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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 22 2011

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 $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.

Elizabeth M'Cormack

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 communication installation company. It seeks to employ the beneficiary permanently in the United States as a communication systems installer. 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's wage.

The record shows that the appeal is properly filed, 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 April 10, 2008 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)(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 at 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 filed and accepted for processing by the DOL on April 26, 2001. The rate of pay or the proffered wage set forth by the DOL is $20.94 per hour or $43,555.20 per year. The Form ETA 750 also indicates that the position requires two years work experience in the job offered.

To show that the petitioner has the ability to pay $20.94 per hour or $43,555.20 per year beginning on April 26, 2001, it submitted copies of the following evidence:

- [redacted] individual tax returns filed on Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Return, for 2001 and 2002;
- IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2003-2006;
- The beneficiary's IRS Forms 1099-MISC and W-2 for 2003-2007;
- The beneficiary's IRS Forms 1040 for 2001 and 2002;
- [redacted] personal mortgage statements for 2001 and 2002; and
- Bank statements of [redacted], wife of [redacted], for 2001-2003.

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2001 and 2002. [redacted] was the sole proprietor. The petitioner became an S Corporation with two shareholders on April 29, 2003.[1] [redacted] owns 55% of the corporation, [redacted] the other 45%. On the petition which [redacted] signed on November 13, 2006, the petitioner claimed to have initially established the business in April 1987, to currently employ 13 workers, and to have a gross annual income and net annual income of $655,919 and $391,563, respectively.

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.[2]

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

---

[1] The DOL certified the labor certification application on November 14, 2005, incorporating all changes through amendment.

[2] 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).

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 this case, in response to the director's request for evidence (RFE), [redacted] submitted a letter dated January 21, 2008 [redacted] claiming that he had employed the beneficiary since August 1998. Earlier in response to the DOL's Assessment Notice dated September 22, 2003, the beneficiary claimed he started to work for the petitioner in June 1997. The record, however, contains no independent objective evidence that can be used to verify the veracity of these claims. The beneficiary's 2001 and 2002 Form 1040 personal tax returns do not reflect that the beneficiary was employed by the petitioner in 2001 and 2002. The Forms 1099-MISC and W-2 submitted into the record reflect that the beneficiary was paid and employed by the petitioner only from 2003.

The beneficiary received the following wages from the petitioner from 2003 to 2007:

- In 2003, the beneficiary received $11,132.88[3] ($32,422.32 less than the proffered wage).
- In 2004, the beneficiary received $14,146.18 ($29,409.02 less than the proffered wage).
- In 2005, the beneficiary received $27,701.30 ($15,853.90 less than the proffered wage).
- In 2006, the beneficiary received $34,408.75 ($9,146.45 less than the proffered wage).
- In 2007, the beneficiary received $38,795.41 ($4,759.79 less than the proffered wage).

When 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 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

[3] In 2003, the beneficiary received Forms 1099-MISC and W-2 from the petitioner; he was paid $8,888 as a non-employee and $2,244.88 as an employee of the petitioner.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner, as noted earlier, was structured as a sole proprietorship in 2001 and 2002. 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). 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.

On December 14, 2007 the director requested that [redacted] submit, among other things, copies of his checking and savings accounts and a list of his monthly recurring household expenses including mortgage payments, automobile payments, installment loans, credit card payments, and household expenses in 2001 and 2002.

In response to the director's request, [redacted] provided the director with copies of monthly mortgage statements for 2001 and 2002 and bank statements for the years 2001 through 2003.[4] Both the mortgage and the bank statements are in the name of [redacted] wife, [redacted]. [redacted] While the mortgage statements reflect housing expenses, the petitioner has failed to submit evidence of other expenses. Thus, it cannot be determined whether the petitioner's adjusted gross income (AGI) for 2001 and 2001, when combined with personal assets reflected in the bank statements, are sufficient to cover the proffered wage and personal expenses.

---

[4] The 2003 bank statements will not be considered here since the business as of April 29, 2003 was no longer structured as a sole proprietorship. The petitioner is an S Corporation as of that date, and because a corporation such as the one in this case is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Consequently, the owner's personal assets in 2003 can no longer be considered as evidence of the petitioner's ability to pay.

According to the tax returns in the record, in 2001 and 2002 [redacted] and his spouse filed joint tax returns with two dependent children.

A further review of [redacted] and [redacted] tax returns reveals the following information about their gross income and ability to pay the beneficiary's wage in 2001 and 2002:

Tax Year	Adjusted Gross Income (AGI)	Annual Mortgage Payment[5]	Net Income (AGI less Annual Mortgage Payment)	The Proffered Wage[6]
2001	$28,441	$25,594.08	$2,846.92	$43,555.20
2002	$30,657	$25,594.08	$5,062.92	$43,555.20

Under these circumstances, the AAO concludes that it is highly unlikely that the petitioner could pay $43,555.20 per year on a net income of slightly more than $2,800 in 2001 and $5,000 in 2002 where he also had to support himself, his spouse and two dependent children.

As noted above, [redacted] the sole proprietor, also submitted his wife's monthly personal bank statements for the years 2001 through 2002, which, upon review, do not demonstrate that they had, on average, sufficient ending balances to pay the beneficiary's wage of $43,555.20 in both 2001 and 2002.

From 2003 thereon, the petitioner is an S Corporation.

The record before the director closed on January 29, 2008 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003-2006, as shown in the table below.

- In 2003, the Form 1120S stated net income (loss)[7] of ($6,496) (line 21 of page one).

[5] The monthly mortgage payment in 2001 and 2002 was $2,132.84; therefore, the annual payment was $25,594.08 ($2,132.84 multiplied by 12).

[6] As noted above, the record contains no evidence of the beneficiary's employment with the petitioner before 2003; therefore, the petitioner in order to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date had to be able to pay the full proffered wage or $43,555.20 in 2001 and 2002.

[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS

- In 2004, the Form 1120S stated net income (loss) of $73,165 (line 21 of page one).
- In 2005, the Form 1120S stated net income (loss) of $156,619 (line 21 of page one).
- In 2006, the Form 1120S stated net income (loss) of $96,119 (line 18 of page three).

Based on the information above, the petitioner had sufficient net income to pay the beneficiary's wage in 2004, 2005, and 2006, but not in 2003.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets (liabilities) for 2006 and 2007, as shown in the table below.

- In 2003, the Form 1120S stated net current assets (liabilities) of $34,912.

As noted above, the beneficiary has already been paid $11,132.88 in 2003 by the petitioner. To show that it has the ability to pay in that year, the petitioner has to show that it has at least $32,422.32 in net current assets. In this case, the petitioner's net current assets in 2003 are more than $32,422.32; hence, the petitioner has established that it has the ability to pay the proffered wage in 2003.

Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, with the exception of 2006, there is no additional income, credit, or deduction on the petitioner's schedule K and thus, the petitioner's net income from 2003 to 2005 is found on line 21.

[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Based on the net income and net current asset analysis above, even though the S corporation petitioner has established that it has the continuing ability to pay the beneficiary's wage, the sole proprietor petitioner has not.

On appeal, counsel for the petitioner maintains that the petitioner has the ability to pay the proffered wage. Specifically, counsel contends that the petitioner paid the beneficiary $6,000 and $10,174 in 2001 and 2002, respectively. These amounts are found in the beneficiary's individual tax returns, schedule C, Profit or Loss from Business (Sole Proprietorship). No accompanying Forms W-2 or 1099-MISC are submitted, however. Further, the beneficiary lists his business income as laborer in 2001 and his occupation as machine operator. In 2002, the beneficiary lists his business income as construction and his occupation as machine operator. None of these job titles are consistent with the job description for communication consultants on the labor certification application at part 13. Thus, the AAO will not accept these amounts as wages paid by the petitioner to the beneficiary in 2001 and 2002. 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)).

Even if the AAO were to accept counsel's assertions as true, the sole proprietorship petitioner would still not have the ability to pay the beneficiary's wage. As noted above, the sole proprietor submitted an incomplete list of household expenses; the AAO cannot determine whether the petitioner has sufficient income to pay both the proffered wage and to support himself and his family. Further, after deducting just the home mortgage from his income, the sole proprietor petitioner had to support himself, his wife, and two children on a net income of slightly above $2,800 in 2001 and a little over $5,000 in 2002. It is unlikely that he could pay the remainder of the beneficiary's wage of over $30,000 in each of those years.

Though not raised on appeal, 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. 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. As in *Sonegawa*, 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 record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage particularly in 2001 and 2002. Unlike *Sonegawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1987. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

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.