

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

BC

FILE:

SRC 07 234 51046

Office: TEXAS SERVICE CENTER

Date: **MAY 27 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom

Acting Chief, Administrative Appeals Office

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

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as an assistant horse trainer. As required by statute, the petition is accompanied by 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. 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 July 10, 2008 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 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 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 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 Form ETA 9089 was accepted on February 7, 2007. The proffered wage as stated on the Form ETA 9089 is \$19,136.00 per year. The Form ETA 9089 states that the position requires 24 months of experience in the job offered.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal counsel has submitted a brief, an Equine Portfolio Appraisal and supporting documents, a summary table showing the proffered wage and wages actually paid to individuals on whose behalf the petitioner has filed a preference visa petition, and copies of W-2 Wage and Tax Statements issued to individuals on whose behalf the petitioner has filed a preference visa petition. Other evidence in the record includes the IRS Form 1040 Individual Income Tax Returns for [REDACTED] for the years 2006 and 2007, and copies of the Form W-2 Wage and Tax Statements issued to the beneficiary by the petitioner for the years 2006 and 2007.

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 2002, to have gross annual income of \$1,292,117.00 and net annual income of -\$51,743.00, and to currently employ 25 workers. On the ETA Form 9089, signed by the beneficiary on July 7, 2007, the beneficiary claimed to have worked for the petitioner since January 1, 2004.

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, U.S. 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 submitted copies of Form W-2 Wage and Tax Statements issued to the beneficiary for the years 2006 and 2007.<sup>2</sup> The

---

<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).

<sup>2</sup> As the priority date was established on February 7, 2007, the date that the ETA 9089 was filed, the petitioner was not required to establish its ability to pay the proffered wage in 2006. However, information from 2006

W-2 Wage and Tax Statements from 2007 shows that the petitioner paid the beneficiary \$32,060.00 that year, which is in excess of the proffered wage. However, the director noted that the petitioner had filed several preference visa petitions and therefore the petitioner was required to establish its ability to pay each of the beneficiaries. Specifically, USCIS records show that the petitioner submitted seven preference visa petitions in 2007, including the instant petition. On appeal, counsel has provided the proffered wage for each beneficiary, as well as copies of the W-2 Wage and tax Statements showing wages actually paid to each beneficiary.

Beneficiary	Receipt Number	Proffered Wage	Wages Actually Paid
	SRC 07 234 51046	\$19,136.00	\$32,060.00
	SRC 07 236 52425	\$19,136.00	\$31,480.00
	SRC 07 140 51275	\$18,533.00	\$21,088.00
	SRC 07 235 50441	\$32,219.00	\$16,660.00
	SRC 07 234 51057	\$18,553.00	\$15,114.00
	SRC 07 234 51003	\$19,136.00	Not employed by petitioner
	SRC 07 234 50939	\$32,219.00	\$21,300.00

The petitioner paid the following beneficiaries in excess of the proffered wage: [REDACTED] and [REDACTED]. For the remaining beneficiaries, the petitioner must establish its ability to pay the difference between the proffered wage and the wages actually paid to those beneficiaries. This amounts to a total of \$49,053.00.

If the petitioner does not establish that it employed and paid the beneficiaries 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. 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

---

will be considered generally in determining the petitioner's ability to pay the proffered wage.

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 (7<sup>th</sup> 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.

In the instant case, the sole proprietor filed her 2007 tax return as the "head of household" and did not list any dependents. The sole proprietor's adjusted gross income for 2007 was -\$310,351.00. Although the sole proprietor did not submit a list of monthly expenses, as requested by the director, it is obvious that the adjusted gross income figure of -\$301,351.00 would not enable the sole proprietor to cover the difference between the proffered wages and the wages actually paid to the beneficiaries.

On appeal counsel states that the sole proprietor had sufficient assets to "offset the losses sustained by the business, sustain herself, and satisfy the deficit between the wages paid to the beneficiaries and the proffered wages."<sup>3</sup> Specifically, counsel states that the sole proprietor currently owns an interest in 21 thoroughbred horses with an appraised value of \$743,582.50 and that the sole proprietor could sell these horses to generate needed revenue. In support of this claim, counsel has submitted an "Equine Portfolio Appraisal" from [REDACTED] Chairman of Dapple Bloodstock. However, the regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner's ability to pay the proffered wage must be established by tax returns, annual reports, or audited financial statements. In this matter, the petitioner has not submitted such evidence describing her assets and liabilities. Instead, the petitioner has submitted an appraisal by a third party. It does not appear as if this appraisal meets the requirements of an audited financial statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden

---

<sup>3</sup> Counsel also contends on appeal that the director erred under 8 C.F.R. § 103.2(b)(8) by failing to raise the issue of multiple beneficiaries in the Request for Evidence issued on March 27, 2008. This is incorrect. Once the petitioner responded to the director's RFE, all required initial evidence had been submitted. The director found that eligibility had not been established and, in accordance with 8 C.F.R. § 103.2(b)(8)(iii), denied the petition. 8 C.F.R. § 103.2(b)(8)(iii) states "If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility . . ." Regardless, as the petitioner submitted additional evidence on appeal pertaining to this issue, it is unclear what remedy would have been appropriate other than the consideration of this evidence by the AAO on appeal, even assuming the director erred.

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)).

Furthermore, the appraisal report is dated July 10, 2008. As noted above, the priority date in this case is February 7, 2007. No evidence has been provided regarding the sole proprietor's assets at the time of the priority date. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.<sup>4</sup>

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.

---

<sup>4</sup> Furthermore, it is noted that the evidence in this matter does not warrant approval under a totality of the circumstances analysis. *See Matter of Sonogawa*, 12 I&N Dec. 612. The decision in *Sonogawa* related to a petition filed during uncharacteristically unprofitable or difficult years in a framework of profitable or successful years. 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. Clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*. The petitioner did not establish a pattern of profitable or successful years, that 2007 was uncharacteristically unprofitable or difficult for some reason, or that it has a sound business reputation. Instead, as noted above, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the ability to pay the proffered wage.