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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



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
LIN 08 139 50831

Office: NEBRASKA SERVICE CENTER

Date: OCT 26 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

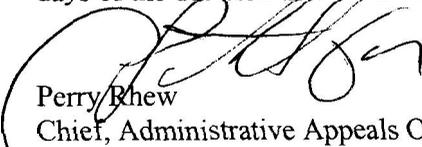
ON BEHALF OF PETITIONER:



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).


Perry Rhew
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 operates a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a care provider. As required by statute, the petition is accompanied by a Form 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 counsel, asserts that the director failed to consider the owner's individual retirement account (IRA) in support of the petitioner's 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 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)(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 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 ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the priority date is July 15, 2004. The proffered wage as stated on the ETA 750 is 10.00 per hour, which amounts to \$20,800 per year.

On the ETA 750, signed by the beneficiary on May 20, 2004, 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 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the surrounding 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, or that its net income or net current assets could cover the difference between the actual wages paid and 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 record does not indicate that the petitioner employed the beneficiary.

Evidence of the petitioner's ability to pay the proffered wage was provided. The petitioner is structured as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$20,800 per year as of the priority date and in response to the director's request for additional evidence, the petitioner provided incomplete copies of the sole proprietor's U.S. Individual Income Tax Return for 2004, 2005, 2006, and 2007. The tax returns submitted reflect that the sole proprietor filed jointly with his spouse and claimed one dependent. The returns also contain the following information:

	2004	2005	2006	2007
Wages	\$45,974	\$46,600	\$54,000	\$69,000
Taxable interest	\$ 8,737	\$11,413	\$25,311	\$25,686
Business Income	\$32,560	-\$11,926	-\$36,083	-\$71,759
Adjusted Gross Income ²	\$68,967	\$24,013	\$35,150	\$ 7,841

It is noted that the business income reported on line 12 of page 1 of the respective Forms 1040 tax returns includes income from three businesses operated as guest homes in 2004, 2005, and 2006 and

² Adjusted gross income is shown on line 36 in 2004 and on line 37 in 2005, 2006, and 2007.

six locations operated as guest homes in 2007. The address set forth on the ETA 750 as the location where the alien will be employed is [REDACTED], which on Schedule C, Profit or Loss from Business of each of the respective tax returns appears as “[REDACTED] [REDACTED] is identified as the sole proprietor of [REDACTED]. It is noted that except for 2007, the cumulative net profit reported on line 31 of each of the Schedule Cs, does not match the total business income shown on line 12 of page 1.

The petitioner also provided a summary of the sole proprietor’s household living expenses that totaled \$80,220 annually.³

The petitioner further provided copies of portfolio statements from December 31, 2007, March 31, 2008, June 30, 2008, September 30, 2008, and December 31, 2008 from Wachovia Securities covering the period from December 31, 2007. The statements are in the name of the “[REDACTED] Family Trust” with [REDACTED] and [REDACTED] as trustees. The account number is xxxx-[REDACTED]. The statement indicates that the listed amounts in individually named accounts as being linked to the primary account of xxxx-[REDACTED]. The individual accounts appear to hold amounts in either IRAs, Roth IRAs, or in the [REDACTED] Family Trust. The December 31, 2008 statement indicates that approximately \$229,000 was held in the trust and that two IRAs held by [REDACTED] amounted to approximately \$579,000.

The director denied the petition, determining that after deduction household expenses from the petitioner’s adjusted gross income as indicated on the income tax returns, there were insufficient funds remaining to the pay the proffered wage. The director declined to accept the IRAs and family trust funds as representing liquid assets where funds were readily available to pay the proffered wage.

On appeal, counsel disputes the director’s conclusion, noting that over \$800,000 was held in several IRAs and the family trust. Counsel asserts that IRAs are commonly accepted as liquid assets and could be withdrawn with a 10 percent penalty, and that even with the penalty, the majority of the funds are intact.

Counsel’s assertions are not persuasive. It is noted that 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).

³ The petitioner did not submit any evidence to document its personal expenses.

Unlike a corporation, a sole proprietorship does not constitute a separate legal entity from its 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 *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 this case, after deducting household living expenses of \$80,220 from each of the amounts reported as adjusted gross income in the four years under consideration, the amount remaining to pay the proffered wage of \$20,800 is a loss. The fund(s) remaining to pay the proffered wage after deducting household living expenses would be -\$11,253 in 2004; -\$56,207 in 2005; -\$45,070 in 2006 and -\$72,379 in 2007. Based on the tax return information provided, the petitioner has not demonstrated that it had the *continuing* financial ability to pay the proffered wage 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 Sonegawa*, 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 *Sonegawa* 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.

In this case, as noted above, the petitioner provided incomplete tax returns and insufficient other documentation. The petitioner failed to state on Form I-140 when it was established, how many people it employed, or its gross or net annual income. For example, each of the returns reflects substantial taxable interest, but it is unknown what the origin of these funds was and whether the principal was available to be withdrawn to support payment of the proffered wage in the designated period. Similarly, with regard to the IRAs and the ██████████ Family Trust, the evidence provided raises a question as to whether the IRAs were in some way related to or governed by the family trust. A copy of the trust was not provided that would explain this and also would explain whether the terms of the trust would otherwise permit disposition of funds governed to be used in support of employment of foreign workers. Such evidence should be contemporaneous with the establishment of the trust. It is further noted that the portfolio statements provided do not cover 2004, 2005 or 2006 and would not demonstrate the petitioner's ability to pay the proffered wage in those years. Finally, without more, we would consider it highly unlikely that an IRA would be used in order to provide funds for payment of a proffered wage to a foreign worker when a 10 percent penalty, although leaving substantial sums intact, would also represent a significant loss of money and more than the proffered wage. 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)).

Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* are relevant. As the record currently stands, the AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, we also note that the employment verification letter provided to the record by ██████████ failed to verify that the beneficiary worked full-time as a caregiver for her mother. The ETA 750 provides that the beneficiary must have one year of experience in the job offered before the priority date. Although ██████████ describes the duties performed by the beneficiary from January 2001 to December 2002, she does not quantify the hours per week or otherwise establish that the beneficiary acquired at least one year of full-time work experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii).⁴

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D.

⁴ This regulation provides in pertinent part: (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

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 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.