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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

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER

OCT 20 2010
Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Nebraska Service Center. The petitioner filed a motion to reopen. The director reopened the petition and reaffirmed the denial. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 February 13, 2008 denial, the 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 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, 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 11, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 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 [REDACTED] and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary claimed to work for the petitioner since March of 2001.

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 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. 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 2001 onwards. The petitioner provided copies of W-2 Forms showing that wages were paid to the beneficiary during relevant years from 2001 through 2006, but less than the proffered wage. Thus, it will be necessary to establish that the petitioner has the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary. Those sums are set forth in the table below:

- 2001 W-2 Form wages - \$4,445.50; Petitioner must establish ability to pay \$16,354.50.
- 2002 W-2 Form wages - \$12,000.00; Petitioner must establish ability to pay \$8,800.00.

¹ 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).

- 2003 W-2 Form wages - \$11,500.00; Petitioner must establish ability to pay \$9,300.00.
- 2004 W-2 Form wages - \$12,000.00; Petitioner must establish ability to pay \$8,800.00.
- 2005 W-2 Form wages - \$12,000.00; Petitioner must establish ability to pay \$8,800.00.
- 2006 W-2 Form wages - \$12,000.00; Petitioner must establish ability to pay \$8,800.00.²
- 2007 W-2 Form wages - \$18,000.00; Petitioner must establish ability to pay \$2,800.00.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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).

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.

In the instant case, according to the sole proprietor's tax returns, the sole proprietor supported a family of two from 2001 through 2006. The proprietor's tax returns reflect the following information for the following years:

- In 2001 the proprietor's adjusted gross income (Form 1040, line 33) was \$14,289.47.

² The record closed on January 4, 2007 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the 2006 tax return was not yet due. The petitioner has, however, supplied copies of portions of its tax returns for 2001 through 2006.

- In 2002 the proprietor's adjusted gross income (Form 1040, line 35) was \$13,039.54.
- In 2003 the proprietor's adjusted gross income (Form 1040, line 34) was \$12,175.27.
- In 2004 the proprietor's adjusted gross income (Form 1040, line 36) was \$8,622.96.
- In 2005 the proprietor's adjusted gross income (Form 1040, line 37) was \$24,129.32.
- In 2006 the proprietor's adjusted gross income (Form 1040, line 37) was \$27,854.99.

In 2001 and 2004, the sole proprietor's adjusted gross income of \$14,289.47 and \$8,622.96 respectively, fails to cover the difference between the proffered wage and wages actually paid to the beneficiary of \$16,354.50 in 2001 and \$8,800.00 in 2004. As previously noted, however, the proprietor must show the ability to pay not only the difference between the proffered wage and wages actually paid to the beneficiary, but the normal living expenses for herself and dependent. Although the director asked the proprietor to provide a list of recurring household expenses in a request for evidence dated December 7, 2006, the proprietor failed to do so.³ Thus, it cannot be determined that the proprietor had the ability to pay the difference between the proffered wage and wages actually paid to the beneficiary plus the normal living expenses for the proprietor and her dependent during any relevant year (from 2001 through 2006).

On appeal, the proprietor states that the beneficiary has health issues which prevented him from working a full work schedule during the relevant period. The proprietor states that she operates her business as a hobby to occupy her free time and that she and her daughter are supported by her husband who lives in China. The proprietor states that the beneficiary needs his job or he will not be able to pay for needed healthcare. In support of the appeal, the proprietor provided copies of W-2 Forms for years 2006 and 2007 [addressed above], and copies of her 2001 through 2006 tax returns [addressed above].

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

³ The sole proprietor submitted some evidence of the petitioner's bills and the sole proprietor's expenses and assets, but nothing to clearly establish what the sole proprietor's monthly expenses have been from the time of the priority date.

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 proprietor has insufficient adjusted gross income to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2001 and 2004. As previously noted, the proprietor must also show the ability to sustain herself and her beneficiary. The proprietor did not provide her necessary living expenses, even though requested to do so by the director in a December 7, 2006 request for evidence. Thus, the proprietor has not established the ability to pay during any relevant year. The proprietor stated that she and her daughter are supported by her husband who lives in China. The proprietor did not, however, provide proof of any such support or the value of any such support. 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 proprietor also provided copies of business bank account records in support of the Form I-140 petition dated in 2006. Reliance on the balances in the proprietor's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the proprietor in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the proprietor. Second, bank statements show the amount in an account on a given date, here 2006, and cannot show the sustainable ability to pay a proffered wage from the 2001 priority date onward. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on her tax returns.

The proprietor submitted settlement statements from a real estate closing for the purchase of her residence. The evidence submitted, however, does not establish the fair market value for that real estate, provide a title examination listing any encumbrances against the property so that a determination can be made as to whether or not there is equity in the property. Further, a personal residence is not a liquefiable asset that could be used to pay employee wages. The evidence submitted regarding this asset will not be considered when determining the proprietor's ability to pay the proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the proprietor has not established that she had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the record does not establish that the beneficiary has two years experience in the proffered position as required by the Form ETA 750. 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner submitted an experience letter that written in Chinese. The translation of the letter did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Additionally, it is unclear who signed the letter on behalf of the beneficiary's prior employer. The letter does not, therefore, establish that the beneficiary was qualified to perform the duties of the position (two years experience in the proffered position) as of the priority date. In any future filings, the experience letter must meet the requirements set forth above and be accompanied by a certified translation.

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.