

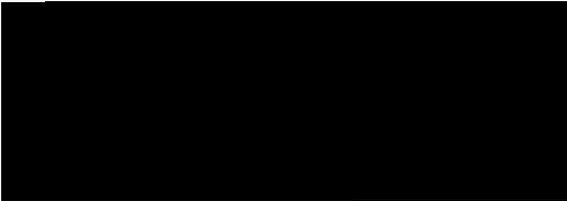
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U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **NOV 17 2009**

SRC 07 279 50294

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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).

Perry Rhew
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 laboratory equipment sales and service business. It seeks to employ the beneficiary permanently in the United States as a technician. 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 for 2001, 2002, 2003, 2004 and 2005. The director denied the petition accordingly.

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.

As set forth in the director's May 6, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$640.00 weekly (\$33,280.00 per year). The Form ETA 750 states a minimum level of

eight years education, a minimum level of one year training, and a minimum level of one year experience are required in the job offered.

The record before the director closed on April 8, 2008 with the receipt by the director of the petitioner's response to the director's request for evidence (RFE). As of that date, the petitioner's 2007 federal income tax return was not yet due. Prior to addressing whether the petitioner has the ability to pay the proffered wage, the AAO notes that the petitioner filed the Form ETA 750 under the name Jenda Scientific, Inc. on April 30, 2001. The Form ETA 750 was certified by the Department of Labor on February 5, 2007. On February 6, 2007, the DOL amended the name of the petitioner on the Form ETA 750 to be JendaLab Products, LLC. The AAO notes that the Department of Labor accepted the corrections to the Form ETA 750 that reflect the new ownership. As such, the AAO finds that JendaLab Products, LLC is a successor-in-interest to Jenda Scientific, Inc. In order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage.

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.¹ On appeal, a statement from Joseph Seboek, a Form 1120S, U.S. Income Tax Return for an S Corporation for Jenda Scientific, Inc. for 2005, bank statements for JendaLab Products, LLC and Jenda Scientific, Inc were submitted. The record also includes an offer of employment for the beneficiary; Form 1040, Schedule C tax statements for JendaLab Products, LLC for 2005 and 2006, W-2 Forms for the beneficiary for 2004, 2005 and 2006, a letter of employment for the beneficiary, and Forms 1120S, U.S. Income Tax Return for an S Corporation for Jenda Scientific, Inc. for 2001, 2002, 2003 and 2004.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.² On the petition, the petitioner claimed to have been established in 1995 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, 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 an ETA 750 labor certification application establishes a priority date for any immigrant petition later

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).

² The AAO notes that in 2004 and 2005, the petitioner changed from Jenda Scientific, Inc. which was structured as an S corporation to JendaLab Products, LLC which resulted in a C corporation.

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. 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. Although the petitioner does not assert that it has employed the beneficiary, the record includes W-2 Forms from the petitioner after the corporation change. The W-2 Forms show that JendaLab Products, LLC paid the beneficiary \$14,266.75 in 2004, \$24,568.82 in 2005, and \$27,112.49 in 2006. As such, the petitioner has not established that it has employed and paid the beneficiary an amount at least equal to the proffered wage.

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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of

tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the record includes Forms 1120S, U.S. Income Tax Return for an S Corporation for Jenda Scientific, Inc. for 2001, 2002, 2003, 2004 and 2005. The record also includes Forms 1040, Schedule C, Profit or Loss from Business (Sole Proprietorship) for the proprietor [REDACTED] of JendaLab Products, LLC for 2004, 2005 and 2006. Jenda Scientific, Inc.'s tax returns demonstrate its net income for 2001, 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of \$12,430.00.
- In 2002, the Form 1120S stated net income of \$17,176.00.
- In 2003, the Form 1120S stated net income of \$19,416.00.
- In 2004, the Form 1120S stated net income of \$24,123.00.
- In 2005, the Form 1120S stated net income of \$36,255.00.

The AAO notes the record does not include a Form 1120S, U.S. Income Tax Return for an S Corporation for Jenda Scientific, Inc. for 2006. Therefore, for the years 2001, 2002, 2003, 2004 and 2006, Jenda Scientific, Inc. did not have sufficient net income to pay the proffered wage of \$33,280.00 per year. The AAO notes that in 2005, Jenda Scientific, Inc. demonstrated its ability to pay the proffered wage.

The record also includes Forms 1040, Schedule C, Profit or Loss from Business (Sole Proprietorship) for the proprietor [REDACTED] of JendaLab Products, LLC for 2004, 2005 and 2006.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the record does not include the complete Form 1040, only the Schedule C. As such, the record does not include information regarding how many family members the sole proprietor supports. The proprietor's Schedule C tax returns reflect the following information for the following years:

	<u>2004</u>
Proprietor's gross income (Form 1040, Schedule C, line 7)	\$65,372.00
	<u>2005</u>
Proprietor's gross income (Form 1040, Schedule C, line 7)	\$217,752.00
	<u>2006</u>
Proprietor's gross income (Form 1040, Schedule C, line 7)	\$209,575.00

As previously noted, the AAO notes that although the Form ETA 750 states the beneficiary has not worked for the petitioner, the record includes W-2 Forms for the beneficiary for 2004, 2005 and 2006 showing that he worked for JendaLab Products, LLC. In 2004 the beneficiary earned \$14,266.75, in 2005 he earned \$24,568.82, and in 2006 he earned \$27,112.49. As such, the petitioner needs to show the ability to pay the difference between wages paid and the proffered wage.

When looking at the gross income of JendaLab Products, LLC for 2004, 2005 and 2006, the AAO is unable to determine whether it has demonstrated the ability to pay the difference between wages paid and the proffered wage, as the complete Form 1040 tax statements are not included in the record and the record fails to include information regarding the number of dependents, if any, the sole proprietor was supporting.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The AAO notes that the record fails to include the Schedules L for Jenda Scientific, Inc. for 2001, 2002, 2003 or 2006. As Jenda Scientific, Inc. has already demonstrated its ability to pay the proffered wage for 2005, those tax return will not be analyzed.

- In 2004, the Form 1120S stated net current assets of \$3,030.00.

Therefore, for the years 2001, 2002, 2003, 2004 and 2006 Jenda Scientific, Inc. did not have sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

█ asserts that USCIS should take into account the bank statements for Jenda Scientific, Inc. and JendaLab Products, LLC. █ reliance on the balances in Jenda Scientific, Inc.'s bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered in determining the petitioner's net current assets. The record of proceeding also contains bank statements from JendaLab Products, LLC's checking and money market accounts covering the period December 1, 2005 through December 30, 2005 and January 1, 2005 through January 31, 2005. The AAO notes that these bank statements cover a two month period and therefore are insufficient to demonstrate JendaLab Product, LLC's ability to pay the proffered wage for 2001, 2002, 2003, 2004, 2005 and 2006.

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 (BIA 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. 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 was established in 1995. Based on the tax returns in the record, Jenda Scientific, Inc. demonstrated that it paid out salaries or wages in the amounts of \$4,792.00 in 2001, \$20,137.00 in 2002, \$23,809.00 in 2003, \$8,115.00 in 2004, and \$0 in 2005. Based on the Form I-140, the petitioner claims to employ three workers. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003, 2004, 2005 or 2006 were uncharacteristically unprofitable years for the petitioner. 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The appeal will be dismissed.

ORDER: The appeal is dismissed.