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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

[Redacted]

DATE: FEB 01 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel DiToro
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 August 14, 2009 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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$24.38 per hour (\$50,710.40 per year based on 40 hours per week). The Form ETA 750 states that the position requires three years of experience in the job offered: carpenter or three years of experience in a related occupation: floor carpenter or finish carpenter.

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

On appeal, counsel submits a brief; a listing for the sole proprietor's house on Bing.com; copies of mortgage statements for the sole proprietor's house located at [REDACTED] a listing for a property located at [REDACTED] mortgage statements for the property located at [REDACTED] copies of certificates of title for three vehicles owned by the sole proprietor; a copy of Form ETA 750; copies of Internal Revenue Service (IRS) Forms 1099, which the sole proprietor issued to the beneficiary in 2001, 2002, 2003, 2004, and 2005; copies of the sole proprietor's U.S. Individual Income Tax Returns (Forms 1040) for 2001, 2002, 2003, 2004, 2005, 2006, and 2007; copies of bank statements from 2001 through 2009; and a copy of a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum issued on May 4, 2004 by Associate Director for Operations, William R. Yates.

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 1985 and currently to employ one worker. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in his assessment of the petitioner's ability to pay. Counsel asserts that the net pay from the sole proprietor's business, when combined with the wages already paid to the beneficiary, exceeds the proffered wage. Counsel also asserts that the petitioner has inventory, the cost of which should be considered towards the petitioner's ability to pay the beneficiary and that the sole proprietor has a net worth, including the value of two dwellings and funds held in bank accounts, which is sufficient to pay the beneficiary the proffered wage.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS

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).

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 provided copies of IRS Forms 1099, which he issued to the beneficiary in 2001, 2002, 2003, 2004, and 2005.

The beneficiary's IRS Forms 1099 for 2001 through 2005 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form 1099 stated compensation of \$26,186.00.
- In 2002, the Form 1099 stated compensation of \$26,595.00.
- In 2003, the Form 1099 stated compensation of \$29,491.00.
- In 2004, the Form 1099 stated compensation of \$27,478.50.
- In 2005, the Form 1099 stated compensation of \$21,660.00.

The sole proprietor demonstrated that he paid the beneficiary a portion of, but not all of the full proffered wage for each year from 2001 through 2005. Therefore, the sole proprietor must demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for each year from 2001 through 2005, that difference being \$24,524.40 for 2001; \$24,115.40 for 2002; \$21,219.40 for 2003; \$23,231.90 for 2004; and \$29,050.40 for 2005. The petitioner has not demonstrated that he employed or paid the beneficiary during 2006 or 2007.

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 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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'r 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. See *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 petitioner 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 \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$37,859.00.
- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$42,444.00.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$37,833.00.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$37,450.00.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$38,159.00.
- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$35,541.00.
- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$47,351.00.

As a sole proprietor, the petitioner must demonstrate not only the ability to pay the beneficiary from his adjusted gross income, but also the ability to support his household. To that end, the director requested and the petitioner provided a list of his recurring, monthly, household expenses for each year from 2001 through 2007. According to the sole proprietor, his expenses total \$3,723.00 per month or \$44,676.00 per year.

After deducting the sole proprietor's recurring, monthly, household expenses, the petitioner reports a deficit for each year from 2001 through 2006. In 2007, the sole proprietor has \$2,675.00 remaining. However, this sum is not sufficient to pay the beneficiary the full proffered wage. Therefore, the petitioner has not demonstrated sufficient adjusted gross income to pay the beneficiary the difference

between the wages already paid and the full proffered wage for 2001, 2002, 2003, 2004, and 2005 or the full proffered wage for either 2006 or 2007.

On appeal, counsel asserts that the sole proprietor's net income from his business, when combined with the wages which were already paid to the beneficiary, exceeds the proffered wage for each year.

As the petitioner is a sole proprietorship, the AAO would not consider the net profit from the sole proprietor's business alone. That figure is reported on the first page of the sole proprietor's U.S. Individual Income Tax Return, on line 12, as business income. As a sole proprietor, the AAO considers the petitioner's adjusted gross income as articulated above. Further, the sole proprietor provided no evidence of wages paid to the beneficiary during 2006 or 2007.

On appeal, counsel cites *Matter of Royal Antique Rugs, Inc.*, 90-INA-529 (1991 BALCA) for the premise that the value of the company's inventory may be used to determine the petitioner's ability to pay. Counsel does not state how DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Further, as inventory, counsel makes reference to two vehicles, which are owned by the sole proprietor's company. If these vehicles are used for the operation of the business, it is not reasonable to assume that the petitioner would sell the vehicles to pay the beneficiary. Further, the sole proprietor has provided no evidence demonstrating that he is willing to sell such property for purposes of paying the beneficiary. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, counsel cites *Matter of Ohsawa America*, 88-INA-540 (1988 BALCA) for the premise that the net worth of the owner of the petitioning entity may be considered in an evaluation of the petitioner's ability to pay. However, counsel does not state how DOL's BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The AAO would consider the sole proprietor's personal, unencumbered, and liquefiable assets that could reasonably be applied towards paying employee wages. However, as evidence of the sole proprietor's assets, counsel makes reference to the sole proprietor's house as well as a second property and four vehicles which the sole proprietor purportedly owns.

Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's

wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d at 1220 ; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10; *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.

The AAO has discussed the sole proprietor's vehicles above. Further, rather than providing evidence of the ownership of four vehicles, on appeal, counsel provided titles to three vehicles: a 1990 Cadillac Brougham, a 1997 Ford van, and a 1989 Ford dump truck. The petitioner provided no documentary evidence to demonstrate the current market value of the vehicles. Further, two of the vehicles belong to the petitioner's business and are used for business purposes. As a construction business, it is unlikely that the petitioner would sell vehicles which are integral to the operation of his business for purposes of paying the beneficiary.

On appeal, counsel makes reference to the sums held in the sole proprietor's bank accounts. On appeal, counsel provided statements from accounts maintained at Bank of America, LaSalle Bank, N.A., MB Financial Bank, and Mid-City National Bank.

The funds in the Mid-City National Bank (2001) and MB Financial Bank (2002 through 2007) accounts are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record of proceeding contains monthly statements from the sole proprietor's personal checking accounts maintained at Bank of America and LaSalle Bank N.A. ([REDACTED]). The accounts were opened at LaSalle Bank N.A. and were continued at Bank of America, using the same account numbers, after Bank of America purchased LaSalle Bank N.A. in 2007.² The petitioner provided all 12 monthly statements for the account ending in [REDACTED] for 2007 and 2008. For the account ending in [REDACTED], the petitioner provided only three monthly statements for 2007 and five monthly statements for 2009. However, for 2008, the petitioner provided all 12 monthly statements for the account ending in [REDACTED]. For the account ending [REDACTED], the average annual balance for 2007 was \$3,937.95 and for 2008 was \$772.08. For the account ending [REDACTED], the average annual balance for 2008 was \$3,413.39. As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages already paid to the beneficiary, from 2001 through 2005 or the full proffered wage in 2006 or 2007 based its adjusted gross income, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances, which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary, from 2002 through 2005 and the full proffered wage in 2006 and 2007.

In this case, the petitioner provided no evidence of funds in personal bank accounts in 2001, the year of the priority date. The petitioner provided no evidence of funds held in personal bank accounts for 2002, 2003, 2004, 2005, or 2006. In 2007, the average annual balance of the funds held in the sole proprietor's bank account ending [REDACTED] was \$3,937.95, which is not sufficient to pay the beneficiary the full proffered wage. Further, the sole proprietor provided only three monthly statements for his bank account (ending [REDACTED] for 2007). Therefore, he has not demonstrated an annual average balance for that account. Combining the average annual balances for the sole proprietor's two accounts for which complete sets of statements were provided [REDACTED] for 2008, results in an annual average balance of \$4,185.47. This sum is not sufficient to pay the beneficiary the full proffered wage for that year.

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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

² See <http://www.msnbc.msn.com/id/18269962/> (accessed December 10, 2012).

petitioner's sound business reputation and outstanding reputation as a couturière. 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's gross sales have been modest and declining over the course of the seven years for which the attempt was made to demonstrate the ability to pay. The petitioner paid no salaries during the same seven years, but compensated independent contractual labor. The sum paid to such workers, likewise, declined during the course of the seven years under consideration. The sole proprietor provided bank statements for his business checking account maintained at Mid-City National Bank (for 2001) and MB Financial Bank (for 2002 through 2007) in an effort to demonstrate the current assets of his business. Between 2001 and 2007, the years for which statements were provided, the sole proprietor's average annual balance declined from \$9,866.90 to \$3,859.48, corresponding with the decline in the sole proprietor's gross sales and payroll. Further, since these funds were maintained in a business checking account, they likely do not represent additional funds available to pay the beneficiary. Rather, according to the evidence, such funds are reflected on the sole proprietor's Schedule C. The net profit identified on Schedule C was brought forward each year and reported as business income on line 12 of the first page of the sole proprietor's personal income tax return. This sum was used as the basis of the sole proprietor's adjusted gross income and, as discussed above, was not sufficient both to pay the beneficiary and support the sole proprietor's household for any year from the priority date onwards. Additionally, the sole proprietor has not established the historical growth of his business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within his industry, or whether the beneficiary is 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 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.