [REDACTED]; and Glory Fashions II, 21100 Dulles Town Center, #109, Sterling, Virginia, EIN [REDACTED]

The 2005 individual tax return is accompanied by Schedules C for the following businesses: Diors Fashions II, 5801 Duke Street, B-104, Alexandria, Virginia EIN [REDACTED]; Glory Fashions, 5801 Duke Street, B-216, Alexandria, VA EIN [REDACTED] and Glory Fashions II, 21100 Dulles Town Center, #210, Sterling, Virginia. All three Schedules C indicate that the sole proprietor had incorporated its business and consolidated inventory as of December 31, 2005, pursuant to IRS guidelines.

The petitioner that submitted the I-140 petition also submitted an IRS Form 1120S, U.S. Income Tax Return for an S Corporation for GD Fashion, Inc. The record also contains a document from the Commonwealth of Virginia, State Corporation Commission that states GD Fashion, Inc. incorporated on August 2, 2005. The record also contains two documents entitled "Certificate Required to be Filed by a Corporation Conducting Business in the State of Virginia Under an Assumed or Fictitious Name." One document indicates that GD Fashion, Inc. was conducting business as Glory at 21100 Dulles Town Circle, Sterling, Virginia and the other indicates that GD Fashion, Inc. is conducting business as Glory and Dior, 5801 Duke Street, #E-140, Alexandria,

Virginia. The documents indicate that the petitioner's owner signed these documents on January 24, 2006 and January 29, 2006 respectively.

The record also contains a letter from the Internal Revenue Service (IRS) dated August 17, 2005 addressed to GD Fashions, Inc., Annandale, Virginia that provided the EIN of [REDACTED]. The record does not contain any other evidence relevant to the I-140 petitioner's identification as the petitioner that filed the ETA Form 750.

On the petition, the petitioner claimed to have been established in 1998 and to currently employ four workers. It claims to have gross annual income of \$117,817 and net annual income of \$43,264.

On appeal, counsel asserts that the sole proprietor, [REDACTED] trades as Dior Fashions at 2700 Potomac Mills Circle #960 signed the I-140 petition and has since incorporated his business. Counsel states that [REDACTED] is 50 percent owner, along with his wife, of three businesses operating under the corporate structure of GD Fashion, Inc., including Glory, Sterling, Virginia; Glory & Dior, Alexandria; and Glory & Dior, Potomac Mills Circle #969. Counsel notes that the 2007 business license from Prince William County also shows that the [REDACTED] still operate a business at 2700 Potomac Mills Circle, Woodbridge at the same location of the petitioner on the ETA Form 750.

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, United States Citizenship and Immigration Services (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).

The evidence in the record of proceeding shows that Diors Fashions, the petitioner that submitted the Form ETA 750 to DOL, was a business operated by a sole proprietorship in tax years 2003 to 2004. As the sole proprietorship does not include a Schedule C in its 2005 Form 1040 tax return for Diors Fashions, the record does not establish that this particular store conducted business operations in tax year 2005. Further although the petitioner submitted certificates with regard to doing business under fictitious names for two businesses as of January 2006, the petitioner did not submit any such certificate for Diors Fashions at the Potomac Mills Center. Thus the record does not establish that the petitioner identified on the ETA Form 750 continued business operations in either tax year 2005 or 2006.

The evidence submitted by GD Fashions, Inc. on appeal with regard to business being conducted as Glory and Dior, at 2700 Potomac Mills Circles, #969 does not establish that the petitioner identified on the ETA Form 750 and the individual that submitted the I-140 petition are one and the same

business, and that such business was operated from the 2003 priority date to the present. The AAO notes that if the petitioner was an S Corporation at the time of filing the I-140 petition, the petition should have identified the petitioner as the S Corporation, rather than utilizing the name of the petitioner's owner. The AAO also notes that the business contract for Glory and Dior at Potomac Mills Circle is for a different location than the claimed location of the petitioner listed on the ETA Form 750. Thus, the AAO finds that the I-140 petitioner has not sufficiently established that the petitioner that filed the Form ETA 750 exists and is conducting business under the present S corporation business structure. The director's decision is affirmed.

For illustrative purposes, the AAO will briefly examine the petitioner that submitted the I-140 petition's ability to pay the proffered wage during the relevant period of time, based on the tax returns submitted to the record. In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

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 (1<sup>st</sup> 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 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In tax years 2003 to 2005, the tax returns submitted to the record establish that the Form ETA 750 petitioner was a business operated by a sole proprietorship. A sole proprietorship is 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 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 four during tax years 2003 through 2005. The proprietor's tax returns reflect the following information for the following years:

|   |           |           |          |
|---|-----------|-----------|----------|
| Proprietor's adjusted gross income (Form 1040, line 36 or 37) | 2003      | 2004      | 2005     |
|   | \$102,882 | \$106,824 | \$86,698 |

In all three years, the sole proprietor's adjusted gross income is sufficient to cover the proffered wage of \$25,854.40. However, the I-140 petitioner did not submit the requested list of monthly household expenses as requested by the director. Therefore the record does not establish that the sole proprietor could support himself and three other dependents, while also paying the entire proffered wage to the beneficiary.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 the instant case, the petitioner has several small retail clothing businesses operating in shopping malls. The petitioner has four employees for the two businesses operating under fictitious names as of 2006. Although the petitioner states it was established in 1998, the record contains no further evidence that the petitioner that filed the Form ETA 750 was actually in business in 1998. The record does not contain any other documentation with which to evaluate the claimed petitioner's

profile within the appropriate business community, or other such relevant factors. 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.