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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 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,

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 a family daycare business. It seeks to employ the beneficiary permanently in the United States as a child care worker. As required by statute, the petition is accompanied by 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, 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 29, 2009 denial, the 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 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 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 ETA Form 9089 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 March 9, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.86 per hour (\$18,428.80 per year). The ETA Form 9089 states that the position requires 24 months 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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is a sole proprietor.<sup>2</sup> The petitioner did not indicate on her I-140 petition when the business was established or the number of workers she currently employs. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on August 13, 2007, the beneficiary does not indicate that she has been employed by 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 Form 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).

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship at the time of filing the petition. 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. The petitioner has failed to establish by documentary evidence that it employed the beneficiary in 2007 at a salary equal to or greater than the proffered wage. The petitioner submitted on appeal a copy of an IRS Form W-2, Wage and Tax Statement, issued by [REDACTED] with Federal Employer Identification Number [REDACTED] for \$14,884.80 in wages paid to the beneficiary in 2008. As the Form W-2 indicates that the petitioner, [REDACTED] paid the

<sup>1</sup> 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).

<sup>2</sup> It appears that the petitioner incorporated as a Limited Liability Company (LLC) on September 26, 2007 [REDACTED]. However, the petitioner has not provided any evidence to establish a successor-in-interest relationship between the sole proprietor and the LLC.

beneficiary wages for 2008. The AAO will accept this evidence as proof of payment of some of the wage in 2008. However, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 (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).

The petitioner filed as 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 is not legally separate from its owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's income, liquefiable 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. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 33 and 35, respectively. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

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.

The record shows that the sole proprietor has filed her personal tax returns as married filing jointly, with two dependents. The proffered wage is \$18,428.80. The petitioner claims that her living expenses are on average \$49,032.00 per year. In the instant case, the sole proprietor's IRS Form reflects her adjusted gross income (AGI) as follows:

- In 2007, the proprietor's IRS Form 1040 stated AGI of \$42,516.00.
- In 2008, the proprietor's IRS Form 1040 stated AGI of \$31,068.00.

Therefore, the sole proprietor's AGI for 2007, minus her annual expenses for that year is less than the proffered wage. Similarly, the sole proprietor's AGI for 2008 is insufficient to pay the

balance of the proffered wage for that year, after deducting her household expenses. The sole proprietor's annual expenses exceed her AGI; therefore, it is improbable that the sole proprietor could support herself and two dependents on the minimum amount of funds that remain after reducing the adjusted gross income by the amount that is required to pay the proffered wage.

The evidence demonstrates that from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

Counsel asserts on appeal that the director erred in determining that the petitioner had failed to establish its ability to pay the proffered wage since the priority date. Counsel further asserts that the petitioner is able to finance all of its enterprises, including paying the proffered wage to the beneficiary, which is evidenced through the certified public accountant's reports.

On appeal, the petitioner submits two letters from [REDACTED] Certified Public Accountants, stating that there were expenses taken on the petitioner's income tax return for 2007 and 2008 which, when added back in, would be sufficient to pay the proffered wage. The petitioner has not submitted an amended tax return indicating that she refiled her taxes to take fewer allowable deductions in order to pay the beneficiary's wage. The AAO will not accept the possibility of adding back deductions legitimately taken when the 2007 and 2008 tax returns were filed, as evidence of its ability to pay the proffered wage in 2007 and 2008. The tax returns as filed do not reflect that the petitioner has the ability to pay the proffered wage.

The petitioner submits copies of its bank statements as evidence. The sole proprietor's bank statements and her reliance on the balances in the bank accounts, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the bank statements, to the extent that they represent assets, have not been submitted in the context of audited financial statements which would also consider the sole proprietor's debts and other obligations. Accordingly, these bank statements are not probative to the petitioner's ability to pay the proffered wages. The bank statements of [REDACTED] do not reflect amounts available to the petitioner to pay the proffered wage. [REDACTED] entity separate from its owner and shareholder [REDACTED] the petitioner's husband. Thus, the cash balances of [REDACTED] may not be considered to pay the prevailing wage of the petitioner's employee. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or

of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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. The petitioning entity in *Sonegawa* 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 *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 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 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.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2007 or 2008. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Although the petitioner's CPA states that gross receipts are up significantly from 2007 to 2008, the CPA is referring to a separate corporate entity, [REDACTED] Schedule C of the petitioner's tax returns for 2007 and 2008 for the child day care services reflect similar gross receipts for both 2007 and 2008. The bank statements are not probative of the petitioner's ability to pay the proffered wages. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089, or that it entails outsourced services. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that the job offer is *bona fide*. For this additional reason, the petition will be denied. The ETA Form 9089 and petition were filed by a sole proprietorship owned and operated by [REDACTED]. However, the Florida Division of Corporations page submitted by the petitioner reflects that [REDACTED] incorporated on September 26, 2007. It is unclear from the record whether the petitioner continues to operate the petitioning business as a sole proprietor.<sup>3</sup> It is also noted that the two business entities have different EIN numbers. The instant petition was filed on March 9, 2007 by the sole proprietor using the EIN number of [REDACTED]. The EIN number of [REDACTED] is [REDACTED].

A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the petitioner that filed the labor certification and petition is a different entity from the LLC for which 2007 and 2008 tax returns were submitted as evidence of the petitioner's ability to pay the proffered wage.

It has not been claimed that the LLC is a successor in interest to the petitioner. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the claimed successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The record contains no evidence to establish a valid successor-in-interest relationship between the petitioner and [REDACTED]. There is no evidence of the organizational structure of the petitioner prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the LLC acquired the essential rights and obligations of the petitioner necessary to carry on the business in the same manner as the petitioner. The evidence does not establish that the LLC is continuing to operate the same type of business as the petitioner. The evidence does not establish that the manner in which the business is controlled by the LLC is substantially the same as it was before the ownership transfer.

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<sup>3</sup> The petitioner, as a sole proprietor, paid the beneficiary's salary in 2008 using the EIN number of the sole proprietor.

The fact that the LLC is owned and operated by the former sole proprietor, [REDACTED] is not sufficient alone to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the LLC is a successor-in-interest to the sole proprietor. As it appears likely that the petitioner is no longer running the business, the job offer has not been established to be bona fide. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying experience in the job offered. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have completed grade school and must have two years of experience in the job offered as a babysitter.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's job duties as a babysitter it is stated that her job experience included: "Sanit[ize] toys and play equipment, discipline children and recommend or initiate other measures to control behavior....Instruct children in health and personal habits..." The petitioner submitted a translated letter of employment from [REDACTED] in which she stated that she employed the beneficiary from February 2002 through April 2006 to take care of her children. Here, the translated employment letter does not establish that the beneficiary has the experience necessary to perform the duties described in the ETA Form 9089. The letter fails to specify the nature of the beneficiary's duties and her responsibilities in Peru as a babysitter. *See* 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.