

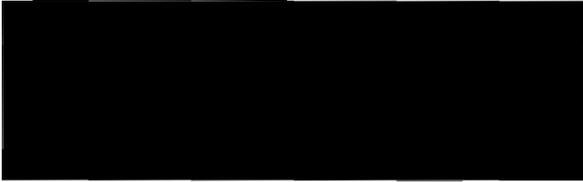
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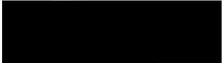
U.S. Citizenship
and Immigration
Services

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FILE:



WAC-06-011-51370

Office: CALIFORNIA SERVICE CENTER

Date: JUL 26 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner operates a board and care facility for the elderly with disabilities, and seeks to employ the beneficiary permanently in the United States as a special education teacher, secondary school ("Teacher"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's April 11, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

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 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 U.S. Department of Labor. *See* 8 CFR § 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$61,280 per year based on a 40 hour work week.² The labor certification was approved on April 21, 2005. The petitioner filed an I-140 Petition for the beneficiary on October 14, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1994; gross annual income: not listed; net annual income: -\$40,970; and current number of employees: not listed.

On April 11, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary listed that she has been employed with the petitioner from December 2000 to the present (date of signature, April 17, 2001) as a care giver. The petitioner did not submit any evidence of prior wage payment to the beneficiary. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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 proprietor, 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

² The petitioner initially listed a wage of \$10.00 per hour, but DOL required that the wage be increased to \$61,280 per year prior to certification.

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 himself, and his wife and resides in San Diego, California. The tax returns reflect the following information:

RJ HOMES OF LA JOLLA	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2003³	-\$40,790	\$84,778	\$0	-\$38,827
2002	\$50,939	\$112,440	\$17,880	\$7,746
2001	\$49,600	\$109,250	\$15,370	\$9,554

If we reduced the sole proprietor's adjusted gross income (AGI) by \$61,280, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with an adjusted gross income of: 2003: -\$102,070; 2002: -\$10,341; and 2001: -\$11,680.

The sole proprietor would be left with a negative adjusted gross income in each of the foregoing years, and, therefore, the sole proprietor's tax returns would not demonstrate that he could pay the beneficiary the proffered wage and support himself and his wife in any of the foregoing years.⁴

The petitioner additionally submitted "Property Profile" statements related to properties owned by the petitioner. The statements exhibited that the sole proprietor owned: a multi-unit property in Oceanside, California, which showed a June 16, 2005 sale amount of \$1,715,500, with a loan of \$935,000; a second property in Encinitas, California, a hotel motel with eight units showing a sale amount of \$851,000, as of June 18, 2003, with a loan of \$64,500; and a third property in Vista, California purchased in 1999 at an amount of \$200,000 with a loan of \$159,920. The sole proprietor provides that the total value of the properties is: \$2,766,500, with loans in the amount of \$1,159,420, and equity in the amount of \$1,607,080. The sole proprietor asserts that he could pay the beneficiary's salary from equity established in the three properties if necessary, but that the business has been able to cover its expenses and even show a profit.

The properties are all, however, still subject to loans, and, therefore, are not personal unencumbered and readily liquefiable assets. Based on the sole proprietor's tax returns, the three properties generate rental income (already considered in the sole proprietor's adjusted gross income), but are subject to mortgages. The mortgage payments, loss of rental income, or substantial repairs could all impact the sole proprietor's income. Further, we note that businesses typically do not leverage real property to pay employee wages.

Based on an examination of the petitioner's adjusted gross income with the beneficiary's wage subtracted, the sole proprietor would be left with negative income and would need to rely on personal assets himself in all of the foregoing years. The sole proprietor has not provided an estimate of living expenses so that we cannot

³ The sole proprietor did not provide his 2004 individual tax return with Schedule C. The sole proprietor did note that he filed for an extension to file his 2004 tax return. The petitioner did not provide this return on appeal, which presumably should have been available by the time of filing the appeal.

⁴ Further, we note that the sole proprietor did not provide an estimate of monthly household expenses with supporting documentation for CIS to determine the amount the sole proprietor would need to support himself and his wife after paying the proffered wage.

determine the amount of funds that he would require to support himself and his wife, and what if any funds the sole proprietor would have left available.

As the sole proprietor has not provided any evidence related to readily liquefiable personal assets, we would not conclude that the sole proprietor could support himself and his wife and pay the proffered wage.

On appeal, counsel provides that CIS should consider the petitioner's overall circumstances and cites to *Big Joy Chinese Restaurant*, 1988-INA-354 (1999 BALCA), and to *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) in support.

First, we note that while 8 C.F.R. § 103.3(c) provides that precedent decisions CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished 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 cases that counsel has cited are not binding precedent and were issued by an appellate unit falling under the Department of Justice, both of which are unrelated to the AAO.

Second, if we were to examine the petitioner's overall circumstances, we would not conclude that the petitioner can pay the proffered wage. It is unclear from the record how many individuals the petitioner employs. The sole proprietor's Schedule C reflects that the petitioner has not paid more than \$20,000 in wages in any of the years for which tax returns were provided, and the proffered wage for the beneficiary is three times that amount - \$61,280. It is unclear how many residents the petitioner cares for, or that the services of a teacher would be required for those residents.⁵

Counsel contends that the sole proprietor owns three properties and can draw on the equity of those properties, and that the sole proprietor owned those properties as of the priority date. As noted above, the three properties are not immediately liquefiable and are subject to three loans themselves. The sole proprietor did not provide the amount owed monthly in mortgage payments, or how much the sole proprietor would need to draw out to support himself and his wife. Further, any borrowing against established equity would create new liabilities and debts for the sole proprietor. The petitioner did not provide any documentation of immediately available assets, such as funds held individually by the sole proprietor in bank accounts, or bank accounts for the petitioner's business.

⁵ Further, we note that the beneficiary's ETA 750B provided that the petitioner has employed her as a caregiver, with job duties including: "provide necessary care and supervision of elderly residents; assist the elderly in dressing, bathing, feeding and all their daily needs; supervise the elderly daily activities; may apply compresses and hot water bottles as directed by the Nurse or Physician." Her current duties diverge from the ETA 750A job duties: "Teach elderly with disabilities or handicapped their daily living skills including hygiene, safety motor skills, visual skills, personal care skills; develop plans for rehabilitative training; and assist in food preparation." The petitioner added the following additional job duties prior to DOL certification: "prepare develop plan for daily activity programs to promote interaction, considering physical, emotional and educational levels and development." A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Based on the current wages paid, and the beneficiary's current position, it is questionable that the petitioner will employ the beneficiary in accordance with the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979).

Counsel additionally cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) that CIS should consider the petitioner's reasonable expectation of an increase in business or profits.

Matter of Sonogawa, 12 I&N Dec. 612 relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance. Counsel, here, has not provided any evidence parallel to the facts of *Sonogawa*, or to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the proffered wage.

Counsel contends that CIS should consider that by adding the beneficiary's services as a teacher, the petitioner's business will be more successful. The petitioner has not provided any estimates for the amount it presently charges its residents, or the increase that it would expect to charge its residents for the beneficiary's added services and the amount of additional revenue that increase would generate. Further, based on the sole proprietor's tax returns, he would need to increase charges significantly in order to pay the beneficiary the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing, the petitioner has not demonstrated that the sole proprietor can support himself and his spouse, and pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

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.

ORDER: The appeal is dismissed.