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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**



B5

Date: **MAR 28 2012**

Office: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 dental clinic. It seeks to employ the beneficiary permanently in the United States as a dentist. 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 June 12, 2008 denial, the 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.¹

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within

¹ It is noted that the director treated an appeal filed on July 16, 2008 as a motion and denied it as untimely filed on August 18, 2008. The AAO will withdraw that decision. First, although both appeal and motion boxes are ticked in Part 2 of the Form I-290B, it appears most likely that this signified counsel's desire that the director first treat the appeal as a motion before forwarding it to the AAO. This is consistent with the regulation at 8 C.F.R. § 103.3. Second, it appears that the July 16, 2008 Form I-290B was timely filed. The petitioner submitted on appeal a copy of the envelope in which the June 12, 2008 decision was supposedly mailed. That envelope bears a July 13, 2008 post mark. Therefore, it appears more likely than not that the June 16, 2008 appeal was filed 33 days after mailing, not 34 days. Accordingly, as the original appeal was timely filed, the AAO assumes jurisdiction over that appeal, will consider its merits, and withdraws the August 18, 2008 motion decision. However, as noted herein, the AAO will dismiss the appeal.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$55.00 per hour (\$114,400.00 per year). The Form ETA 750 states that the position requires a dental degree.

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 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 1983 and to currently employ 10 workers. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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, 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'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. The record of proceeding contains copies of the beneficiary's IRS Forms W-2 as shown in the table below.

- In 2001, the Form W-2 stated total wages of \$45,035.00 (a deficiency of \$69,365.00).
- In 2002, the Form W-2 stated total wages of \$80,897.00 (a deficiency of \$33,503.00).
- In 2003, the Form W-2 stated total wages of \$58,950.00 (a deficiency of \$55,450.00).

² 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- In 2004, the Form W-2 stated total wages of \$37,285.00 (a deficiency of \$77,115.00).
- In 2005, the Form W-2 stated total wages of \$44,940.00 (a deficiency of \$69,460.00).
- In 2006, the Form W-2 stated total wages of \$29,400.00 (a deficiency of \$85,000.00).
- In 2007, the Form W-2 stated total wages of \$37,933.01 (a deficiency of \$76,466.99).

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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of one. The proffered wage is \$114,400.00. The sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) as follows:

- In 2001, the proprietor did not provide a tax return.³

³ The petitioner submitted its financial statements as evidence of his ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be

- In 2002, the proprietor's IRS Form 1040 stated AGI of \$84,484.00.
- In 2003, the proprietor's IRS Form 1040 stated AGI of \$9,796.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$3,099.00.
- In 2005, the proprietor's IRS Form 1040 stated AGI of \$65,327.00.
- In 2006, the proprietor's IRS Form 1040 stated AGI of \$78,866.00.
- In 2007, the proprietor's IRS Form 1040 stated AGI of \$8,918.00.

The sole proprietor must demonstrate he can cover his existing business expenses as well as pay the proffered wage out of his adjusted gross income or other available funds. In addition, the sole proprietor must show that he can sustain himself and his dependents. *See Ubeda v. Palmer, supra.*

With respect to the sole proprietor's personal expenses, the petitioner initially listed his monthly household expense total as \$441.00; however, on appeal, the petitioner listed his monthly household expense total as \$1,971.00 (\$23,652.00 annually). Although requested by the director, the petitioner has not provided objective verifiable evidence of his recurring household expenses. Furthermore, the proprietor did not list health insurance, life insurance, cable, telephone, or internet service as part of his household expenses. As the petitioner listed \$12,242.00 as medical and dental expenses on his 2007 Schedule A to Form 1040, the petitioner apparently incurs such expenses. Therefore, the household expenses listed on appeal still appear to be understated. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It is unlikely that the petitioner would have inadvertently omitted \$1,530.00 in household expenses, which is the difference between the amount initially submitted and the amount submitted on appeal. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, the sole proprietor has failed to establish his ability to pay the proffered wage as of the priority date. He has failed to establish that his AGI minus household expenses was sufficient to pay the difference between the wages paid to the beneficiary and the proffered wage in 2001 through 2007.

audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Although the petitioner submitted copies of investment account statements with interest income amounts stemming from his investments, the interest income amounts were reported on his income tax returns and accounted for in the adjusted gross income amounts. Further, the evidence is insufficient to demonstrate whether the yearly investment account balances are sufficient to establish the petitioner's ability to pay the proffered wage, or the extent to which the accounts are liquefiable, save penalties and interest for early withdrawals. Overall, the evidence submitted fails to establish the existence of a sum of money available since the priority date from which the petitioner could have paid the beneficiary the difference between the proffered wage and the wages actually paid. The total deficiency from 2001 to 2007 was \$466,000.00.

Counsel asserts that the petitioner is not obligated to show that it has paid the prevailing wage to the beneficiary, and is not required, prior to approval of the I-140 petition, to employ the beneficiary. Although the petitioner may not be obligated to demonstrate that it has paid the prevailing wage, it may establish that through the beneficiary's wages, and/or the petitioner's net income or its net current assets, it has the ability to pay the proffered wage since the priority date. It has not done so in this matter. *See* 8 C.F.R. § 204.5(g)(2).

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. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any

uncharacteristic business expenditures or losses in the relevant years. Counsel infers that the petitioner has been in business since 1983 and that the petitioner anticipates a steady increase in its income. Reliance on the petitioner's future receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient.

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.

Beyond the decision of the director, USCIS records indicate that the petitioner has filed other petitions since the petitioner's establishment. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

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.