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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

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 02 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as an Other 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 $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

[1] The Form ETA 750, Application for Alien Employment Certification, lists the employer as Jonathan and Susan Hirschel. The petition lists Jonathan & Hirschel as the petitioner.

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 private household. It seeks to employ the beneficiary permanently in the United States as a general housekeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved 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 also determined that the petitioner had not established that, as of the priority date, the beneficiary was qualified to perform the duties of the proffered position with three months of qualifying employment experience. Therefore, the director 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.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, received on December 24, 2008, that he would be submitting a brief or additional evidence to the AAO within 30 days. *See* 8 C.F.R. § 103.3(a)(2)(viii)(which states that where counsel is granted additional time to submit a brief after the filing of the appeal, the appeal brief must be sent directly to the AAO.) The record indicates that, as of the date of this decision, no brief or additional evidence has been submitted. The AAO will consider the record complete.

As set forth in the director's November 21, 2008 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary had the required qualifications for the proffered position as of the priority date.

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 on appeal.[2]

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

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

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).

Here, the DOL accepted the petitioner's Form ETA 750 on May 2, 2001. The proffered wage as stated on the Form ETA 750 is $337.60 per week or $17,555.20 per year. The Form ETA 750 states that the position requires three months of experience in the proffered position.

The evidence in the record shows that the petitioner is structured as a private household/sole proprietorship. On the petition, the petitioner did not list: how many employees it currently employs, its gross annual income or its net annual income.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that form, 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 (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. Here, the petitioner has not established that it paid the beneficiary the proffered wage or any portion of that wage during the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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).

The petitioner is a private household/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/private households report income and expenses on their individual (Form 1040) federal tax return each year. In addition to having the ability to pay the proffered wage, 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.

Here, the record indicates that the sole proprietor is married with four dependents. Counsel indicated that the sole proprietor had submitted, on appeal, a list of his recurring monthly expenses. However, there is no such list in the A-file. The record before the director closed on February 20, 2008 when the petitioner filed the petition and supporting documentation. The petitioner submitted only the 2001 IRS Form 1040 at that time. On appeal, it submitted the 2001, 2003, 2004, 2005, 2006 and 2007 IRS Forms 1040. The petitioner did not state why it did not provide the 2002 tax return. The proprietor's tax returns reflect the following information for the following years:

- The 2001 proprietor's Form 1040, line 33, states adjusted gross income of $86,807.
- The 2002 proprietor's Form 1040 was not submitted.
- The 2003 proprietor's Form 1040, line 34, states adjusted gross income of $96,201.
- The 2004 proprietor's Form 1040, line 36, states adjusted gross income of $114,237.
- The 2005 proprietor's Form 1040, line 37, states adjusted gross income (loss) of -$31,423.
- The 2006 proprietor's Form 1040, line 37, states adjusted gross income of $62,339.
- The 2007 proprietor's Form 1040, line 37, states adjusted gross income of $88,431.

In 2001, the sole proprietor's adjusted gross income would leave the proprietor, after deducting the proffered wage, with $69,251 to cover his annual household expenses for himself and his four dependents. The proprietor failed to submit a list of his annual household expenses that this office might determine if the proprietor had sufficient net income to cover his expenses and the wage. Thus, the proprietor has not established the ability to pay the proffered wage in 2001 using his net income.

The sole proprietor did not submit financial information for 2002. Thus, the proprietor has not established that he could pay the proffered wage and cover his household expenses for himself and four dependents in 2002 using his net income.

In 2003, the sole proprietor's adjusted gross income would leave the proprietor, after deducting the proffered wage, with $78,645.80 to cover his annual household expenses for himself and his four

dependents. The proprietor failed to submit a list of his annual household expenses. Nonetheless, this office finds this amount would be sufficient to cover the expenses for a family of five. Thus, the proprietor has established the ability to pay the instant wage in 2003 using his net income.

In 2004, the sole proprietor's adjusted gross income would leave the proprietor, after deducting the proffered wage, with $96,681.80 to cover his annual household expenses for himself and his four dependents. The proprietor failed to submit a list of his annual household expenses. Nonetheless, this office finds that $96,681.80 would be sufficient to cover the annual household expenses for a family of five. Thus, the proprietor has established the ability to pay the instant wage in 2004 using his net income.

The sole proprietor suffered a loss in 2005. Thus, the proprietor has not established that he could pay the proffered wage and cover his household expenses for himself and four dependents in 2005 using his net income.

In 2006, the sole proprietor's adjusted gross income would leave the proprietor, after deducting the proffered wage, with $44,783.80 to cover his annual household expenses for himself and his four dependents. The proprietor failed to submit a list of his annual household expenses. Thus, the proprietor has not established the ability to pay the instant wage in 2006 using his net income.

In 2007, the sole proprietor's adjusted gross income would leave the proprietor, after deducting the proffered wage, with $70,875.80 to cover his annual household expenses for himself and his four dependents. The proprietor failed to submit a list of his annual household expenses. Nonetheless, this office finds that this amount would be sufficient to cover the annual household expenses for a family of five. Thus, the proprietor has established the ability to pay the instant wage in 2007 using his net income.

Thus, the proprietor failed to show the continuing ability to pay the wage from the priority date onwards through an examination of wages paid to the beneficiary (if any) and net income. It has only established an ability to pay the wage in 2003, 2004 and 2007.

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 (BIA 1967). The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000 during the 1950s through the 1960s. 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a sole proprietor's adjusted gross income, savings or various liquefiable 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.

Here, the record does not indicate how many employees the sole proprietor/private household has. Also, the proprietor did not establish a steady increase in personal wealth during the relevant period. For instance, his wages have fluctuated as follows during this period: $85,726 in 2001; $98,590 in 2003; $116,784 in 2004; $70,936 in 2005; $97,118 in 2006; and $119,267 in 2007. Moreover, the proprietor failed to provide a tax return for 2002 or other documentary evidence of his financial position in that year. Thus, the proprietor has failed to establish that his increased personal wealth over the period of analysis justifies finding that he has the ability to pay the wage, despite the low net income figures reported on his tax returns during certain years of that period. Further, the proprietor has not established: the occurrence of any uncharacteristic business expenditures or losses; or whether the beneficiary will be replacing a former employee or an outsourced service. 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.

The petitioner has failed to show the continuing ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on this basis.

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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of general housekeeper. Here, item 14 indicates that there is no educational requirement for this position. The applicant must have three months of experience in the job offered, the duties of which are listed at Item 13 of the Form ETA 750A. As this is a public record, those duties will not be repeated here. Item 15 does not list any other special requirements.

The beneficiary set forth her credentials on the Form ETA 750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 15, where the beneficiary is required to list any work experience relevant to the proffered position, she did not list any prior work experience.

The petitioner did not submit into the record any documentation related to the beneficiary's prior work experience.

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.

The director pointed out in the notice of decision that the petitioner had not provided any documentation to establish that the beneficiary had obtained three months of experience as a general housekeeper as of the priority date. The petitioner did not submit such documentation on appeal.

Therefore, the petitioner has not shown that the beneficiary was qualified as of the priority date to perform the duties of the proffered position as those qualifications are defined on the Form ETA 750. The petitioner has also failed to show an ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on both of these grounds, with each considered an independent and alternative basis of dismissal.

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.