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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]
WAC 06 114 51214

Office: TEXAS SERVICE CENTER

Date: OCT 28 2009

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a board and care home. It seeks to employ the beneficiary permanently in the United States as a home health aide. 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).¹ 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 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 November 28, 2006 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)(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.

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed May 29, 2009).

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). Here, the Form ETA 750 was accepted on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$14.31 per hour (\$29,764.80 per year).

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.² On appeal, counsel submits a brief; a Retail Installment Sales Contract dated September 17, 2006 for a BMW automobile; grant deeds to several properties in San Francisco, California, together with real estate assessments for the properties; an appraisal dated January 18, 1994 for a diamond ring; California Certificates of Title for a Cadillac and a Mercedes Benz; and evidence of a line of credit in the amount of \$27,500.00 issued to [REDACTED]. Other relevant evidence in the record includes IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] and [REDACTED] for 2001, 2002, 2003, 2004, and 2005; IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 2002, 2003, 2004, and 2005; a list of the sole proprietor's household expenses for 2006, together with statements corroborating the expenses; bank statements for the petitioner from Wells Fargo Bank for the periods ending July 31, 2006 and August 31, 2006;⁴ bank statements for the sole proprietor from Bank of America for the period ending August 30, 2006 referencing the sole proprietor's checking account and certificate of deposit; bank statements for the sole proprietor from CitiBank for the periods ending July 20, 2006 and August 17, 2006 referencing the sole proprietor's checking and savings accounts; a letter dated September 20, 2006 from World Savings Bank referencing the sole proprietor's two certificates of deposit; and two Time Account Maturity Notices dated July 21, 2006 referencing the sole proprietor's two certificates of deposit.

² 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).

³ USCIS gives less weight to loans and debt as a means of paying salary since the debts will increase the proprietor's liabilities and will not improve his overall financial position. 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).

⁴ The funds in the proprietor's checking account represent what appears to be the sole proprietor's business checking account. Therefore, some of these funds are shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses.

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 a gross annual income of \$201,377.00 and a net annual income of \$184,029.00. On the Form ETA 750B, signed by the beneficiary on June 29, 2006, the beneficiary claimed to have worked for the petitioner as a caregiver since February 2002.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage. Counsel states that the proprietor's list of monthly expenses covered only 2006, and is not indicative of the proprietor's expenses prior to 2005. Counsel notes that the payment for the BMW automobile began in 2006, and was not a personal expense of the proprietor prior to that year. Counsel asserts that the director failed to take into account the bank accounts and certificates of deposit of the petitioner. Counsel also provides evidence of other assets owned by the sole proprietor, including several parcels of real estate, a diamond ring, two vehicles and a line of credit.

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, 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 beneficiary's IRS Forms W-2 for 2002, 2003, 2004, and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form W-2 stated compensation of \$12,000.00.
- In 2003, the Form W-2 stated compensation of \$12,000.00.
- In 2004, the Form W-2 stated compensation of \$12,000.00.
- In 2005, the Form W-2 stated compensation of \$11,500.00.

Therefore, for the years 2001, 2002, 2003, 2004, and 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2002, 2003, 2004, and 2005. Since the proffered wage is \$29,764.80 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the

beneficiary and the proffered wage, which is \$17,764.80, \$17,764.80, \$17,764.80 and \$18,264.80 in 2002, 2003, 2004, and 2005, respectively. The petitioner must establish that it can pay the full proffered wage in 2001.

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 supports a family of four. The proprietor's tax returns reflect her adjusted gross income for the following years:

- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$97,277.00.
- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$130,295.00.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$146,622.00.

- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$184,029.00.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$148,570.00.

Therefore, in 2001, the sole proprietor's adjusted gross income covers the proffered wage of \$29,764.80, and in 2002, 2003, 2004, and 2005, the proprietor's adjusted gross income covers the difference between the wages actually paid to the beneficiary and the proffered wage. However, the petitioner submitted a list of her yearly household expenses for 2006, which totaled \$134,708.64. The director determined that the petitioner did not establish its ability to pay the proffered wage in any relevant year. On appeal, the petitioner submitted evidence to establish that she had sufficient personal assets to pay the proffered wage in 2001, and the difference between the wages actually paid to the beneficiary and the proffered wage in 2002, 2003, 2004, and 2005 after taking into account her personal household expenses. The assets include several certificates of deposit, two vehicles, the proprietor's personal bank accounts, several parcels of real estate and a valuable piece of jewelry. Therefore, the petitioner has established its continuing ability to pay the proffered wage.⁵

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁵ On June 25, 2009, the AAO sent the petitioner a Notice of Derogatory Information and Request for Evidence (NDI) noting that the petitioner ceased to operate a business at 859 Camaritas Circle, South San Francisco, California on or about April 21, 2008. The petitioner responded to the NDI and provided sufficient evidence to establish that the particular job opportunity and the area of intended employment will remain the same. *See* 20 C.F.R. § 656.30(c)(2).