

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

**DUPLICATE COPY**

B6

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

NOV 22 2010

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

ON BEHALF OF PETITIONER:

[Redacted]

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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.

*Elizabeth McCormack*

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 an individual who owns a landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscaper. 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 deemed the evidence in the record insufficient to establish by a preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date. 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.

As set forth in the April 21, 2008 decision, the single 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)(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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 750 was accepted for processing by the Department of Labor (DOL) on April 30, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$8.21 per hour or \$17,076.80 per year. The proffered position as a landscaper does not require any minimum

education, training, or work experience. The beneficiary claimed at part B of the Form ETA 750 that he had been working for the petitioner since March 1993. No evidence has been submitted to support that claim, however. The record contains no Form W-2, 1099-MISC, paystub, or payroll record.

Along with the petition and the approved Form ETA 750, copies of the following evidence were submitted to demonstrate that the petitioner has the ability to pay \$8.21/hour or \$17,076.80/year beginning on April 30, 2001:

- Page one and schedule C (Profit or Loss from Business) of [REDACTED] Forms 1040, U.S. Individual Income Tax Return, for the years 2002 through 2006.

Upon receipt of the evidence as noted above, before adjudicating the petition, the director notified the petitioner to send additional evidence, namely, a copy of [REDACTED] individual tax return for the year 2001 and a list of his monthly recurring household expenses, including his mortgage or rent payments, food, automobile payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

In response to the director's notice, counsel for the petitioner stated that [REDACTED] did not have a copy of his 2001 tax return, nor could he obtain a copy of the tax return from the Internal Revenue Service (IRS). A facsimile from the IRS was submitted confirming counsel's claim that the IRS no longer kept a copy of [REDACTED] tax return for the year 2001. Counsel requested additional time to submit the 2001 tax return of [REDACTED] but stated nothing about [REDACTED] monthly recurring household expenses, nor did he provide any evidence showing [REDACTED] monthly expenses.

The director declined to give the petitioner additional time and denied the petition, finding that the petitioner failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, counsel submits a complete copy of [REDACTED] tax return for the year 2001, indicating that [REDACTED] could not previously locate a copy of his 2001 tax return due to the death of his accountant, but he recently found that tax return.

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>

<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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form I-140 petition, the petitioner claimed to have gross annual income of \$163,514 and to currently employ four workers.

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).

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.

However, as stated earlier, no evidence of record indicates that the petitioner ever employed or paid the beneficiary.

When the petitioner does not establish that it employed or 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*, --- F. Supp. 2d ---, 2010 WL 956001, at \*6 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

---

newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner, as noted above, 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.

A review of the petitioner's tax returns reveals that the petitioner, [REDACTED] was single without any dependents between 2001 and 2006. The table below shows the following information about the petitioner's income and ability to pay the beneficiary's wage:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Proffered Wage (PW)	Annual Household Expenses	AGI less Annual Household Expenses (Net Income)
2001 (line 33, Form 1040)	\$193,565	\$17,076.80	Unknown	Unknown
2002 (line 35, Form 1040)	\$170,643	\$17,076.80	Unknown	Unknown
2003 (line 34, Form 1040)	\$192,013	\$17,076.80	Unknown	Unknown
2004 (line 36, Form 1040)	\$111,443	\$17,076.80	Unknown	Unknown
2005 (line 37, Form 1040)	\$257,191	\$17,076.80	Unknown	Unknown
2006 (line 37, Form 1040)	\$179,857	\$17,076.80	Unknown	Unknown

Based on the table above, the AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage beginning on the priority date. Without further information or evidence about the petitioner's monthly or annual recurring household expenses, this office cannot determine whether the petitioner has that ability. The director's request for a list of the petitioner's monthly recurring household expenses is authorized by regulation and is reasonable.

The regulation at 8 C.F.R. § 103.2(b)(14) states:

Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which

precludes a material line of inquiry shall be grounds for denying the application or petition.

The director, before issuing a decision, has specifically requested the petitioner to submit a list of his monthly recurring household expenses. The petitioner failed to submit such a list. Such a list is material in determining whether the petitioner can cover his business expenses and sustain himself as well as pay the proffered wage out of his individual income. The petitioner's failure to comply creates doubt about his ability to pay the beneficiary's wage. See 8 C.F.R. § 103.2(b)(14).

Finally, USCIS may also 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. 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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*. Nor has it been established that the petitioner, especially between 2001 and 2006, had uncharacteristically substantial expenditures which prevented it from paying the beneficiary the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and considering the absence of evidence establishing the sole proprietor's household expenses, the AAO concludes that the petitioner does not have the ability to pay the salary offered as

of the priority date and continuing to present. 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.