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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

OCT 02 2009

SRC 06 009 50355

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, 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.2(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence and affidavits with the motion demonstrates that the petitioner has established its ability to pay the proffered wage as of the priority date of April 30, 2001.

The petitioner is a landscaping business. It seeks to employ the beneficiary permanently in the United States as a spray, lawn, and tree supervisor. 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 AAO concurred with the director's decision on appeal.

The record shows that the motion 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 AAO's August 28, 2007 dismissal, 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 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 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 \$33,769 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of spray, lawn, and tree supervisor or two years experience in the related occupation of crew worker.

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 motion, counsel submits a brief, a copy of the sole proprietor's profit sharing plan with Tip Top Roofing & Sheet Metal, Inc. for the year ending December 31, 2002, a partial copy of the I-140 Immigrant Petition for Alien Worker "SOP" from I-Link (CD information), a copy of the 2007 Poverty Guidelines, a partial copy of the sole proprietor's 2005 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, a copy of the 2005 Form 1099-

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).

MISC, issued by the petitioner on behalf of the beneficiary, copies of the sole proprietor's 2001 and 2002 personal assets with no lien, and copies of affidavits from individuals who know the sole proprietor, [REDACTED] and [REDACTED]. Other relevant evidence in the record includes the first two pages of the sole proprietor's 2005 Form 1040, copies of the sole proprietor's 2001 through 2004 Forms 1040, including Schedule Cs, copies of the 2001 through 2004 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, a letter, dated March 23, 2006, from [REDACTED] Certified General Real Property Appraiser, and a copy of a webpage for Kelley Blue Book. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1988 and to currently employ 7 workers. On the Form ETA 750B, signed by the beneficiary on November 6, 2001, the beneficiary claims to have been employed by the petitioner from March 1999 to the present (November 6, 2001). In addition, counsel has submitted the 2001 through 2005 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, in corroboration of the beneficiary's claim. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$33,769 and the actual wages paid to the beneficiary during those years. In the years 2001 through 2005, the beneficiary was paid wages by the petitioner of \$19,447.50, \$21,507.38, \$23,916.75, \$29,689, and \$32,101.25, respectively. Therefore, the difference between the proffered wage of \$33,769 and the actual wages paid to the beneficiary in 2001 through 2005 was \$14,321.50, \$12,261.62, \$9,852.25, \$4,080, and \$1,667.75, respectively.

On motion, counsel asserts that the petitioner has established its ability to pay the proffered wage based on prorating the beneficiary's salary in 2001 from the priority date until the end of the year, by using the Poverty Guidelines, by the value of the sole proprietor's real estate, by the value of the sole proprietor's firearm collection, and by loans from personal friends.

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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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).

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 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 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 supported a family of three in 2001 through 2005. The sole proprietor's tax returns reflect the following information for the following years:

In 2001, the sole proprietor's adjusted gross income (Form 1040, line 33) was \$26,914.

In 2002, the sole proprietor's adjusted gross income was \$44,729.

In 2003, the sole proprietor's adjusted gross income was \$39,638.

In 2004, the sole proprietor's adjusted gross income was \$29,486.

In 2005, the sole proprietor's adjusted gross income was \$54,223.

While it appears that the sole proprietor had sufficient funds to pay the difference between the proffered wage of \$33,769 and the wages actually paid to the beneficiary in 2001 through 2005, the

sole proprietor has once again failed to submit a list of his monthly personal recurring expenses.² Therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the difference between the proffered wage of \$33,769 and the actual wages paid to the beneficiary and support a family of three in 2001 through 2005. Thus, the petitioner has not established its ability to pay the proffered wage in 2001 through 2005.

On motion, counsel claims that the petitioner has established its ability to pay the proffered wage based on prorating the beneficiary's salary in 2001 from the priority date until the end of the year, by using the Poverty Guidelines, by the value of the sole proprietor's real estate, by the value of the sole proprietor's firearm collection, and by loans from personal friends.

Counsel is mistaken. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. As previously explained in the AAO's August 28, 2007 decision, we will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel states that the I-140 USCIS Standard Operating Procedure (SOP), 5-152 states "The Federal Poverty Guidelines for the year that the priority date is established may be used as a reference point for evaluating ability to pay." However, again as stated in the AAO's August 28, 2007 decision, the AAO does not recognize the Poverty Guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses, and, therefore, they will not be considered when determining the ability to pay the proffered wage. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time USCIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support.³ Furthermore, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are

² The director had requested in a Request for Evidence (RFE) that the sole proprietor submit a list of his monthly expenses. The AAO further noted in its August 28, 2007 decision that the sole proprietor failed to submit a list of his monthly person expenses.

³ The Affidavit of Support is utilized in some cases at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to USCIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding.

published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.").

On motion, counsel has requested an additional 30 days to provide evidence of the ability of the sole proprietor's friends to loan them money using the \$8,000 acre of land and assets as collateral, to compile a list of the sole proprietor's personal recurring monthly expenses, and to have the sole proprietor's firearm collection, believed to be valued at \$25,000 appraised. Counsel dated the motion October 12, 2007. As of this date, more than 23 months later, the AAO has received nothing further.

The land valued at \$8,000 is considered to be a long term asset (having a life longer than one year), and its value is not considered to be readily available to pay the proffered wage to the beneficiary as it is not easily converted into cash. In addition, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

With regard to the sole proprietor's firearm collection, the petitioner has not submitted any evidence of its value. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With regard to the sole proprietor's retirement account, the sole proprietor has failed to submit a list of his personal recurring expenses, and therefore, even if the AAO included the sole proprietor's retirement account, the AAO would still be unable to determine if the sole proprietor had sufficient funds to pay the proffered wage and support a family of three with the sole proprietor's expenses from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Additionally, the retirement account information was dated December 12, 2002. If assets are held in stocks, or stock funds, the account value may now be substantially less. Nothing shows the value of the account at year end for 2003, 2004, 2005, and onward.

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 on the Form I-140, the petitioner claims that the business was established in 1988. The petitioner has provided Forms 1040 for the years 2001 through 2005 with none of the tax returns establishing the sole proprietor's ability to pay the proffered wage. In addition, the petitioner's tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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 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. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO's decision of August 28, 2007 is affirmed. The petition remains denied.