

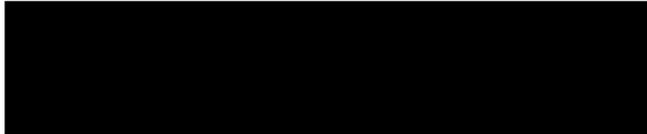
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: DEC 08 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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home for the elderly. It seeks to employ the beneficiary permanently in the United States as a home health aide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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. Therefore, the director denied the petition.

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.

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

As set forth in the director's January 30, 2008 denial, at issue in this case is whether 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)(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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 Form ETA 750 was accepted for processing by any office within

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 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 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 DOL accepted the petitioner's Form ETA 750 on June 7, 2001.² The proffered wage as stated on the Form ETA 750 is \$1,336.42 per month or \$16,037.04 per year.³ The Form ETA 750 states that the position requires: four years of high school; no work experience; and the special requirements of a knowledge of food nutrition, food preparation, food storage, menu planning, CPR and first aid.⁴ The Form ETA 750 also states these special requirements: must speak and write in English; must be willing to live on the premises; and must be available on call 24 hours per day.⁵

At the outset, it is noted that the Form ETA 750 lists as the employer: [REDACTED] and it lists [REDACTED] as the address at which the beneficiary in this matter will work. The petition lists the petitioner/employer as [REDACTED]. The tax returns in the record reflect that [REDACTED] is a sole proprietor, residing at [REDACTED], who operates four residential care homes, one of which is [REDACTED]. The petitioner and the

² United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has also filed two other immigrant visa petitions for two additional sponsored workers which USCIS has approved. The first of these petitions ([REDACTED]) has a June 1, 2001 priority date. USCIS approved that petition on February 5, 2008. The beneficiary in that matter has not adjusted to lawful permanent resident status. The second additional sponsored worker [REDACTED] has a priority date of October 16, 2001. USCIS approved this petition on November 7, 2008. The beneficiary in that case has not adjusted to lawful permanent resident status. Thus, throughout the relevant period (2001 onwards), the petitioner has had two additional petitions pending. As such, the petitioner must show an ability to pay the instant wage and the proffered wages for two additional sponsored workers from 2001 onwards.

³ The Form ETA 750 also indicates that overtime work as needed is required for the proffered job and that such work would be compensated at an hourly rate that is 50% higher than the proffered wage. It is noted that covering any overtime pay would increase the petitioner's wage obligation.

⁴ The AAO notes that the petitioner did not submit evidence that the beneficiary had the other special requirements listed on the Form ETA 750 and as such it has not demonstrated that the beneficiary was qualified for the proffered position as of the priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). See also *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986) (which states that USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.)

⁵ The Form ETA 750 also references other points which appear to be requirements of the petitioner if the beneficiary obtains lawful permanent resident status such as the applicant must: have the legal right to work; be willing to be fingerprinted and to have those fingerprints submitted to the U.S. Department of Justice; and be willing to submit to a Health Screening Report issued by the State of California Health and Welfare Agency.

employer listed on the Form ETA 750 are not the same. The place of employment listed on the petition and that listed on the Form ETA 750 are not the same. The sole proprietor is listed as the payer on the beneficiary's Forms W-2 in the record. If the petitioner should seek to pursue this petition further subsequent to this dismissal, it must establish a corporate relationship between the employer on the Form ETA 750 and the employer on the petition such that it can claim that the instant petition is properly supported by a corresponding Form ETA 750.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner stated that it was established in 1994 and that it has nine employees. It also stated that its gross annual income is \$470,000. It did not list its net annual income on the petition. On the Form ETA 750B, signed by the beneficiary on May 29, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the 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 wage, 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 petitioner did not submit documentation to indicate that it had paid the beneficiary the full proffered wage any year during the relevant period. The Forms W-2, Wage and Tax Statement, in the record reflect that the petitioner paid the beneficiary: \$2,949.00 in 2001, or \$13,088.04 less than the proffered wage; \$12,949.50 in 2002, or \$3,087.54 less than the proffered wage; \$12,303.00 in 2003, or \$3,734.04 less than the proffered wage; \$12,380.00 in 2004, or \$3,657.04 less than the proffered wage; \$14,310.00 in 2005, or \$1,727.04 less than the proffered wage; and \$14,985.00 in 2006, or \$1,052.04 less than the proffered wage.

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). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 879 (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 (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.

Here, the record indicates that the sole proprietor has five dependents, a spouse and four children. The proprietor did not submit a statement regarding his monthly household expenses. Thus, this office does not have information from which to calculate his annual living expenses. The record before the director closed on January 24, 2008 when the petitioner filed its response to the director's request for evidence. The petitioner's 2006 tax return was the most recent return available at that time. The proprietor's tax returns reflect the following information for the following years:⁶

- The 2001 Form 1040, line 33, states adjusted gross income (loss) of -\$77,406.
- The 2002 Form 1040, line 35, states adjusted gross income (loss) of -\$40,674.
- The 2003 Form 1040, line 34, states adjusted gross income of \$126,335.
- The 2004 Form 1040, line 36, states adjusted gross income of \$96,740.
- The 2005 Form 1040, line 37, states adjusted gross income of \$59,773.
- The 2006 Form 1040, line 37, states adjusted gross income of \$157,698.

In 2001 and 2002, the sole proprietor's adjusted gross income was negative. The proprietor could not have covered: his annual expenses for a family of five; the difference between the actual wage that it paid the beneficiary, if any, and the proffered wage in those years; and the wages of two

⁶ The AAO notes that even if this office could consider [REDACTED] as the petitioner entitled to the labor certification application here, the Schedules C for this entity in the record reflect modest gross receipts and wages paid during the relevant period, and as such the overall financial circumstances for this entity appear weak.

additional sponsored workers out of a deficit. As such, the proprietor has not shown the ability to pay the instant wage and his two other sponsored workers' wages in 2001 and 2002, using his adjusted gross income.

In 2003, the sole proprietor's adjusted gross income of \$126,335 leaves the proprietor with \$122,600.96, after deducting the difference between the actual wage that it paid the beneficiary in that year and the proffered wage or \$3,734.04. The proprietor did not submit information regarding his annual expenses for a family of five. Thus, this office is not able to calculate what amount is left after deducting the proprietor's annual household expenses. The record also does not include information regarding the proffered wages of the proprietor's two other sponsored workers. Thus, the proprietor has not established the ability to pay the proffered wage and the wages of two additional sponsored workers in 2003 using his adjusted gross income.

In 2004, the sole proprietor's adjusted gross income of \$96,740 leaves the proprietor with \$93,082.96, after deducting the difference between the actual wage that it paid the beneficiary in that year and the proffered wage or \$3,657.04. Again, the proprietor did not submit information regarding his annual expenses for a family of five. The record also does not include information regarding the proffered wages of the proprietor's two other sponsored workers. Thus, the proprietor has not established the ability to pay the proffered wage and the wages of two additional sponsored workers in 2004 using his adjusted gross income.

In 2005, the sole proprietor's adjusted gross income of \$59,773 leaves the proprietor with \$58,045.96, after deducting the difference between the actual wage that it paid the beneficiary in that year and the proffered wage or \$1,727.04. The proprietor did not submit information regarding his annual expenses for a family of five. The record also does not include information regarding the proffered wages of the proprietor's two other sponsored workers. Thus, the proprietor has not established the ability to pay the proffered wage and the wages of two additional sponsored workers in 2005 using his adjusted gross income.

In 2006, the sole proprietor's adjusted gross income of \$157,698 leaves the proprietor with \$156,645.96, after deducting the difference between the actual wage that it paid the beneficiary in that year and the proffered wage or \$1,052.04. Even though the proprietor did not submit information regarding his annual expenses for a family of five, and though the record does not include information regarding the proffered wages of the proprietor's two other sponsored workers, this office finds that it is more likely than not that \$156,645.96 would be sufficient to cover these expenses. Thus, the proprietor has established the ability to pay the proffered wage and the wages of two additional sponsored workers in 2006 using his adjusted gross income.

In sum, the petitioner has not shown an ability to pay the proffered wage and its two additional sponsored workers' wages through its adjusted gross income or net income in 2001 through 2005. It has shown the ability to pay the wage and its two additional sponsored workers' wages in 2006.

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, as urged by counsel. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner in *Sonogawa* had been in business for over 11 years

and routinely earned a gross annual income of about \$100,000 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 1994 and it has nine employees. The petitioner has not established unusual growth since incorporating. Its gross sales or receipts have not markedly increased, but have somewhat fluctuated. The petitioner has not established expectations of increased profits and increased business as suggested by counsel on appeal. 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.

On appeal, counsel indicated that USCIS should prorate the proffered wage for the portion of the year that occurred after the priority date in 2001. However, USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Any suggestion made in these proceedings that the proprietor's surplus adjusted gross income from one year might be used to show an ability to pay the wage in another year is misplaced. The proprietor must show that he can pay his annual household expenses, the proffered wage and the wages of his two additional sponsored workers with funds that are available within each year of the relevant period of analysis.

On appeal, counsel cited an unpublished U.S. district court case: *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D. Mass. September 29, 1989) for the premise that a sole proprietor's personal assets should be considered when determining the proprietor's ability to pay the proffered wage. Counsel also cited *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) for the same premise.

Regarding *O'Conner*, first, this office notes that counsel did not submit this district court decision. Second, the AAO is not bound to follow the published or unpublished decision of a U.S. district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). While the reasoning that underlies such a decision shall be given due consideration when it is properly before the AAO, this office need not, as a matter of law, follow the analysis of a district court judge. *See id.* at 719.

Regarding *Ranchito Coletero*, counsel did not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Nonetheless, this office would note that it did consider any evidence of the instant proprietor's personal assets⁷ and overall financial circumstances available in the record when analyzing his ability to pay the instant wage and that of his two other sponsored workers in this matter, in keeping with precedents that are binding on USCIS such as *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984) and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Counsel also indicated that if the proprietor manages to fund the business through a period when there is a shortfall and thereby is able to keep the business going, then USCIS should find that he has established an ability to pay the wage. This is not correct. The proprietor must establish a continuing ability to pay the instant wage and its two other sponsored workers' wages from the priority date onwards out of his available funds. *See* 8 C.F.R. § 204.5(g)(2)

The petitioner has not shown an ability to pay the proffered wage and the wages of its two additional sponsored workers from the priority date onwards.

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.

⁷ There is no such evidence in the record.