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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

B6

FILE:

[REDACTED]  
SRC 07 282 58579

Office: TEXAS SERVICE CENTER

Date: **AUG 18 2010**

IN RE:

Petitioner:  
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:

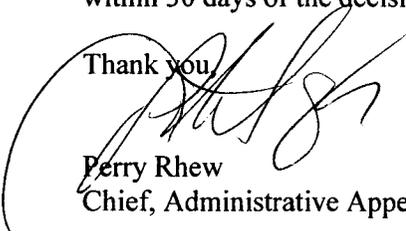
[REDACTED]

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 your 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 an individual householder. She seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 should have considered the petitioner's daughter's financial ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 Form 9089 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 February 27, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.33 per hour, which amounts to \$17,326.40 per year. On the ETA Form 9089, signed by the beneficiary on July 13, 2007, 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 Form 9089 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 petitioner 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.

The director requested additional evidence from the petitioner, [REDACTED], on July 24, 2008. He requested a copy of the petitioner's Form 1040, U.S. Individual Tax Return for 2007. Additionally, the director instructed the petitioner to submit a summary of personal household expenses and a documentation of her date of birth.

In response, the petitioner, [REDACTED] failed to submit evidence of her own ability to pay the certified wage of \$17,326.40. Instead, she supplied a letter from her daughter, [REDACTED], a copy of [REDACTED] birth certificate, and a copy of [REDACTED] 2007 federal income tax return and Wage and Tax Statement (W-2). [REDACTED] letter states that she will take full responsibility for payment of the beneficiary's proposed wage offer.<sup>1</sup>

The director denied the petition because the petitioner failed to provide evidence of her own ability to pay the proffered wage and declined to accept her daughter's assurance that she would be responsible.

On appeal, counsel merely states that the petitioner's evidence of her daughter's financial ability to pay the proffered wage is not prohibited by regulation. Counsel cites no legal authority for this theory. His contention is not persuasive.

We note that the [REDACTED] the petitioner on the Immigrant Petition for Alien Worker (I-140) has affirmed on the labor certification and on Part 5 of the I-140 that she is the prospective U.S. employer of the beneficiary. As the petitioner and prospective employer, she is obliged to establish

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<sup>1</sup> Even if we considered [REDACTED] which we do not accept, from the record, it is unclear that her income could support both payment of the full-time proffered wage and support herself and her family with two dependents.

that she has the ability to pay the proffered wage. She must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

The personal guarantee of another person who has not been shown to have a legal obligation to pay the proffered wage may not be used as a substitute for the *petitioner's* own ability to pay the proffered salary. See *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Even if an affidavit of support is offered, it is only utilized 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 INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing state of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not a guarantee from a different individual to support payment of the beneficiary's wage. See 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or affidavit of support to be utilized in lieu of proving ability to pay through prescribed financial documentation.

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 a given 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 (1<sup>st</sup> 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).

Where an individual or sole proprietorship is involved, unlike a corporation, assets and liabilities are indivisible from their owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the individual's or sole proprietor's adjusted gross income, assets and personal liabilities are 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. Any 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 (7<sup>th</sup> Cir. 1983). For that reason, individuals and 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 matter, no review of adjusted gross income, household expenses, or assets and liabilities is possible because the petitioner failed to submit documentation pertinent to her own financial status. 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 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, as noted above, the petitioner has not submitted any evidence demonstrating that uncharacteristic losses or other circumstances similar to *Sonogawa* are relevant.

Based on a review of the underlying record and argument submitted on appeal, it may not be determined that the petitioner has established her continuing financial ability to pay the proffered wage. 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.

**ORDER:** The appeal is dismissed.