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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

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date AUG 25 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 an Italian restaurant and pizzeria. It seeks to employ the beneficiary permanently in the United States as an Italian specialties cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification[1] approved by the United States 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.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO conducts appellate review on a *de novo* basis. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003). The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

For the reasons cited below, the AAO will dismiss the appeal. We find that the petitioner failed to establish that it has had the continuing ability to pay the proffered wage. We further find that the petitioner failed to submit evidence of the required education as set forth on the ETA 750.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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

[1] After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

> 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 750, Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. The petitioner must also demonstrate that the beneficiary possesses the required education and experience as required on the ETA 750 as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is $755.60 per week, which amounts to $39,291.20 per year. On the Form ETA 750, signed by the beneficiary on April 27, 2001, the beneficiary does not claim to have worked for the current petitioner, but for its predecessor-in-interest as shown on the amended ETA 750.

On Part 5 of the I-140, the petitioner claims to have been established in September 1977, to generate $110,000 in gross annual income and $10,000 in net annual income.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the Form 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 one of the essential elements 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The petitioner has provided no evidence of employment or payment of wages to the beneficiary.

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 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities as expressed on a federal tax return or audited financial statement. It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In this case, the petitioner has provided no federal tax returns or audited financial statements in accordance with the regulation at 8 C.F.R. § 204.5(g)(2) from which an examination of income and assets may be made.

The petitioner claims to be a sole proprietorship, but as the record does not contain any tax returns, this cannot bed verified. In the case of a sole proprietor, the analysis related to the ability to pay the proffered wage is slightly different. 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 (7th Cir. 1983). For that reason, sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. USCIS examines a sole proprietor's adjusted gross income on an individual tax return or if submitted, a personal audited financial statement for the relevant years beginning at the priority date. In the instant case, the petitioner has provided no federal tax returns or audited financial statements as required by 8 C.F.R. 204.5(g)(2). Further, the petitioner has provided no evidence of relevant household expenses.

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.

On July 22, 2008, the director issued a notice of intent to deny the petition based upon the petitioner's failure to establish its ability to pay the proposed wage offer and upon the lack of evidence showing that the beneficiary had the requisite experience in the job offered.

In response, current counsel submits a letter indicating that the petitioner is a sole proprietorship. An accompanying letter is from [redacted] the sole proprietor's business attorney. The letter, dated August 4, 2008, indicates that the sole proprietor and his spouse own a one-family house at 13-03 [redacted] whose fair market value is claimed to be approximately $500,000 and carries a mortgage of approximately $150,000. The other premises owned by the sole proprietor and his spouse are located at [redacted] states that it contains a recently constructed one-story restaurant whose fair market value is approximately $600,000, and is unencumbered. No other evidence of the petitioner's ability to pay the proffered salary of $39,291.20 per year was provided.

The director denied the petition on the basis that the petitioner had failed to establish the continuing ability to pay the proffered wage.

On appeal, the petitioner, through counsel, submits affidavits from the sole proprietor(s), as well as their attorney [redacted]. Both affidavits affirm the ownership of the real estate described above. Both affidavits affirm their belief of the fair market value of the properties. Additionally, the sole proprietors claim that they have good credit and can readily obtain credit line mortgages to support payment of the beneficiary's proposed wage offer.

It is noted that USCIS does not consider total assets including depreciable assets that the petitioner uses in its business. It is noted herein that the one of the petitioner's properties described in this case includes the property upon which the petitioner operates. It would not be part of this consideration as real estate is generally considered as a long term asset and would not be converted to cash during the ordinary course of business. It would not, therefore, become funds available to pay the proffered wage. Further, a petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Additionally, it is noted that in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's income net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment Terms*, 45 (1998).

The petitioner has not submitted sufficient evidence to establish its *continuing* ability to pay the proffered wage beginning as of the priority date pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2).

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonegawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In this matter, there are few facts and little evidence upon which to evaluate the petitioner's circumstances. Some of the evidence would require clarification. For instance, on Part 5 of the I-140, the petitioner is stated to have been established in 1977, yet the record indicates that the petitioner's location has a newly constructed one-story restaurant. The ownership appears to have changed as recently as 2007, as suggested by the amendments on the ETA 750. We cannot conclude that any unusual or unique business circumstances or reputational factors or have been shown to exist in this case that parallel those described in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year within a framework of profitable years for the petitioner. Additionally, without any tax returns, we cannot assess the validity of the job offer and whether it would support a full-time employee as required by the labor certification.

Additionally, it is noted that to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Relevant to the visa classification sought in this case, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) states:

> (D) *Other Workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Here, Item 14 of the ETA 750 requires that the beneficiary have completed eight years of grade school and four years of high school. The petitioner failed to provide any evidence in the form of a diploma and grade transcript showing that this requirement was fulfilled as of the priority date.

Based on a review of the underlying record and the evidence and argument provided on appeal, the AAO concludes that the petitioner has failed to establish its continuing ability to pay the proffered wage beginning at the priority date of April 30, 2001, and additionally failed to establish that the

beneficiary possessed the requisite educational credentials as set forth on the ETA 750. 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.