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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 02 2010

IN RE:

Petitioner:
Beneficiary:

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)

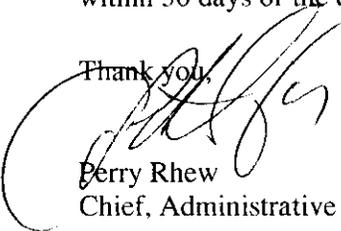
ON BEHALF OF PETITIONER:

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 \$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 employment based 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and contends that documentation related to the petitioner's ability to pay the proffered wage had been previously submitted.

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.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(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.

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).

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); 8 C.F.R. 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, certified by the DOL and submitted with the instant petition. [REDACTED] *Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on October 29, 2007, which establishes the priority date. The proffered wage as stated on the labor certification is \$7.52 per hour, which amounts to \$15,641.60 per year.

The evidence in the record of proceeding, which was submitted on appeal, suggests that the petitioner is structured as a sole proprietorship.² On the ETA Form 9089, the petitioner claims to employ four workers and to have commenced operation in 2006. The ETA Form 9089 indicates that the petitioner had not employed the beneficiary as of the beneficiary's date of signing of January 22, 2008. Counsel claims on appeal that the petitioner paid the beneficiary \$17,000 in wages in 2008. Counsel states that a copy of the beneficiary's 2008 Wage and Tax Statement (W-2) has been submitted on appeal, however, this document has not been included with the materials provided. 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)).

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. [REDACTED] 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 overall 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

² It is noted that the copy of the 2007 individual Form 1040 tax return submitted on appeal shows [REDACTED],” however, signed the Immigrant Petition for Alien Worker (Form I-140) and the ETA Form 9089. It is unclear if this is the same person, but this should be clarified in any further filings.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As stated above, the record contains no first-hand evidence that the petitioner has employed or paid the beneficiary.

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (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.

[REDACTED] 1049, 1054 (S.D.N.Y. 1986) (citing [REDACTED] 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term

tangible asset is a "real" expense.

“[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” at 537 (emphasis added).

A sole proprietorship is 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 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.

For this reason, the sole proprietors provide a summary of annual household expenses. Here, according to the director, the petitioner failed to submit any evidence of its ability to pay, including a summary of recurring household expenses, to the underlying record. Therefore, the director denied the petition on April 13, 2009.

In 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.

On appeal, the petitioner, through counsel, submits a letter dated May 3, 2009. Counsel claims that evidence supporting the petitioner’s ability to pay the proffered wage was actually sent to the Service Center on December 1, 2008, which was approximately ten months after filing the Form I-140. Counsel submits a copy of a USPS tracking number that she alleges was the package containing this evidence. She states that the evidence submitted to the Service Center, before it issued a decision, consisted of a copy of the petitioner’s 2007 income tax return and a copy of the beneficiary’s high school diploma. She additionally claims that a copy of the beneficiary’s 2008 W-2 has been submitted on appeal.

First, it is noted that the director’s denial based on the lack of evidence of eligibility, without issuing a request for evidence, is supported by the record. The regulation at 8 C.F.R. § 103.2(b)(1), requires the petitioner to establish eligibility for the benefit sought at the time of the filing, including providing initial evidence required by the applicable regulation. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, “if there is evidence of ineligibility in the record.” Second, it is unknown

what prompted this petitioner to submit this additional evidence in December 2008 without a solicitation from the director and it remains unclear if the evidence and the tracking receipt are actually related to the instant petition, and not another filing, however, the AAO notes that the petitioner has not established its ability to pay the proffered wage as the record currently stands.

As noted above, if a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, or that its net income or net current assets³ 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 during that period. In the instant case, as stated above, in counsel's May 3, 2009, letter, she claimed that a copy of a W-2 issued to the beneficiary shows that the beneficiary was paid \$17,000 during 2008. However, counsel's May 5, 2009, transmittal letter, itemizing the documents submitted on appeal, omits mention of a W-2. As noted above, a W-2 has not been provided on appeal.

The regulation at 8 C.F.R. § 204.5(g) (2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. On appeal, counsel provides a copy of an individual federal income tax return (Form 1040) filed by [REDACTED] in which she claims ownership of the petitioning business on Schedule C, Profit or Loss from Business. The return also shows that she filed as a single person for 2007. The return contains the following information:

[REDACTED]

As noted above, the petitioner did not submit any summary of recurring household expenses relevant to the sole proprietor's ability to pay the proffered wage, as well as cover her own personal expenses. As set forth above, her declared adjusted gross [REDACTED] could not cover a certified wage [REDACTED] even without considering any additional expenses. The petitioner has not demonstrated its ability to pay the proffered wage in 2007.

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. The difference between these two figures may be characterized as net current assets. As the individual income tax returns of sole proprietors do not reflect a balance sheet from which net current assets may be calculated, an audited financial statement would be the appropriate evidence to show net current assets.

⁴ Adjusted gross income is shown on line 37 in 2007.

The petitioner has also provided a copy of an unaudited financial statement covering the first nine months of the petitioner's operation for 2008. This financial statement is not sufficient to demonstrate the petitioner's ability to pay the proposed wage offer. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement that counsel submitted with the petition is not persuasive evidence of the ability to pay in 2008. It is the unsupported representations of management and is not probative of the petitioner's ability to pay the proffered wage in this year.

Going on record without 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)).

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 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.

In the instant case, as noted above, the documentation includes one tax return for 2007⁵ and one unaudited financial statement. Further, the business commenced business in 2006, which was one year before the application for the permanent labor certification was filed. No reputational or other factors analogous to *Sonegawa* have been provided. The overall circumstances do not indicate that the petitioner has established that it has had the continuing ability to pay the proffered wage to the beneficiary.

Beyond the decision of the director and relevant to the ETA Form 9089's requirement that the beneficiary possess a high school education, counsel's May 3, 2009, letter also indicates that a copy of the beneficiary's high school diploma is enclosed. However, the only submission relevant to the

⁵ The record additionally lacks the sole proprietor's personal expenses.

beneficiary's education that was submitted on appeal and to the underlying record is a copy of a letter from the principal [REDACTED] in which she states that the beneficiary graduated from the high school on April 25, 1967. This is not sufficient in lieu of an actual diploma from the school showing that the beneficiary has completed high school. The petitioner has not demonstrated that this document is non-existent or unavailable. The regulation at 103.2(b)(2)(i) provides that if a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, a presumption of ineligibility arises and an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. Here, if the document is nonexistent or unavailable, a sworn statement from the high school representing the unavailability as such should be submitted, along with a statement of how it was determined that the beneficiary graduated. 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)).

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority is supported by federal courts).

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

Based on a review of the underlying record and the evidence and argument submitted on appeal, the AAO concludes that the petitioner has not established that it has had the continuing ability to pay the proffered wage or that it has demonstrated that the beneficiary possessed the requisite education required by the terms of the approved labor certification.

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.