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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**



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FILE: [redacted]
LIN 07 176 50522

Office: NEBRASKA SERVICE CENTER

Date:
FEB 02 2010

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:
[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 restaurant. It seeks to employ the beneficiary permanently in the United States as an international cook. 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 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 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 director's November 14, 2007 denial, 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)(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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.70 an hour, or \$18,096 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 on September 25, 1987, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on October 31, 2004, the beneficiary claimed to work for the petitioner since 1992.

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. The petitioner submitted the beneficiary's W-2 Forms for tax years 2001 to 2006 that established the petitioner paid the beneficiary the following wages: \$9,239.18 in 2001; \$11,497.61 in 2002; \$9,485.22 in 2003; \$11,645.63 in 2004; \$11,531.22 in 2005; and \$14,635.52 in 2006. 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 2001 onwards. The sole proprietor also submitted copies of the beneficiary's last four 2007 pay stubs that indicated a n

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).

hourly wage of \$10.30. While the sole proprietor has provided evidence that in 2006 it paid the beneficiary a salary greater than the proffered wage, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in the relevant period of time.²

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). 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.

Counsel in the response to the director's RFE referred to an interoffice memorandum written by Mr. William R. Yates, former USCIS Associate Director for Operations.³ On appeal, he reiterates that this memo states that if the petitioner has net income greater than the proffered wage, the adjudicator

² The difference between the beneficiary's actual wages and the proffered wage in the relevant period of time is as follows: \$8,856.82 in 2001; \$6,598.39 in 2002; \$8,610.78 in 2003; \$6,450.37 in 2004; \$6,564.78 in 2005; and \$3,460.48 in 2006.

³ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

should not deny an I-140 petition. Counsel asserted that the sole proprietor's net income, as stated on his Schedules C, indicate that the sole petitioner has a net income greater than the proffered wage in tax years 2001 to 2006.

Counsel's assertion is not persuasive. The phrase net income is generically utilized in the Yates memo and refers to business entities that report net ordinary income identified on the first page of the appropriate corporate tax return, after deductions such as depreciation and other business expenses have been considered. With regard to the instant petitioner, as a sole proprietor, his net income, (gross income, after deductions and expenses have been subtracted) is most appropriately identified as adjusted gross income, identified on the first page of Form 1040.

Counsel also claims that some of the deductions taken to calculate the sole proprietor's adjusted gross income on page one of the Form 1040 are the same deductions taken to compute the sole proprietor's monthly household expenses and also claimed as business expenses. Counsel provides no further explanation of his assertion.

Upon review of the sole proprietor's itemized list of monthly expenses estimated in 2007, and his business expenses listed on Schedules C submitted to the record, the AAO does not find any duplication of monthly household with monthly business expenses. Items such as food, gas, water, telephone, and health insurance are clearly personal household expenses rather than business expenses. Counsel correctly asserts that sole proprietor's household expenses may have increased, due to the age of the sole proprietor's children and the increased cost of clothing since 2001. The AAO notes that the sole proprietor did not itemize any clothing expenses on its breakdown of household expenses, and also estimated very low costs of electricity and water; however, it also acknowledges that household expenses can change over a period of six years. Nevertheless, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The AAO does not find counsel's assertions to be persuasive, and will consider the sole proprietor's adjusted gross income in these proceedings.

In the instant case, the sole proprietor supports a family of four during tax years 2001 through 2006. The proprietor's tax returns reflect the following information for the following years:

Sole Proprietor's adjusted gross income in 2001 (Form 1040, line 33)	\$34,206
Sole Proprietor's adjusted gross income in 2002 (Form 1040, line 35)	\$28,531
Sole Proprietor's adjusted gross income in 2003 (Form 1040, line 34)	\$42,113
Sole Proprietor's adjusted gross income in 2004 (Form 1040, line 36)	-\$21,381
Sole Proprietor's adjusted gross income in 2005 (Form 1040, line 37)	\$27,433
Sole Proprietor's adjusted gross income in 2006 (Form 1040, line 37)	\$41,173

In response to the director's RFE dated August 14, 2007, the sole proprietor submitted an itemized list of personal monthly household expenses that totaled \$3,791.51, or \$45,498.12 annually. In all tax years except for 2004, the sole proprietor's adjusted gross income covers the difference between the beneficiary's actual wages and the proffered wage of \$18,096. However, the remaining adjusted gross income is not sufficient to pay the sole proprietor's yearly household expenses of \$45,498.12

during any tax year in the relevant period of time. Therefore the sole proprietor cannot establish its ability to both pay the difference between the beneficiary's actual wages and the proffered wage, and pay his own annual household expenses.

In response to the director's RFE, the sole proprietor also submitted the first page of statements for his Bank of America business checking statement from January 2001 to June 2007. Counsel identified the twelve month average balance for these bank statements and noted that the evidence showed a positive cash flow from month to month, and year to year. Counsel on appeal reiterates this statement. However, the AAO notes that counsel appears to have added all the ending monthly balances in each year and utilized this number as the sole proprietor's average yearly balance in his business checking bank statements. For example, in the response to the director's RFE, counsel identified the sole petitioner's 12-month average balance in his business checking account in tax year 2001 as \$25,157.74. However, this figure represents the total of all monthly balances for eleven months of 2001.⁴ When divided by eleven, the sole proprietor's average monthly balance during tax year 2001 is \$2,287.06. Thus counsel's figures are inaccurate, in addition to not establishing that the sole proprietor, based on his business checking statements, had additional monies to pay the difference between the beneficiary's actual wages and the proffered wage and also cover his annual household expenses.

The AAO further notes that personal checking accounts, savings accounts, money market accounts, certificates of deposits, or other similar accounts, should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses; however, the sole proprietor's monthly balances from its business checking account are funds most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. The AAO will examine the sole proprietor's business checking account when it examines the sole proprietor's totality of circumstances further in these proceedings.

On appeal, counsel states that the sole proprietor's tax returns indicate the ownership of a house since 2001, and that since the sole proprietor's tax returns indicate mortgage interest payment of approximately \$15,000, the sole proprietor had cash available to pay the beneficiary. Counsel's assertions are without merit. The sole proprietor's mortgage interest payments are part of his liabilities, and are not available as extra financial assets with which to pay the difference between the beneficiary's actual wages and the proffered wage.

On appeal, the sole proprietor submits a letter that states he has approximately \$300,000 equity in his house, and \$25,000 equity in his four vehicles. Counsel refers to this document as a sworn affidavit, and also refers to an equity line on the sole proprietor's house that is readily available as cash. However, the sole proprietor's letter is not an affidavit sworn to by a declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Further, the record also does not contain any evidence of an equity line on the sole proprietor's house. The sole proprietor apparently simply notes the amount of equity in his residence

⁴ The sole proprietor's business checking bank statement for August 2001 was not submitted to the record.

that could be based on arbitrary increases in property values. USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the sole proprietor's liabilities and will not improve its overall financial position.

On appeal, counsel also refers to several AAO decisions that allow for other considerations in determining a petitioner's ability to pay the proffered wage; counsel does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of US CIS are binding on all its employees in the administration of the Act, unpublished 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).

Counsel also references minutes from an AILA teleconference liaison meeting with the Vermont Service Center on November 16, 1994 that provides statements by the Service Center Director as to means to determine a petitioner's ability to pay the proffered wage. Again, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Thus, the AAO does not view counsel's reference to 1994 commentary by the Vermont Service Center as persuasive.

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. 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, counsel on appeal notes that the petitioner paid wages to its employees during the relevant period of time, based on line 26, Schedule C, and that the combined annual wages were higher than the proffered wage. This fact does not establish the petitioner's ability to pay the difference between the beneficiary's wages and the proffered wage in tax years 2001 to 2006. In fact, the sole proprietor would have had to utilize almost all wages paid in tax years 2001 and 2003 to pay the proffered wage. The AAO does note that the wages paid to the sole proprietor's five employees have increased each relevant tax year.

The AAO also acknowledges that the sole proprietor has been in business since 1989, a considerable time in terms of small restaurants, and notes that even in tax year 2004, when the sole proprietor's adjusted gross income was negative, the sole proprietor's business reflects a net profit of \$50,727.⁵

In examining evidence in the record with regard to the sole proprietor's additional financial resources, with regard to the sole proprietor's business checking account, the monthly balances are not significant enough to establish that the sole proprietor could have paid the difference between the beneficiary's actual wages and the proffered wage. Balances that reflect the entire proffered wage every month would establish much more conclusively the use of the sole proprietor's business checking balances to establish the ability to pay the proffered wage.

The record does not contain sufficient additional evidence such as savings accounts that could establish that the petitioner has additional personal financial resources with which to pay the proffered wage. Finally, the AAO finds no evidence in the record as to the petitioner's business profile within the restaurant industry, or similar factors, that would lead the AAO to conclude that the petitioner has established that it had the continuing ability to pay the proffered wage.

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.

⁵ The sole proprietor's Form 1040 for tax year 2004 reflects a stock loss of \$62,465, that resulted in the overall negative adjusted gross income.