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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: MAR 21 2011

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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, 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,

Elizabeth M. McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an individual doing business as a Chinese restaurant. The business seeks to employ the beneficiary permanently in the United States as a cook helper. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted sufficient evidence to establish the petitioner has the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continually through the present. The director also determined that the petitioner had not established that the beneficiary met the one year of experience required by the labor certification at the time of filing, December 27, 2006. The director denied the petition accordingly.

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 May 21, 2009 denial, the issues in this case are 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 and whether the beneficiary met the minimum requirement of one year of experience as a cook helper at the time the labor certification was accepted for processing, December 27, 2006.

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 or seasonal 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on December 27, 2006. The proffered wage as stated on the ETA Form 9089 is $12.10 per hour, which equates to an annual salary of $25,168. The ETA Form 9089 states that the position requires 12 months of experience in the job offered.

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 in 2001 and to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on March 17, 2008, the beneficiary claimed to work full-time for the [redacted] as a cook helper from October 1, 1993 until December 31, 1995.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. On the ETA Form 9089 signed by the beneficiary on March 17, 2008, the beneficiary does not claim to have worked for the petitioner. However, the record reflects that the petitioner has paid the beneficiary wages. In the instant case, the petitioner provided Forms W-2 showing the wages it paid to the beneficiary during the time periods shown in the table below.

- In 2006, the beneficiary was paid $7,200 ($17,968 less than the proffered wage).
- In 2007, the beneficiary was paid $5,400 ($19,768 less than the proffered wage).

[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 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).

- In 2008, the beneficiary was paid $7,200 ($17,968 less than the proffered wage).

Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2006 through 2008. The petitioner must show that it can pay the remaining amounts for the years 2006 through 2008.

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*, 696 F. Supp. 2d. 813, 881 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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).

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.

The record before the director closed on April 27, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). The sole proprietor submitted copies of his individual income tax returns for the years 2006 through 2008[2], his business checking account statements for the periods January 1, 2009 through January 30, 2009; February 1, 2009 through February 28, 2009 and February 28, 2009 through March 31, 2009; his 2006-2008 FormsW-2, copies of rental receipts for February-April 2009; and a list of monthly recurring household expenses. As of the close date, the petitioner's 2008 federal income tax return was the most recent return available. In the instant case, the sole proprietor's Form 1040, U.S. Individual Income Tax Returns show that he filed as single for each year from 2006-2008. The proprietor's tax returns reflect the following information for the following years:

- In 2006, the proprietor's Form 1040 stated adjusted gross income on line 37 of $27,992.
- In 2007, the proprietor's Form 1040 stated adjusted gross income on line 37 of $40,192.
- In 2008, the proprietor's Form 1040 stated adjusted gross income on line 37 of $48,119.

The proprietor listed his household expenses as $1,200 per month totaling $14,400 annually. Accepting the list at face value, the proprietor has not shown sufficient income to pay the beneficiary's remaining wages of $17,968 for the year 2006 from the monies that remain after reducing the adjusted gross income by the amount required for the annual household expenses. The petitioner's earnings are sufficient to pay the beneficiary's proffered wage in 2007 and 2008. In 2006, the petitioner is deficient by $4,376 in making up the difference between the wages already paid and the monies that remain after reducing the adjusted gross income by the amount required for the annual household expenses.

The proprietor's ownership of personal assets will be taken into account when considering his ability to pay the beneficiary the proffered wage. The sole proprietor submitted his business checking account statements for the periods January 1, 2009 through January 30, 2009; February 1, 2009 through February 28, 2009 and February 28, 2009 through March 31, 2009 showing a total balance of $6,531.82, $6,845.71 and $7,345.82, respectively. It is noted that the sole proprietor did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. The petitioner did not submit evidence of assets in 2006. The petitioner has not established his ability to pay the proffered wage since the priority date.

The sole proprietor's assertions on appeal do not outweigh the evidence that he could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 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

[2] The petitioner had previously submitted his 2006 tax return.

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 sole proprietor has not provided sufficient financial evidence to establish his ability to pay the proffered wage in 2006. Similarly, the sole proprietor has not established that his inability to pay the wage from his net income is due to unusual or extenuating circumstances in 2006. In the instant case, the proprietor has not provided its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. Nor has the proprietor shown that unusual or extraordinary circumstances prevented it from paying the proffered wage in 2006.

Thus, in assessing the totality of the evidence submitted, the sole proprietor has not established that he had the continuing ability to pay the proffered wage from 2006 and onwards. See 8 C.F.R. § 204.5(g)(2).

Beyond the decision of the director, the petitioner has not established that the beneficiary met the one year experience requirement of the labor certification at the time of filing, December 27, 2006.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on December 27, 2006.

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). According to the plain terms of the labor certification, the applicant must have one year of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed by the [redacted] as a cook helper from October 1, 1993 until December 31, 1995.

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*, 229 F Supp. 2d 1025, 1043 (E.D. Cal 2001), *aff'd*, 345 F.3d 683 (9 Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The proprietor must submit evidence that the beneficiary obtained the required one year of experience in the job offered before December 27, 2006. The regulations at 8 C.F.R. § 204.5(g)(1) state in pertinent part that evidence relating to qualifying experience shall be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

The sole proprietor did not provide a letter from the beneficiary's previous employer, [redacted] In his response to the director's RFE dated April 25, 2009, the petitioner states that he was unable to obtain a letter from [redacted] because it was closed in March 1997. Absent evidence of [redacted] House's closure and the beneficiary's one year of experience as a cook helper, the proprietor has not established the beneficiary's qualifications as of the priority date, December 27, 2006. Simply 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)).

In conclusion, the petitioner has not established its ability to pay the proffered wage from 2006 and onwards and has not established that the beneficiary met the minimum requirements of one year of experience as a cook helper at the time the labor certification was accepted for processing, December 27, 2006. Therefore, the petition may not be approved.

Accordingly, 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.

It is also noted that an Immigration Judge found the beneficiary excludable and deportable as an immigrant not in possession of a valid immigrant visa and not in possession of valid travel documents under section 212(a)(7) of the Act. The Immigration Judge denied the beneficiary's application for asylum and withholding of deportation under sections 208(a) and 243(h) of the Act, 8 U.S.C. §§ 1158 and 1253(h). The Board of Immigration Appeals (BIA) dismissed a subsequent appeal on April 8, 1997. The beneficiary failed to appear for deportation on July 21, 1997.

ORDER: The appeal is dismissed.