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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 § 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 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a nursing assistant/caregiver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit initial required evidence to establish that: it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; that the beneficiary had obtained three months experience in the job offered prior to the priority date as required by the Form ETA 750; and that the beneficiary had completed four years of high school education as specified on the Form ETA 750. 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.

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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on February 5, 2004. The proffered wage as stated on the Form ETA 750 is \$1,638 per month (\$19,656 per year). The Form ETA 750 states that the position

requires 3 months experience in the proffered position plus four years of high school education. Additionally, the Form ETA 750, box 15, places the following special requirements on the position:

[The beneficiary must be] willing to work at multiple locations, if necessary. [The] employer will provide on the job training. If hired [, the beneficiary] must speak, read and write English, must know food nutrition, food preparation, food storage, [and] menu planning; [The] beneficiary must obtain first aid [training]; Health Screening Report issued by the State Health and Welfare Agency; [The beneficiary] must be willing to be fingerprinted [with the fingerprints] to be submitted to the Department of Justice; [The beneficiary] must have [the] legal right to work; [The beneficiary must] live on [the] premises; [The beneficiary] must be available on-call 24 hours per day; Overtime will be paid; [and] the [e]mployer will pay in accordance with State Rules and Regulations.

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 structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1994 and to currently employ eight workers. On the Form ETA 750B, signed by the beneficiary on April 9, 2007, the beneficiary did not claim to have worked for the petitioner. On appeal, however, the petitioner submitted a copy of a 2008 W-2 Form issued to the beneficiary showing that the petitioner paid wages to the beneficiary in the amount of \$20,595. The petitioner also submitted a copy of the beneficiary's 2008 tax return which reported wages paid to the beneficiary in the amount of \$20,595.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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).

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<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 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).

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 not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2004 onwards. The petitioner submitted a 2008 W-2 Form showing wages paid to the beneficiary in the amount of \$20,595, which exceeds the proffered wage. No additional proof was submitted of wages paid during any prior or subsequent year. The petitioner must establish the ability to pay the full proffered wage in all other relevant years from 2004 to 2007.

The record closed on January 20, 2008 with the issuance of the director's decision denying the petition. As of that date, the 2007 tax return would have been the most recent tax return available.

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); *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. *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, 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 (7<sup>th</sup> 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.

According to the petitioner's 2007 tax return, the sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following relevant years:

- Proprietor's adjusted gross income for 2007 (Form 1040, line 37) was (-\$7,125).
- The proprietor did not submit copies of its tax returns for 2004, 2005 or 2006.

In 2007, the sole proprietor's negative adjusted gross income fails to cover the proffered wage of \$19,656. The failure to submit copies of its 2004, 2005 or 2006 tax returns precludes the AAO from determining whether the petitioner had sufficient gross income to pay the proffered wage in those years as well as the sole proprietor's personal expenses. As previously noted, the proprietor must establish not only the ability to pay the proffered wage, but the ability to sustain herself and any dependents. The proprietor did not submit monthly living expenses for herself and family during any relevant year. Without these living expenses and copies of tax returns for 2004, 2005 and 2006, it cannot be determined whether or not the petitioner had the ability to pay necessary wages and her personal expenses and expenses of any dependents.

On appeal, the petitioner submitted the 2007 tax return (Form 1040) of the proprietor and her husband, a copy of the beneficiary's high school diploma, the beneficiary's Certified Nursing Assistant Program certificate issued by Good Samaritan Rehabilitation Center, dated February 15, 2002, the beneficiary's 2008 W-2 Form issued by the petitioner, and the beneficiary's 2008 Form 1040EZ. The petitioner does not otherwise address the basis for the appeal or reasons for denial set forth by the director in his January 20, 2008 decision.

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 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 the instant case, the proprietor's 2007 tax return shows negative gross income, which is insufficient to pay the proffered wage and the sole proprietor's expenses. The proprietor did not submit copies of her 2004, 2005 or 2006 tax returns. The proprietor did not submit recurring living expenses for herself and her family. The record does not contain evidence of liquefiable personal assets possessed by the proprietor which could be used to pay the proffered wage plus undetermined living expenses for the proprietor and her family. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. 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.

The regulation at 8 C.F.R. § 204.5(1)(3) provides, in part:

(ii) *Other documentation*—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The Certified Nursing Assistant Program certificate from the Good Samaritan Rehabilitation Center dated February 15, 2002 that the petitioner submitted is insufficient to show three months experience in the proffered position as required by the Form ETA 750. It is unclear how long the program took to complete. Therefore, the beneficiary's three months of required experience has not been established.

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.