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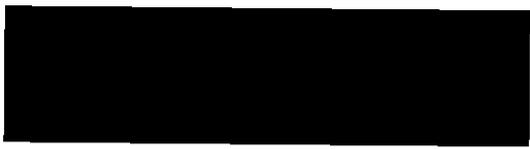
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 08 013 59799

Office: NEBRASKA SERVICE CENTER

Date:

DEC 01 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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 \$630. 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,

Karen S. Roberts for

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 is an import/export business. It seeks to employ the beneficiary permanently in the United States as a storage and distributor manager (import agent). 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.

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 May 14, 2008 denial, the primary 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on August 5, 2005. The proffered wage as stated on the ETA Form 9089 is \$30.00 per hour, which equates to \$62,400 per year. The ETA Form 9089 states that the position requires two years of experience in the job offered.

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 upon appeal.¹

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 1994 and to currently employ four workers. On the ETA Form 9089, signed by the beneficiary under penalty of perjury (there is no date of signature indicated next to signature block), the beneficiary claimed to have worked for Harbin USA, Inc., as an import manager since December 1, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 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 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 established that it employed and paid the beneficiary \$5,200 in March 2008. Therefore, the petitioner must establish that it can pay the full proffered wage in 2005, 2006 and 2007.²

If, as in this case, 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

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).

² The record closed on April 24, 2008 with receipt of the petitioner's response to the director's Request for Evidence (RFE) dated March 14, 2008. Thus, the petitioner's 2007 tax return is the most recent return available.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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 (AGI), 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's Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Returns, reflect the sole proprietor and her spouse supported a family of three (son, daughter and grandchild) in 2005, 2006 and 2007. The Forms 1040, line 37, show the sole proprietor's AGI in those years as \$46,798, \$46,677 and \$50,847, respectively. The sole proprietor also submitted an estimate of her family's recurring household expenses as being \$29,100 per year, including the following monthly payments: mortgage or rent payments of \$1,200; automobile payments of \$275; credit card payments of \$300; household expenses of \$500; and, utility expenses of \$150.

In 2005, 2006 and 2007, the sole proprietor's AGI does not cover the proffered wage of \$62,400. It is improbable that the sole proprietor could support herself and her family on a deficit, which is what remains in each year after reducing her AGI by her estimated household expenses and the amount required to pay the beneficiary the proffered wage.

The sole proprietor submitted a personal checking account statement but it was dated prior to the priority date. The petitioner also submitted an unaudited balance sheet of her personal assets as of

March 31, 2008³ showing cash on hand (\$2,750), fixed assets including automobiles (\$50,500) and jewelry and furniture (\$42,500); and the petitioning business (\$775,000), as well as liabilities of an automobile loan (\$39,800) and credit cards payable (\$8,500). The petitioner did not submit appraisals of the jewelry, furniture, automobiles or business concurrent with any years relevant to the instant case, and it did not provide evidence that the petitioner owned the jewelry, furniture and automobiles in any relevant year. 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)). Further, the fair market value of the petitioner's business is not a liquid asset, as it is unlikely that the sole proprietor would liquefy her business to pay the beneficiary's wage.

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 *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 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

³ The balance sheet is for 2008. Therefore it does not establish the value of the petitioner's assets in the relevant years of 2005, 2006 and 2007. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of the petitioner. The unsupported representations of the petitioner are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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.

On appeal, counsel provides a brief; the petitioner's bank statements and purchase invoices for the years 2005, 2006 and 2007; and, bank statements for the months of January and February 2008. Counsel asserts that the bank statements show average yearly balances of between \$102,000 and \$135,000 (equaling between \$8,500 and \$11,000 per month cash on hand) and business inventory assets averaging between \$207,000 and \$310,000 establish the petitioner's ability to pay the beneficiary the proffered wage.

The funds in the petitioner's bank accounts represent the sole proprietor's business checking accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of an entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

The priority date in the instant case is August 5, 2005. In order to establish the ability to pay the proffered wage, bank statements would have to show closing balances which are greater than the annual proffered wage or would have to show monthly increases in balances by at least the amount of the monthly proffered wage as of the priority date and continuing through the date the beneficiary obtains lawful permanent residence. The annual proffered wage of \$62,400 is equal to \$5,200 per month.

Here, the petitioner's business checking accounts reflect the following monthly closing balances:

<u>Month</u>	<u>2005 (\$)</u>	<u>2006 (\$)</u>	<u>2007 (\$)</u>
JAN	6,968.07	4,779.43	4,083.56
FEB	6,878.82	1,860.67	5,727.12
MAR	6,097.63	7,997.83	18,497.86
APR	7,541.15	10,769.17	10,469.01
MAY	29,140.63	19,354.28	11,243.64
JUN	9,383.13	20,624.62	7,169.90
JUL	12,423.08	11,696.01	7,023.97
AUG	12,150.90	12,966.07	5,678.13
SEP	6,191.20	14,436.85	9,337.11
OCT	7,201.17	11,072.31	16,493.77
NOV	6,728.49	6,742.23	8,098.38
DEC	3,743.33	3,602.97	12,306.00

Monthly closing balances on bank statements do not represent new funds each month, but rather show the amount of the petitioner's cash reserves remaining after expenditures. If the cash reserve were used in a given month to pay the monthly wage, the balance in every succeeding month would

then be lower by that amount. The petitioner has not shown monthly increases in balances by at least the amount of the monthly proffered wage, and it has not shown closing balances greater than the annual proffered wage.

In the instant case, the petitioner is a small business, established in 1994 with four employees. The petitioning entity's sole proprietor's tax returns reflect that no wages were paid in 2005, and only \$18,720 and \$37,440 in wages were paid in 2006 and 2007, respectively.⁴ No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. There is no evidence of the petitioner's sustained historical growth,⁵ 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 would be deemed relevant to the petitioner's ability to pay the proffered wage. Furthermore, the petitioner's business bank statements do not establish its ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has the continuing ability to pay the proffered wage.

Based on the evidence submitted, the AAO affirms the decision of the director. The petitioner has 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 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.

⁴ From Schedule C, Line 26, of the sole proprietor's Forms 1040.

⁵ While the petitioner's gross receipts or sales (shown on the sole proprietor's Schedule C, Part 1, Line 1) increased from \$432,697 in 2005, to \$497,223 in 2006, to \$639,622 in 2007, there is no evidence of its sustained growth from the date of its establishment in 1994 through to the priority date of the petition.