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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

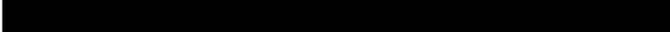


U.S. Citizenship
and Immigration
Services



B6

FILE:  Office: NEBRASKA SERVICE CENTER Date: DEC 01 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:

SELF-REPRESENTED

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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a machinist. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director indicated that, according to the instructions on the Form I-140, Immigrant Petition for Alien Worker, and the regulations, the petitioner must file with the petition for an other worker, a labor certification application certified by the DOL, evidence that the beneficiary meets the educational, training, experience and any other requirements of the labor certification, and evidence of the petitioner's ability to pay the proffered wage. The director stated that the petitioner filed the petition without all the required initial evidence. Therefore, the director denied the petition in accordance with 8 C.F.R. § 103.2(b)(8)(ii) which states in relevant part that where the required initial evidence is not submitted with the petition, U.S. Citizenship and Immigration Services (USCIS) may deny the application for lack of initial evidence.

The record shows that the appeal is properly filed, 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 January 20, 2009 denial, at issue here is whether the petitioner submitted all the initial required evidence such as evidence to demonstrate that the petitioner has the ability to pay the proffered wage from the priority date onwards.

On appeal, the petitioner submitted a statement and evidence related to its ability to pay the wage.

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

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 at 8 C.F.R. § 204.5(l)(2) defines "other worker" as:

a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of

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 this 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).

a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 Form ETA 750 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 Form ETA 750 was accepted on November 18, 2002. The proffered wage as stated on the Form ETA 750 is [REDACTED]. The Form ETA 750 states that the position has no educational or experience requirements, and no other special requirements.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1993. It stated that it currently employs two workers. The petitioner also stated that it has a gross annual income of [REDACTED] and a net annual income of [REDACTED]. The petitioner did not submit copies of its complete tax returns for each year in the relevant period of analysis. Instead, it submitted only the Schedule C, Profit or Loss From Business, for 2004 through 2007; thus, the record is incomplete and fails to provide information about the petitioner's fiscal year. On the Form ETA 750B, which is not dated, the beneficiary stated that he worked for the petitioner from November 2000 through the date that he completed that form. As the form is not dated, the record does not reflect on what date he completed it.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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, 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. Here, the Forms W-2, Wage and Tax Statement, in the record establish that the petitioner paid the beneficiary: [REDACTED] in 2002, or [REDACTED] less than the proffered wage; [REDACTED] in 2003, or [REDACTED] less than the proffered wage; [REDACTED] in 2004, or [REDACTED] less than the proffered wage; [REDACTED] in 2005, which is more than the proffered wage; [REDACTED] in 2006, which is more than the proffered wage; and [REDACTED] in 2007, or [REDACTED] less than the proffered wage.

Thus, the petitioner has established an ability to pay the proffered wage in 2005 and 2006 through actual wages paid. It has not shown the ability to pay the wage in any other year in the relevant period and would need to demonstrate its ability to pay the difference between wages actually paid and the proffered wage in 2002, 2003, and 2004.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

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 (which may be found on page one of the tax return) 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 [REDACTED] where the beneficiary's proposed salary was [REDACTED] or approximately thirty percent (30%) of the petitioner's gross income.

Here, the record is devoid of information regarding how many dependents the sole proprietor has and regarding the proprietor's monthly household expenses. Also, the proprietor did not provide complete copies of his tax returns. He provided only the Schedules C for 2004 through 2007. Thus, information relating to the proprietor's adjusted gross income throughout the relevant period, as found on page one of the tax return, is not in the record.

The proprietor has already shown an ability to pay the wage in 2005 and 2006 through actual wages paid. He has not shown the ability to pay the wage through wages paid, adjusted gross income (net income), or other financial resources during any of the remaining years in the relevant period of analysis.

In sum, the proprietor has not shown the continuing ability to pay the proffered wage through an examination of actual wages paid and net income from the 2002 priority date year onwards.

On appeal, the petitioner indicated that the director had an obligation to issue a notice of intent to deny or a request for evidence before denying the petition, and that he erred in that he failed to issue either. This is not correct. The petitioner filed this petition on October 15, 2007. The regulation at 8 C.F.R. § 103.2(b)(8)(iii) regarding requests for evidence and notices of intent to deny, as in place from June 18, 2007 onward, states that USCIS may, in its discretion, deny a petition which is not filed with all the required initial evidence or is filed with evidence that does not demonstrate eligibility. The director is not required to issue a request for evidence or notice of intent to deny before denying such petitions.

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). The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about [REDACTED] 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 1993 and it has two employees. The petitioner has not established unusual growth since incorporating. It has not shown that its gross sales or receipts have steadily increased. Rather, it provided only the proprietor's Schedules C for 2004 through 2007; and, in those years, the petitioner's gross receipts or sales fluctuated as follows: [REDACTED] in 2004; [REDACTED] in 2005; [REDACTED] in 2006; and [REDACTED] in 2007. Its net profit fluctuated as well during those years, showing a net profit (loss) of [REDACTED] in 2004; [REDACTED] in 2005; [REDACTED] in 2006; and [REDACTED] in 2007. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. 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 throughout the relevant period.

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.