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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: NEBRASKA SERVICE CENTER Date: SEP 16 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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

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 hairdressing business. It seeks to employ the beneficiary permanently in the United States as a hairdresser. 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 from the priority date of the visa petition onwards. 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.

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 it also has the ability to pay the wages of its other sponsored workers whose petitions were pending during the relevant period.

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.[1]

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).

Here, the DOL accepted the petitioner's Form ETA 750 on March 18, 2003.[2] The proffered wage as stated on the labor certification application is $15,433.60 per year. The Form ETA 750 indicates

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[1] 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).

that two years of experience in the proffered job are needed to perform the duties of the proffered position.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner did not state when it was established. The petition does state that the petitioner currently employs 5 workers. The petitioner listed $101,048 in gross annual income and $45,985 in net annual income on the petition.

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, 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. On the Form ETA 750B, signed by the beneficiary on February 4, 2003, the beneficiary did not indicate that she had worked for the petitioner. The 2005 Form W-2, Wage and Tax Statement, in the record reflects that the petitioner paid the beneficiary $9,120 in 2005, or $6,313.60 less than the proffered wage. The 2006 Form W-2 in the record reflects that the petitioner paid the beneficiary $13,680 in 2006, or $1,753.60 less than the proffered wage. The petitioner's July 7, 2007 pay stub in the record indicates that the petitioner paid the beneficiary $10,260 during January 1, 2007 through July 7, 2007, or $5,173.60 less than the proffered wage in 2007.[3]

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[2] United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner filed a labor certification application and immigrant visa petition for an additional beneficiary which USCIS has approved. This petition ([redacted]) has an April 19, 2001 priority date. USCIS approved that petition on March 10, 2004. The beneficiary in that matter adjusted to lawful permanent resident status on February 27, 2006. Thus, during a portion of the relevant period in this case, 2003 through 2006, the petitioner must show an ability to pay the instant wage and the proffered wage for one additional full-time sponsored worker.

[3] Any assertion that USCIS should assume that the hourly wage paid from January until July in 2007 was also paid through the end of 2007 is misplaced. USCIS will consider only the wages paid the beneficiary which are documented by the petitioner for the record. *See 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))(which states that going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings.)

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 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 (IRS Form 1040, U.S. Individual Income Tax Return) federal tax return each year. The business-related income and expenses in this case are reported on Schedule C, Profit or Loss from Business, 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.

Here, the record indicates that the sole proprietor has one dependent, his spouse. The sole proprietor submitted a statement during 2007 which lists his monthly household expenses as $892.40, or $10,708.80 annually. He submitted another statement in 2004, with an earlier filing, which lists his monthly household expenses as $3,742.28, or $44,907.36 annually. Such inconsistencies call the accuracy of the proprietor's statements regarding his expenses into question.

Doubt cast on any aspect of the proof submitted by a petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The record before the director closed on April 20, 2007 when the petitioner filed its response to the RFE. The sole proprietor's 2007 tax return was not yet available at that time. Thus, the 2006 tax return is the most recent return in the record. The proprietor's tax return reflects the following information:[4]

- The proprietor's 2003 Form 1040, line 34, states adjusted gross income of $20,460.
- The proprietor's 2004 Form 1040, line 36, states adjusted gross income of $186,608.
- The proprietor's 2005 Form 1040, line 37, states adjusted gross income of $16,504.
- The proprietor's 2006 Form 1040, line 37, states adjusted gross income of $13,680.

In 2003, after deducting the proffered wage of $15,433.60, the proprietor had only $5,026,40 remaining. This is not sufficient to cover his annual household expenses and the additional expense of the petitioner's other sponsored worker's wage. Thus, the proprietor has not shown the ability to pay the instant wage and an additional sponsored worker's wage using net income in 2003.

In 2004, the proprietor had sufficient net income to cover the instant wage, his annual household expenses and the added expense of another sponsored worker's wage. Thus, the proprietor has shown the ability to pay the instant wage and an additional sponsored worker's wage using net income in 2004.

In 2005, after deducting the portion of the proffered wage which was not paid the beneficiary that year, $6,313.60, from net income, the proprietor had only $10,190.40 remaining. This is not sufficient to cover his annual household expenses and the additional expense of the petitioner's other sponsored worker's wage. Thus, the proprietor has not shown the ability to pay the instant wage and the petitioner's other sponsored worker's wage using net income in 2005.

In 2006, after deducting the portion of the proffered wage which was not paid the beneficiary that year, $1,753.60, from net income, the proprietor had only $11,926.40 remaining. This is not sufficient to cover his annual household expenses and the additional expense of the petitioner's other sponsored worker's wage. Thus, the proprietor has not shown the ability to pay the instant wage and the petitioner's other sponsored worker's wage using net income in 2006.

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 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

[4] The sole proprietor's 2002 Form 1040 is also in the record. This covers the period just before the priority date. As such, it will not be analyzed here. It will be considered later in this analysis when considering the totality of the petitioner's financial circumstances.

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 state when the petitioner was established. The record indicates that it has 5 employees. The petitioner did not establish that it experienced unusual, steady growth since incorporating. Its gross receipts and sales have fluctuated as follows: $167,437 in 2002; $101,964 in 2003; $149,480 in 2004; $112,336 in 2005; and $115,963 in 2006. Further, the petitioner has not established: its reputation within the industry; 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.

On appeal, counsel referred to nonprecedent decisions of the AAO and of the Board of Alien Labor Certification Appeals (BALCA)[5] to support various assertions. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act.[6] However, nonprecedent decisions of the AAO and BALCA decisions are not binding on USCIS employees. *See R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), aff'd 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated).

For instance, on appeal, counsel suggested that a BALCA decision supported the finding that where, as in this case, the proprietor's net income significantly increases a year after the priority date, the petitioner has shown the reasonable expectation of its ability to pay the wage. This is not persuasive. The petitioner in this case must show the ability to pay the instant wage, an added sponsored worker's wage and the sole proprietor's annual expenses each year from 2003 through 2006, and the instant wage and the proprietor's expenses after that. *See* 8 C.F.R. § 204.5(g)(2). Further, the record reflects that in 2004 the sole proprietor's net income increased for reasons that were not related to the strength of the

[5] Counsel did not submit copies of these decisions.

[6] Also, the regulation at 8 C.F.R. § 103.9(a) indicates that precedent decisions must be designated and published in bound volumes or as interim decisions.

petitioner's business. That is, it increased because the sole proprietor sold a piece of real estate that year.

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

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.