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



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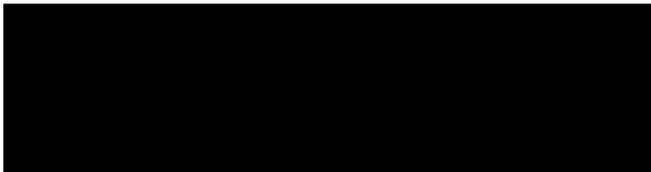
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 07 079 53786

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station, garage, and mini market. It seeks to employ the beneficiary permanently in the United States as a gas station manager. As required by statute, the petition is accompanied by an 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.

On appeal, the petitioner, through current counsel, asserts that its failure to submit the requested evidence in response to the director's instructions was due to the ineffective assistance of prior counsel. Current counsel also maintains that the acquisition of a duplicate labor certification is the director's responsibility.

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.

Current counsel indicated on the notice of appeal (Form I-290B) that a brief and /or additional evidence would be submitted to the AAO within 30 days. Nothing further has been received to the record in the last sixteen months since the appeal was filed. Therefore, this decision will be rendered on the record as it currently stands.

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).

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 Form ETA 750, 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 Form ETA 750, 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 Form ETA 750 was accepted on December 23, 1997. The proffered wage as stated on the Form ETA 750 is \$17.80 per hour, which amounts to \$37,024 per year. On the Form ETA 750, signed by the beneficiary on December 12, 1997, the beneficiary does not claim to have worked for the petitioner. Subsequent evidence indicates that the petitioner has employed the beneficiary in 2006, but no commencement date has been specified.

One of the issues in this case is the lack of the original labor certification accompanying the I-140, Immigrant Petition for Alien Worker. The record indicates that the petitioner has filed two I-140s on behalf of the beneficiary. The first was filed on March 10, 2003. The instant I-140 was filed on January 22, 2007. Neither was submitted with the original ETA 750 as required by 8 C.F.R. § 204.5(g)(1). The petitioner failed to provide the original in response to the director's request in the 2003 proceedings. Copies of the ETA 750 were submitted instead.² It is unclear when or if the director may have requested a duplicate labor certification in writing from DOL pursuant to 20 C.F.R. § 656.30. The record is incomplete in that respect. For that reason, the AAO will reserve a decision on that issue and address the petitioner's ability to pay the proffered wage and the claim of ineffective assistance of former counsel.

On Part 5 of the I-140, the petitioner claims to have been established on January 1, 1984, to generate \$35,043 in gross annual income, \$33,925 in net annual income and to currently employ three workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application 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. Comm.

² Prior counsel asserts that it filed three I-140 applications on the beneficiary's behalf. Counsel does not cite to, or submit a receipt number to identify this application.

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 overall 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 director requested that the petitioner provide a Wage and Tax Statement (W-2) or Form 1099 (Miscellaneous Income) for any year that it employed the beneficiary. In response, the petitioner provided a copy of a W-2 showing that the petitioner paid \$36,400 in wages to the beneficiary in 2006, or \$624 less than the proffered wage of \$37,024.³

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). 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).

In support of its ability to pay the proffered wage of \$37,024, the petitioner submitted copies of the individual federal tax return (Form 1040) of the owner and his spouse for 1997 through 2006. They reflect that owner and his spouse filed jointly and claimed no dependents on the returns filed during these years. The tax returns contain the following information:

Year	1997	1998	1999	2000
Wages	\$7,800	\$7,800	\$ 8,800	\$8,000
Business Income	\$13,483	\$1,630	- \$ 14,680	-\$1,769

³ The petitioner did not submit a W-2 statement for any other year from 1997 onward. It is noted that Form G-325, filed with the beneficiary's adjustment of status application, signed by the beneficiary on January 5, 2008, does not list his employment with the petitioner. 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).

Adjusted Gross Income ⁴	\$20,330	\$9,372	- \$ 5,880	\$ 351
Year	2001	2002	2003	2004
Wages	\$10,400	\$10,400	\$2,200	\$10,400
Business Income	\$15,607	\$16,090	\$22,852	\$12,705
Adjusted Gross Income	\$19,035	\$25,442	\$33,513	\$22,286
Year	2005	2006		
Wages	\$17,600	\$20,800		
Business Income	\$15,816	\$14,474		
Adjusted Gross Income	\$33,925	\$58,139		

The entity specified on Schedule C of the individual tax returns submitted to the record indicate that the petitioner was operated as a sole proprietorship, or 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). For that reason, sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. In the instant case, the director requested an itemization of the petitioner's monthly recurring household expenses including but not limited to mortgage or rent, automobile payments, utilities, food, installment loans, etc. The petitioner's response failed to include this documentation. This failure was noted by the director in his denial. 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).

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.

⁴ Adjusted gross income is shown on line 32 in 1997; line 33 of the Form 1040 in 1998, 1999, 2000, 2001; line 35 in 2002; line 34 in 2003; line 36 in 2004; line 37 in 2005 and 2006.

In this case, although the sole proprietor has fewer dependents than *Ubeda*, even without considering any household expenses, the proffered wage of \$37,024 exceeds the petitioner's reported adjusted gross income as shown on each of the tax returns (except for 2006). Although payment of compensation to the beneficiary in 2006, along with sufficient funds to cover the \$624 difference between the actual wages paid and the proffered wage establishes the petitioner's ability to pay in this year, the evidence fails to demonstrate that the petitioner had the continuing ability to pay the certified wage of \$37,024 in any of the remaining nine years. The petitioner has not demonstrated that it had the *continuing* financial ability to pay the proffered wage as of the priority date of December 23, 1997, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).

In some cases, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within 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. 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.

In this case, former counsel described some of the petitioner's modifications which have occurred over the years, including photos of the petitioner's reconstruction project in 2005, it does not outweigh the evidence contained in the tax returns. Moreover, former counsel's undocumented assertions do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although the petitioner may have been in business for a number of years, its net profits reflected as business income on the respective tax returns, set forth above, have been extremely modest, including two years (1999 and 2000) showing losses. This evidence does not establish a framework of profitability as in *Sonogawa*. Unlike the *Sonogawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

In regard to current counsel's claim on appeal that the petitioner's failure to provide certain evidence on appeal was due to former counsel's ineffective assistance, it is noted that any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this case, current counsel failed to submit any additional evidence or brief within the period requested on appeal. There is no evidence that has been provided to the record that demonstrates that the three requirements cited above have been fulfilled. Therefore, the AAO concludes that this claim has no merit.

As set forth above, the petitioner has failed to demonstrate its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).

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.