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U.S. Citizenship and Immigration Services
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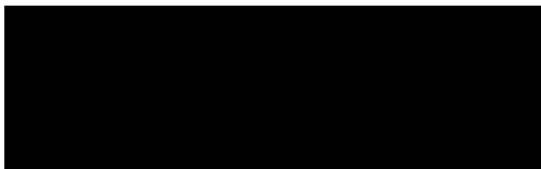
Date: JUL 30 2009

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).

A handwritten signature in black ink.

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 living assistance company. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. As required by statute, the petition is accompanied by a ETA 9089 Application for Permanent Employment Certification certified by the U.S. Department of Labor (DOL). 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated December 7, 2007, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. 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 the Form ETA 9089 Application for Permanent Employment Certification as certified by the DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted for processing by DOL on November 17, 2005, and certified on January 23, 2006. The petitioner filed the Form I-140 on October 18, 2006. The proffered wage as stated on the Form ETA 9089 is \$11.21 per hour (\$23,316.80 per year). The Form ETA 9089 states that the position requires two years of 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.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2003,² 2004 and 2005;³ a letter from counsel dated September 25, 2007; a City of Huntington Beach, California, business license for the petitioner for 2005; two blank checks naming the petitioner; a copy of a Internet webpage from <http://www.zillow.com> (as accessed September 25, 2007) entitled "Zestimate" for [REDACTED] 'two loan statements concerning scheduled principal and interest payments for [REDACTED]⁴ and what appears to be a certificate of property insurance for the period October 3, 2005, to October 3, 2006, for that parcel; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

² The AAO notes that tax returns for 2003 and 2004 have little probative value in the determination of the ability to pay from the priority date of November 17, 2005. However, we will consider the petitioner's 2003 and 2004 federal income tax return generally.

³ Page two of Schedule C, which reflects business related income and expenses, is missing from the petitioner's 2005 tax return.

⁴ The petitioner's personal residence and the business address are the same.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification 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, U.S. 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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

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 employed the beneficiary since October 18, 2002. However, the petitioner has not submitted wage or other evidence of compensation paid to the beneficiary. The AAO notes that the director requested such evidence on August 20, 2007. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

An examination of the petitioner's 2005 U.S. federal tax return Form 1040, Schedule C demonstrates that the petitioner had wage expenses of \$89,231.00, (Schedule C, Part II, Line 26). As stated, since no evidence was submitted of any wage payments to the beneficiary, none of these wage expenses can be attributed to the beneficiary.

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *See* Blacks's Law Dictionary 1398 (7thEd. 1999). The two individuals listed on the tax return submitted for 2005 are noted as married and have attached a Schedule C statement to their tax return listing one of the spouses as proprietor of the "First Step Model Training Home" located at [REDACTED] for the business identified as "Assisted Supported Living Homes."

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). The sole proprietors' yearly personal expenses total \$27,785.00 according to the evidence submitted.

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 individuals. The 2005 tax return reflects the following information:

Tax Return for Year:	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C ⁵)	Petitioner's Net Profit from business (Schedule C)
2005	\$49,125.00	\$596,995.00	\$89,231.00	\$15,229.00

Since the proffered wage is \$23,316.80 per year, the petitioner did have sufficient net income to pay the proffered wage for year 2005 without consideration of the petitioner's personal expenses or the fact that USCIS records show that the petitioner sponsored a second worker. The petitioner must demonstrate that it can pay the respective proffered wage for each sponsored worker from their respective priority dates until each obtains permanent residence.

The director in his RFE requested a list of the petitioner's monthly recurring household expenses which were to include but were not limited to rent or mortgage payments, automobile payments, installment loans, credit card payments, household expenses, auto/home/health insurance, utility expenses and miscellaneous expenses. The petitioner did not submit this requested evidence. According to the 2005 Form 1040 tax return submitted, the petitioner's yearly mortgage payment is \$39,123.00.⁶ The petitioner's other personal expenses are not in evidence.

⁵ Schedule C, Part II, Line 26.

⁶ According to the World Savings loan statement dated June 9, 2006, submitted into evidence, the scheduled principal and interest due for [REDACTED] California is \$3,719.98 or \$44,639.76 calculated on a yearly basis. If this matter is pursued, the

In 2005, the sole proprietorship's adjusted gross income in the amount of \$49,125.00 does not cover the proffered wage of \$23,316.80 including the payment of the petitioner's yearly mortgage payment. In 2005 the petitioner was not able to pay the proffered wage.

Accompanying the appeal, counsel submits a legal brief and no additional evidence.

Counsel's brief states that the petitioner's federal tax returns submitted for 2003, 2004 and 2005 reflect adjusted gross incomes were "well in excess of \$500,000.00 per year." However, according to the federal income tax returns submitted, the petitioner's adjusted gross incomes for 2003, 2004, and 2005, were \$29,085.00, \$31,068.00, and \$49,125.00 respectively.

According to counsel, the director "ignored" the schedules attached to the petitioner's tax returns showing that all business expenses were paid prior to the net profit being reached for each return. Counsel has provided no substantiation that the director "ignored" the schedules attached to the petitioner's tax returns, or the relevance of his statement that "all business expenses were paid prior to the net profit being reached for each return." Further, the petitioner's net profit stated on Form 1040, Schedule C, in 2005, is \$15,229.00 which is less than the proffered wage.

Counsel states that the petitioner's 2005 business expense as found on Schedule C at line 27 provides evidence of the petitioner's ability to pay the proffered wage. A component of that expense is "Cost of Labor" which is relevant to the ATP analysis, but page two of Schedule C, page two which reflects the cost of labor expenses is missing. Counsel's contention that the petitioner's business expense is proof of the ability to pay the proffered wage is unsupported by the evidence as the petitioner's cost of labor expense for 2005 was not submitted in this case.

Further, wages and compensation already paid to others (i.e. the petitioner's cost of labor expense) are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive.

In his brief, counsel states the compensation paid by the petitioner for "outside consultants for children" for years 2003 and 2004 reflects evidence of the ability to pay; however, as these expenditures were before the priority date they have only slight probative value. Further, the offered position is "restaurant cook" a position that would not reasonably be characterized as an outside consultant for children so counsel's statement lacks relevance. We note no cost of labor figure, an entry available as an expense on Schedule C, was submitted by the petitioner for 2005.

petitioner must submit a substantiated listing of its personal monthly expenses containing at least the eight items mentioned above.

Additionally, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker that is identified in the electronics records of USCIS as LIN 08 079 50388. The petitioner must demonstrate the petitioner's ability to pay the wage offered to all the beneficiaries sponsored by the petitioner. The record in the instant case contains no information about wages offered or paid to the other potential beneficiary of an I-140 petitions filed by the petitioner. The record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to all the beneficiaries of the instant petition.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.