



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

SEP 28 2010

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 hotel/inn. It seeks to employ the beneficiary permanently in the United States as a maid/housekeeping cleaner. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. 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. Therefore, the director denied the petition.

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.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, received on July 13, 2009, that he would be submitting a brief or additional evidence to the AAO within 30 days. *See* 8 C.F.R. § 103.3(a)(2)(viii)(which states that where counsel is granted additional time to submit a brief after the filing of the appeal, the appeal brief must be sent directly to the AAO.) The record indicates that, as of the date of this decision, no brief or additional evidence has been submitted. The AAO will consider the record complete.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

As set forth in the director's June 11, 2009 denial, at issue in this case is whether 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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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 Form 9089 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the petitioner's ETA Form 9089 on December 5, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.39 per hour or \$17,451.20 per year. The ETA Form 9089 states that the position requires one month work experience in the proffered job. The position has no other experience requirements or educational requirements.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner stated that it was established in 1872 and that it has two employees. It also stated that its gross annual income is \$192,000 and its net annual income is -\$7,731. On the ETA Form 9089, signed by the beneficiary on February 16, 2008, the beneficiary claimed to have worked for the petitioner from May 1995 through December 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the ETA Form 9089 establishes a priority date for any immigrant petition later based on that form, 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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, 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. Here, the petitioner submitted the copy of a check which the sole proprietor made out to the beneficiary for \$337.50 in 2007. The memo line on the check indicates that the check was paid for 22.50 hours of housework done by the beneficiary. The record indicates that the check was deposited. Thus, the petitioner has established that, in 2007, it paid the beneficiary \$337.50, or \$17,113.70 less than the proffered wage.

The AAO would underscore that any suggestion that this office should assume that this amount (\$337.50) was paid to the beneficiary each week in 2007, merely because the amount on this check is approximately equal to the weekly proffered wage is misplaced. The AAO may only consider wages paid to the beneficiary which are documented for the record when considering amounts the proprietor paid the beneficiary during the relevant period.

The petitioner did not submit any other documentation to indicate that it had employed and paid the beneficiary during the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the relevant 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.

Here, the record indicates that the sole proprietor has no dependents. The director requested a statement of the proprietor's monthly household expenses but the petitioner did not provide one. The record before the director closed on June 3, 2009, when the petitioner filed its response to the director's request for evidence. The petitioner's 2008 tax return was the most recent return available at that time. The proprietor's 2007 and 2008 tax returns reflect the following information:

- The 2007 proprietor's IRS Form 1040, line 37, states adjusted gross income of \$21,436.

- The 2008 proprietor's IRS Form 1040, line 37, states adjusted gross income of \$53,849.

In 2007, the sole proprietor's adjusted gross income of \$21,436 would leave the proprietor, after deducting the difference between the proffered wage and the amount paid the beneficiary in that year (\$17,113.70), with only \$4,322.30 to cover her annual household expenses. The AAO finds that this amount would not have been sufficient to cover an individual's household expenses in 2007. Thus, the proprietor has not shown the ability to pay the instant wage in 2007 using her net income.

In 2008, the proprietor's adjusted gross income (\$53,849) would leave the proprietor with \$36,397.80 to cover her annual expenses, after the deducting the proffered wage. The AAO finds that this amount would have been sufficient to cover an individual's annual expenses in 2008. Thus, the proprietor has shown the ability to pay the wage in 2008 using its adjusted gross income.

In sum, the petitioner has not shown an ability to pay the proffered wage through its net income from the 2007 priority date year onwards.

When filing this petition, counsel asserted that the beneficiary will be replacing a worker employed by the petitioner who is not permanent. However, counsel failed to document this. Going on record without adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). Unsupported assertions are not 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). That is, counsel did not document for the record the name of the individual who the beneficiary would be replacing. Also, counsel did not document his or her full-time employment or that the individual carried out the duties of the proffered position. The record does not document specific wages paid to this worker through Forms 1099-MISC, Miscellaneous Income, or similar independent evidence of amounts paid to individual workers. In addition, there is no documentary evidence in the A-file that the petitioner has replaced any worker or will replace any worker with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There is no evidence that the work done by the petitioner's other worker or workers involves the same duties as the proffered position as set forth on the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who purportedly performed the duties of the proffered position. If that worker performed other kinds of work, then the beneficiary could not have replaced him or her.

On appeal, counsel indicated that to show an ability to pay the wage, the proprietor need only show adjusted gross income of more than the proffered wage. This is incorrect. Before USCIS may find that the proprietor has shown the ability to pay the wage, the proprietor must show that she has funds available to cover her own annual household expenses as well as the proffered wage. Further, any suggestion that the petitioner only needs to show that its total wages paid are more than the proffered wage is also misplaced. The petitioner must show that it had funds available to pay the wage from the priority date onwards. Counsel indicated on appeal that the director denied the petition in part because the proprietor passed away in January 2009 and therefore the petitioner must demonstrate a

successor-in-interest relationship with the current proprietor. However, this was not a basis for the director's denial. The director denied the petition based on the petitioner's failure to show an ability to pay the wage from the priority date onwards. There is no indication in the record that the petitioner has changed ownership at any time during these proceedings. This office would note that a change in the name of the petitioner's registered agent does not constitute a change in ownership. Finally, in his letter dated June 2, 2009, counsel indicated that an additional 30 days were needed to gather more financial information and other evidence in support of the petition. On appeal, counsel indicated that the director erred by not granting this extension. This office would underscore that more than a year has passed since counsel submitted the appeal in this matter, and counsel has not provided any additional evidence or statement. Thus, counsel has had more time than requested to provide additional evidence, but has not done so.

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 petitioner in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000 during the 1950s through the 1960s. 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. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a sole proprietor's adjusted gross income, savings or various liquefiable 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.

Here, the record indicates that the petitioner was incorporated in 1872 and it has two employees. The petitioner's gross sales or receipts did not markedly increase during the relevant period, but remained relatively consistent, as follows: \$205,020 in 2007; and \$217,797 in 2008. Total wages paid in 2007 were only \$20,586 and in 2008 were only \$13,615. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses. It has not provided documentary evidence that the beneficiary will be replacing a former employee or an outsourced service. The petitioner has established considerable longevity and it submitted a review that relates to the relevant period from [REDACTED] which indicates that the petitioner enjoys a positive reputation within its industry for being "charming", "spotlessly clean", and "one of the last remaining bargains in Nantucket". However, these positive factors are not sufficient to overcome the

information on the proprietor's tax returns which indicate that the proprietor did not have funds available to pay the wage in the priority date year. 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 petitioner has not shown an ability to pay the proffered wage from the priority date onwards.

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.