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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

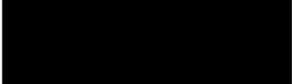
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DATE **JUL 29 2011**

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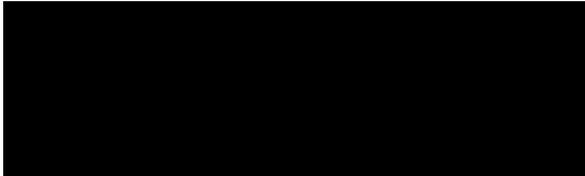
IN RE:

Petitioner: 

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:



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,

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 hair salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. 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 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 May 4, 2009, denial, the single issue in this case is whether or not the petitioner has established 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 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 October 25, 2007. The proffered wage as stated on the ETA Form 9089 is \$12.00 per hour (\$24,960 per year). The ETA Form 9089 states that the position requires 24 months of experience in the offered job.

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.<sup>1</sup>

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 1994 and to currently employ four workers. On the ETA Form 9089, signed by the beneficiary on October 24, 2007, the beneficiary claimed to have worked for the petitioner as a cosmetologist since February 13, 1999. The beneficiary also indicated that she had worked as a cosmetologist for [REDACTED] Salon from July 21, 1998, to February 3, 1999, and for [REDACTED] from December 7, 1995, to June 18, 1997; both in Santa Ana, California. The record contains corroborating employment experience letters from the manager of [REDACTED] and the owner of [REDACTED].

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 Sonogawa*, 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 the instant case, the petitioner and the beneficiary indicated on the ETA Form 9089 that the petitioner had employed the beneficiary since February 13, 1999; however, despite a request from the director, the petitioner failed to provide any documentation of the beneficiary's pay during that time period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

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<sup>1</sup> 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).

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)).

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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).

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. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).<sup>2</sup>

In the instant case, the sole proprietor supported a family of seven. The proprietor's tax return reflects an adjusted gross income<sup>3</sup> of \$61,552 in 2007. The sole proprietor's adjusted gross income exceeds the proffered wage. However, as stated above, sole proprietors must show that they can sustain themselves and their dependents in addition to paying the proffered wage. In response to the director's detailed request for such evidence, the petitioner provided evidence regarding a mortgage payment and an automobile payment. The petitioner provided copies of several utility bills, but did not indicate whether these sporadic billing amounts were indicative of normal usage during the time period in question. The petitioner did not provide any information regarding payments for insurance, credit cards, food, or other household expenses.

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<sup>2</sup> 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 or approximately thirty percent (30%) of the petitioner's gross income.

<sup>3</sup> Adjusted Gross Income as reflected on Form 1040, U.S. Individual Income Tax Return, Line 37.

The director determined that because the petitioner had failed to provide the requested information regarding household expenses, the petitioner had failed to establish the ability to pay the proffered wage. The director denied the petition accordingly.

On appeal, counsel asserts that the “petitioner’s net income exceeds the proffered wage.” However, the director’s March 3, 2009, RFE specifically requested that the petitioner provide information regarding credit card payments and other household expenses. The director’s May 4, 2009, decision specifically mentions the petitioner’s failure to provide this requested evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Further, counsel’s brief in support of the appeal ignores the petitioner’s failure to provide the requested evidence detailing the full extent of the sole proprietor’s monthly household expenses.

Counsel also asserts on appeal that “tax returns are not the only method to show the employer’s ability to pay the proffered wage.” However, counsel fails to explain what other types of documentation should be considered in this case, nor does he provide additional evidence to establish the petitioner’s ability to pay the proffered wage, other than the previously submitted tax returns. In support of his assertion, counsel cited a precedent decision from the seventh circuit court of appeals, *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7<sup>th</sup> Cir. 2009).

In *Construction and Design*, the seventh circuit directly addressed the method used by USCIS in determining a petitioner’s ability to pay the proffered wage. The court in *Construction and Design* noted that the “proffered wage” actually understates the cost to the employer in hiring an employee, as the employer must pay the salary “plus employment taxes (plus employee benefits, if any).” Pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker’s compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the “fully burdened” wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.<sup>4</sup> In this case, as noted above, the proffered wage as stated on the ETA Form 9089 is \$24,960 per year. Using the OMB-approved formula, the “fully burdened” wage rate in this case equates to \$34,944 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must actually establish its ability to pay \$34,944 per year.

Even without knowing what the petitioner’s household spent on food, insurance, credit card debt and other miscellaneous household expenses, we see that the petitioner claimed to have spent, monthly, \$1,801.71 on a mortgage, \$301.31 on a car payment, \$102.58 on electricity, \$84.37 on water, \$60.05

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<sup>4</sup> The 1.4 multiplier is based on data published by the DOL Bureau of Labor Statistics at <http://www.bls.gov/news.release/ecec.t01.htm> (last accessed July 25, 2011).

on telephone service and \$26.87 on natural gas. These expenses, alone, total \$2,376.89 per month (\$28,522.68 per year). Thus, it is improbable that the petitioner could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income in 2007 by the “fully burdened” proffered wage and the sole proprietor’s claimed personal expenses.

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 (Reg. Comm. 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 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 petitioner does not have a substantial number of employees or revenues. The petitioner has not established the historical growth of its business or its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the year in question. The petitioner had adjusted gross income of \$61,552 in 2007. The petitioner supports a family of seven. The proffered wage is \$24,960 per year, and the “fully burdened” wage pursuant to *Construction and Design* is \$34,944 per year. The beneficiary claimed to have been employed by the petitioner since February 13, 1999, however the record does not contain any documentary evidence of this alleged employment.<sup>5</sup> The petitioner failed to submit additional evidence of his monthly personal expenses when requested by the director, and again did not provide

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<sup>5</sup> It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

this evidence on appeal. 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.