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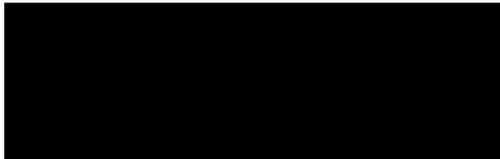
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

BE



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **DEC 30 2010**

IN RE:

Petitioner:

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:



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,

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and therefore, denied the petition.

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.

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.<sup>1</sup>

As set forth in the director's March 19, 2009 denial, the primary 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 Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 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.

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<sup>1</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).

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, 2001. The proffered wage as stated on the Form ETA 750 is \$1,524 per month (\$18,288 per year). On the petition, the petitioner claims that the business was established on October 16, 1998, and that it has a gross annual income of \$215,257 and two employees. On the Form ETA 750B signed by the beneficiary on September 11, 2001, she did not claim to have worked for the petitioner.

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, 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).

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 submitted the beneficiary's W-2 and 1099 forms. These W-2 and 1099 forms show that the petitioner paid the beneficiary \$15,300 (\$9,300 reflected on the W-2 form and \$6,000 reflected on the 1099 form) in 2006, and \$17,050 in 2007. While the petitioner established that it paid the beneficiary a partial proffered wage in 2006 and 2007, the petitioner failed to establish its ability to pay the beneficiary the full proffered wage of \$18,288 for the year of the priority date through the present through examination of wages actually paid 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. 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). 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. Therefore, USCIS will consider the individual's adjusted gross income, assets and personal liabilities as part of the petitioner's ability to pay the proffered wage. The sole proprietors must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, they 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.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The record contains the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2001 through 2007. In the instant case, the tax returns show that the sole proprietor supports herself. The sole proprietor's tax returns reflect the proprietor's adjusted gross income for the following years as below:

Year	Adjusted Gross Income <sup>2</sup>
2001	\$16,717
2002	\$16,222
2003	\$1,110
2004	\$611,731
2005	\$36,836
2006	\$5,722
2007	\$11,357

The record contains a statement of the proprietor's monthly household expenses. The statement indicates that the sole proprietor spent \$3,652 per month (\$43,824 for the year) in 2001, \$3,639 per month (\$43,668 for the year) in 2002, \$3,565 per month (\$42,780 for the year) in 2003, \$3,670 per month (\$44,064 for the year) in 2004, \$2,652 per month (\$31,824 for the year) in 2005, \$2,777 per month (\$33,324 for the year) in 2006, and \$2,802 per month (\$33,624 for the year) in 2007.

The monthly household expenses for 2005 include \$270 for PG&E, \$300 for water, \$25 for phone, \$125 for groceries, \$90 for cable, \$80 for gas and \$1,762 for mortgage. The AAO notes that while the sole proprietor claimed to pay mortgage of \$1,762 per month or \$21,144 yearly and totally spent \$31,824 for her household in 2005, the sole proprietor's tax return for that year shows that she

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<sup>2</sup> Adjusted gross income reflects on Line 33 of the Form 1040 for 2001, Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005 through 2007.

reported home mortgage interest and point of \$59,413 and totally claimed itemized deduction of \$65,051. Therefore, after carefully considering the tax returns and the statement submitted by the sole proprietor, the AAO finds that the reasonable living expenses for the sole proprietor's household in 2005 would rather be approximately \$75,731.<sup>3</sup>

The monthly household expenses for 2006 include \$300 for PG&E, \$350 for water, \$25 for phone, \$125 for groceries, \$90 for cable, \$100 for gas and \$1,762 for mortgage. While the sole proprietor claimed to pay mortgage of \$1,762 per month or \$21,144 yearly and totally spent \$33,324 for her household in 2006, the sole proprietor's tax return for that year shows that she reported home mortgage interest and point of \$72,037 and totally claimed itemized deduction of \$80,804. Therefore, after carefully considering the tax returns and the statement submitted by the sole proprietor, the AAO finds that the reasonable living expenses for the sole proprietor's household for 2006 would rather be approximately \$92,684.<sup>4</sup>

The monthly household expenses for 2007 include \$350 for PG&E, \$360 for water, \$30 for phone, \$150 for groceries, \$75 for cable, \$75 for gas and \$1,762 for mortgage. While the sole proprietor claimed to pay mortgage of \$1,762 per month or \$21,144 yearly and totally spent \$33,624 for her household in 2007, the sole proprietor's tax return for that year shows that she reported home mortgage interest and point of \$42,339 and claimed this amount as her total itemized deduction. Therefore, after carefully considering the tax returns and the statement submitted by the sole proprietor, the AAO finds that the reasonable living expenses for the sole proprietor's household for 2007 would rather be approximately \$54,819.<sup>5</sup>

Therefore, the AAO will use these amounts as the sole proprietor's household living expenses for 2005 through 2007 in determining the petitioner's ability to pay the proffered wage respectively. For 2001 through 2004, this office will consider the amounts claimed by the sole proprietor in her statement since the differences between the statement and the tax returns are not significant.

In years of 2001 through 2003, the petitioner did not pay any compensation to the beneficiary in any of these years. The sole proprietor's tax returns for these years indicate that she did not have sufficient adjusted gross income either to pay the beneficiary the proffered wage of \$18,288 or to cover her household living expenses for these years respectively. Accordingly, the petitioner failed to establish its ability to pay the proffered wage with the sole proprietor's adjusted gross income for 2001 through 2003.

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<sup>3</sup> The total itemized deduction of \$65,051 plus the expenses of 10,680 the sole proprietor claimed in her statement for utilities, cable, groceries and gas.

<sup>4</sup> The total itemized deduction of \$80,804 plus the expenses of \$11,880 the sole proprietor claimed in her statement for utilities, cable, groceries and gas.

<sup>5</sup> The total itemized deduction of \$42,339 plus the expenses of \$12,480 the sole proprietor claimed in her statement for utilities, cable, groceries and gas.

In 2004, the petitioner did not pay the beneficiary any compensation. However, the sole proprietor had adjusted gross income of \$611,731 which was sufficient to pay the full proffered wage of \$18,288 as well as to cover her household living expenses of \$44,064 for the year. Therefore, the petitioner established its ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses with the sole proprietor's adjusted gross income for 2004.

In 2005, the sole proprietor had adjusted gross income of \$36,836 and did not submit any evidence showing that it paid any compensation to the beneficiary. Although the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the full proffered wage of \$18,288, the balance of \$18,548 after paying the beneficiary the full proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses of \$75,731. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2005.

In 2006, the petitioner paid the beneficiary \$15,300 and the sole proprietor had adjusted gross income of \$5,722. Although the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the difference of \$2,988 between wages actually paid to the beneficiary and the proffered wage, the balance of \$2,734 after paying the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses of \$92,684. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2006.

In 2007, the petitioner paid the beneficiary \$17,050 and the sole proprietor had adjusted gross income of \$11,357. Although the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the difference of \$1,238 between wages actually paid to the beneficiary and the proffered wage, the balance of \$10,119 after paying the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses of \$54,819. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001 except for 2004, the petitioner failed to demonstrate that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her family's living expenses in all these relevant years.

USCIS will consider the sole proprietorship's income and the owner's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record contains bank statements. However, counsel's reliance on balances of the petitioner's business checking accounts is misplaced. If the accounts represent what appear to be the sole proprietor's business checking accounts, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Similarly, balances in the petitioner's business checking accounts under names of [REDACTED]

cannot be considered as the sole proprietor's extra liquefiable assets in determining the petitioner's ability to pay the proffered wage.

However, if the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts held by the sole proprietor personally, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. Counsel submits bank statements of the sole proprietor's checking accounts, regular saving accounts and investment CD accounts for the relevant periods. On appeal, counsel claims that the petitioner maintained consistent balance in each of the accounts to pay the prevailing monthly wage of \$1,524 on each monthly from 2001 to 2007. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, we will not consider monthly balance in a bank account towards an ability to pay a monthly proffered wage more than we would consider 12 months of assets towards paying the annual proffered wage.

Counsel asserts on appeal that the sole proprietor had a Certificate of Deposit (CD) account in the amount of over \$100,000 (account number ) which was enough to cover five and a half years of proffered wage. The record contains bank statements for the sole proprietor's personal accounts . These statements show that the sole proprietor had a balance of \$110,525.47 including balances in her senior checking account regular saving account and investment CD account on January 28, 2001, and \$143,868.42 on March 22, 2001 and \$6,244.28 on December 20, 2001, the closest day to the end of year 2001. As previously discussed, the sole proprietor had adjusted gross income of \$16,717. While the combination of the adjusted gross income and the bank account balance at the end of the year was just sufficient either to pay the proffered wage, it still could not cover the sole proprietor's household living expenses. Therefore, the sole proprietor's adjusted gross income added with the balance of bank accounts at the end of the year still cannot cover the family's living expenses in that year, and thus, the petitioner failed to establish its ability to pay the proffered wage for 2001. Counsel's reliance on the balance in the sole proprietor's bank accounts including CD account in 2001 to establish the petitioner's ability to pay is misplaced.

Bank statements submitted in the record show that the sole proprietor had a balance of \$1,358.70 on December 21, 2002, \$632.32 on December 22, 2003, \$1,804.90 on December 22, 2005, \$5,548.95 on December 20, 2006, and \$769.43 on December 20, 2007. As previously discussed, the sole proprietor's adjusted gross income was short of \$45,734 in 2002, \$59,958 in 2003, \$57,183 in 2005, \$89,950 in 2006 and \$44,700 in 2007 to pay the proffered wage and/or to cover the sole proprietor's household living expenses respectively. The petitioner failed to demonstrate that the sole proprietor had sufficient extra liquefiable assets such as balances in her personal bank accounts to cover the shortage in each of these years respectively.

The record also contains the petitioner's financial statements for the year ending on December 31, 2007. However, the financial statements are not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the

AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may also 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 failed to establish its ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses for all relevant years except for 2004 with the sole proprietor's adjusted gross income. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the six out of seven years here relevant were uncharacteristically profitable enough to pay the proffered wage for the petitioner. 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.

Counsel's assertions and evidence submitted on appeal cannot overcome the ground of denial in the director's March 19, 2009 decision. The petitioner failed to establish its continuing ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses from the year of the priority date to the present except for 2004. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.