identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 2 0 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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 our 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 $630. 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,

Elizabeth McCormack

Perry Rhew
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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 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 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 January 27, 2009 denial, 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)(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 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 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 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 September 17, 2004. The proffered wage as stated on the Form ETA 750 is $8.79 per hour or $18,283.20 per year. The Form ETA 750 states that the position

requires 6 years of grade school education and 4 years of high school education, no training, and no experience for the job.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] The record before the director closed on January 9, 2009 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 the most recent return available. Relevant evidence in the record includes a statement of personal monthly household expenses for 2004, 2005, 2006, and 2007, the statements of five bank accounts all dated December 31, 2005, the petitioner's Forms 1040, U.S. Individual Income Tax Return, for 2004, 2005, 2006, and 2007, and four property deeds.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on an unspecified date in 2003 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on September 10, 2004, the beneficiary claims to have worked for the petitioner since July of 2004.

On appeal, counsel asserts that the petitioner's combined net income for the years 2004, 2005, 2006, and 2007 far exceeded the total proffered wage to be paid to the beneficiary for the same period from 2004 to 2007. Counsel contends that the petitioner's personal assets should also be considered when determining the petitioner's ability to pay the proffered wage. Counsel claims that the petitioner's net income of $7,529.00 in 2005 was attributable to a singular one-time expense incurred in that year. Counsel includes copies of previously submitted documentation in support of the appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

[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 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).

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 provided any evidence to establish that it employed and paid the beneficiary the full proffered wage from the priority date on September 17, 2004 onwards despite the fact that the beneficiary indicated that she had been employed by the petitioner since July 2004 on the Form ETA 750B.

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). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, (E.D. Mich. 2010). 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). 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.

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.

A review of the Form 1040 tax returns reveals that the sole proprietor supported himself, his spouse, and a dependent child in 2004, 2005, and 2006, and himself and his spouse in 2007. The petitioner reported annual living expenses[2] as follows:

- 2004 – $12,480.00
- 2005 – $13,080.00.
- 2006 – $18,540.00.
- 2007 – $19,440.00.

It must be noted that the petitioner filed a separate Form I-140, [redacted] on behalf of another beneficiary, [redacted], with USCIS on August 31, 2007. The petitioner is also seeking to employ this beneficiary, [redacted] permanently in the United States as a caregiver. The Form I-140, [redacted] is accompanied by a Form ETA 750 that was accepted by the DOL on September 17, 2004. The proffered wage as stated on the Form ETA 750 is $8.79 per hour or $18,283.20 per year.

Thus, it is necessary to show that the petitioner had the ability to pay the beneficiary of the instant case the proffered wage of $18,283.20 per year, the ability to pay the other beneficiary, [redacted] the proffered wage of $18,283.20 per year, plus the annual living expenses of the petitioner and his dependents. Those sums are set forth below:

- 2004 – $49,046.40
- 2005 – $49,646.40.
- 2006 – $55,106.40.
- 2007 – $56,006.40.

The proprietor's tax returns reflect the following:

- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was $88,450.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was $20,609.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was $186,150.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2007 was $47,815.00.

The evidence in the record reflects that the petitioner had sufficient gross income to pay the proffered wages of both beneficiaries plus family living expenses in 2004 and 2006. However, the record does not establish that the petitioner had the ability to pay both of the proffered wages plus family living expenses in 2005 and 2007. Counsel's assertion that the petitioner's combined net income for the years 2004, 2005, 2006, and 2007 far exceeded the total proffered wage to be paid to

[2] The sole proprietor provided a self estimate of monthly recurring household expenses for 2004, 2005, 2006, and 2007. The monthly expenses listed in these reports shall be multiplied by 12 to determine the petitioner' annual living expenses for each respective year. In any further filings the petitioner should provide a breakdown detailing payments for mortgage, auto, installment loans, credit cards, household expenses and utility expenses as requested by the director.

the beneficiary for the same period is irrelevant as USCIS uses a sole proprietor's adjusted gross income as stated on the Form 1040 for each respective year to determine the petitioner's ability to pay the proffered wage. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009) and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, (E.D. Mich. 2010).

Counsel is correct in asserting that as the petitioner is a sole proprietor, his ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. The petitioner provided the deeds of four properties (including the petitioner's primary residence) and the statements of five bank accounts all dated December 31, 2005. Nevertheless, a review of these five bank statements reveals that three of the five bank accounts are held by the petitioner in trust for three other individuals, and may not be considered as assets of the petitioner. Additionally, it is not probable that the petitioner would sell a residential property that is his primary residence and other real property to pay the proffered wage. It has also not been established that these assets would be readily liquidated or that any liens or encumbrances on the assets would not exceed their value. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance of the claimed assets.

The petitioner has provided bank statements for two personally owned investment accounts, both dated December 31, 2005. The ending balances in both of these accounts are not sufficient enough to cover the full wages for both sponsored beneficiaries for 2005 on a monthly basis, in addition to the proprietor's family expenses. Adding the 2005 year-end balances in these two accounts (combined total of $17,292.73) to the petitioner's adjusted gross income from 2005 ($20,609.00) the total amount ($37,901.73) is insufficient to pay the proffered wages of both sponsored workers and the proprietor's personal household expenses.

In some cases, 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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within 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.

Counsel claims that the petitioner's net income of $7,529.00 in 2005 was attributable to a singular one-time expense incurred in that year. However, counsel fails to specify what this expense was and

neither counsel nor the petitioner has provided documentation reflecting a significant expense that caused the petitioner to have an uncharacteristically unprofitable or difficult year in 2005. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this matter, no specific detail or documentation has been provided similar to *Sonegawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are persuasive in this matter. The AAO cannot conclude that the petitioner has established that he has had the continuing ability to pay the proffered wage of both of the beneficiaries in addition to his household expenses.

Based on a review of the underlying record and argument submitted on appeal, the petitioner has not established his continuing financial ability to pay the proffered wage. 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.