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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 18 2010

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IN RE:

Petitioner:



Beneficiary:

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:



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 full service beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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. The director also determined that the petitioner had not established that, as of the priority date, the beneficiary was qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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.

As set forth in the director's September 6, 2007 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, and whether the beneficiary had the required qualifications for the proffered position as of the priority date.

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 on appeal.¹

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, 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 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).

Here, the DOL accepted the petitioner's Form ETA 750 on April 30, 2001.² The proffered wage as stated on the Form ETA 750 is \$365.00 per week or \$18,980 per year.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner failed to state when it was established and failed to state how many employees it currently employs. It also failed to list its gross annual income and net annual income.

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, U.S. 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 Sonegawa*, 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. In the instant case, the record indicates that the petitioner has employed the beneficiary since May 2001.³ The petitioner submitted a copy of the beneficiary's paycheck which indicates that the beneficiary earned total wages of \$750 for the pay period covering April 8, 2007 through April 14, 2007. The paycheck does not reflect any other year-to-date earnings. The petitioner did not document that it had paid the beneficiary at any other time during the relevant period of analysis. Thus, the petitioner has not established that it paid the beneficiary the proffered wage or any portion of that wage during 2001 through 2006. It has established that it paid the beneficiary \$750 or \$18,230 less than the proffered wage in 2007.

² USCIS records indicate that the petitioner also filed two Forms ETA 750 on April 6, 2001 for two additional, different beneficiaries, also from Turkey; and that these beneficiaries then adjusted to lawful permanent resident status on April 27, 2005 and June 21, 2006 based on approved Forms I-140, Immigrant Petition for Alien Worker, which the petitioner filed on their behalf, and approved Forms I-485, Application to Register Permanent Residence or Adjust Status.

³ The beneficiary stated on the Form G-325A, Biographic Information, submitted with the Form I-485, Application to Register Permanent Residence or Adjust Status, that the petitioner had employed him from May 2001 through the date that he signed that form in September 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during 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). 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.

In the instant case, the record indicates that the sole proprietor is single with no dependents. The sole proprietor did not submit a sworn statement which lists his monthly household expenses. The record before the director closed on July 12, 2007 when the petitioner filed its response to the director's request for evidence. The petitioner's 2006 tax return would have been available at that time, and the director specifically requested that the petitioner submit the tax return, audited financial statement or annual report for 2006, but the petitioner failed to do so. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$18,016.
- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$21,080.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$26,486.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$31,500.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$57,615.

In 2001, the sole proprietor's adjusted gross income is less than the proffered wage of \$18,890, and would leave the proprietor, after deducting the proffered wage, with a deficit to cover his annual household expenses and to cover the proffered wages of the two other beneficiaries/full-time employees for whom the proprietor successfully petitioned, who also have April 2001 priority dates.⁴ Thus, the proprietor has not shown the ability to pay the instant wage in 2001.

The director's decision states that the petitioner cannot pay the proffered wage in 2001, but considers a prorated proffered wage because the priority date is April 30, 2001, not January 1, 2001. The AAO withdraws this point in the notice of decision. USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it 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.

In 2002, the sole proprietor's adjusted gross income of \$21,080 leaves the proprietor with only \$2,100, after deducting the instant proffered wage. The AAO finds that this is not enough to cover his annual household expenses and the proffered wages for the two other individuals for whom he petitioned who also have April 2001 priority dates. Thus, the petitioner has failed to show an ability to pay the proffered wage in 2002.

In 2003, the sole proprietor's adjusted gross income of \$26,486 leaves the proprietor with only \$7,506, after deducting the proffered wage. The AAO finds that this also is not enough to cover his annual household expenses, and the proffered wages for the two other individuals for whom he petitioned who also have April 2001 priority dates. Thus, the petitioner has failed to show an ability to pay the proffered wage in 2003.

In 2004, the sole proprietor's adjusted gross income of \$31,500 leaves the proprietor with only \$12,610, after deducting the proffered wage. The AAO finds again that this is not enough to cover his annual household expenses, and the proffered wages for the two other individuals for whom he petitioned who also have April 2001 priority dates. Thus, the petitioner has failed to show an ability to pay the proffered wage in 2004.

⁴ USCIS records currently before the AAO do not include information regarding the specific proffered wages of the petitioner's two other beneficiaries who have April 2001 priority dates. The records before this office do indicate that these two other beneficiaries were to work full-time at the petitioner's salon and that they successfully adjusted to permanent resident status as skilled workers in 2005 and in 2006. Thus, in 2001 through 2005 the petitioner must show the ability to pay two additional full-time salaries as an added expense, and one additional full-time salary in 2006, before USCIS may find that it had the ability to pay the instant wage in any of those years.

In 2005, the sole proprietor's adjusted gross income of \$57,615 leaves the proprietor with only \$38,635, after deducting the proffered wage. The AAO finds that this also is not enough to cover his annual household expenses, and the proffered wages for two other full-time employees. Thus, the petitioner has failed to show an ability to pay the proffered wage in 2005.

The proprietor failed to submit his 2006 tax return or any other documentary evidence of his ability to pay the wage in that year. Thus, the petitioner has failed to show an ability to pay the wage 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. 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 *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 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.

In the instant case, the record does not indicate when the petitioner was incorporated or how many employees it has. Also, the petitioner did not establish unusual growth since incorporating. While its gross sales or receipts generally have increased as follows: \$141,260 in 2001; \$160,498 in 2002; \$290,154 in 2003; \$332,746 in 2004; and \$502,487 in 2005, the AAO does not find and the tax returns do not demonstrate that such growth in receipts is sufficient to cover the annual expenses of the sole proprietor and the three full-time employees for whom he has petitioned. Moreover, the petitioner failed to provide a tax return for 2006 or other documentary evidence of its financial position in 2006, as requested by the director in the request for evidence. The sole proprietor has not submitted any estimate of personal expenses, or documentation of any other readily available cash or liquefiable assets through which he may pay three proffered wages for all the sponsored beneficiaries. Thus, the petitioner has failed to establish that the growth of its business over the period of analysis justifies finding that it has the ability to pay the wage, despite the low net income figures reported on its tax returns. Further, the petitioner has not established: the occurrence of any

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 15, where the beneficiary is required to list any work experience relevant to the proffered position, he stated that from August 1995 through October 1998 he worked as a hair stylist at [REDACTED] Turkey. He did not provide any additional information concerning his employment background that is relevant to the proffered position on that form.

The petitioner submitted into the record a letter written by the beneficiary's father⁵ [REDACTED] dated January 30, 2001 which indicates that from August 1995 through October 1998 the beneficiary worked as an assistant hair stylist at the hair salon, [REDACTED], which is owned by [REDACTED]. The letter also indicates that the beneficiary worked at [REDACTED] from November 1998 through September 1999.⁶ In addition, the letter indicates that the beneficiary worked 40 "hours a day" (sic) and five days a week, and that his duties consisted of "Hair Cut, Hair Color, Highlight, Perm, Upsweep, etc." The letter does not specify if these were his duties and hours at [REDACTED] or at both salons.

The petitioner also submitted a letter written by the beneficiary's father dated June 25, 2007 which states that the beneficiary worked as a hair stylist at [REDACTED] from August 1995 through October 1998. [REDACTED] indicated that during that period of employment, the beneficiary "specialized in hair cutting, styled and set hair according to latest style, or followed the instructions of customers as well as created new style for customers." He added that the beneficiary is "proficient in highlighting, perming, styling updo's dying, tinting, bleaching, curling or washing hair as requested." He did not indicate when the beneficiary obtained these proficiencies or that this experience is full-time.

Finally, the petitioner submitted a letter on appeal written by [REDACTED] dated October 12, 2007.⁷ [REDACTED] indicated that the beneficiary worked at [REDACTED] as his co-worker from August 1995

⁵ The beneficiary listed [REDACTED] as his father on the Form G-325A, Biographic Information, submitted with the Form I-485, Application to Register Permanent Residence or Adjust Status. [REDACTED] appears as the beneficiary's father's name in the copy of the beneficiary's passport in the record. The director referred to [REDACTED] as the beneficiary's mother in the request for evidence (RFE) and in the notice of decision. On appeal, counsel also refers to [REDACTED] as being female, not male. Nonetheless, based on the designation in the beneficiary's passport, the AAO will refer to [REDACTED] as the beneficiary's father throughout this analysis.

⁶ The petitioner indicated through counsel in response to the request for evidence that it is not able to provide any documentation of the beneficiary's employment from the owner of [REDACTED] as that salon is no longer in business and its owner cannot be located. In addition, the beneficiary failed to list this experience on the Form ETA 750B or the Form G-325A, Biographic Information, in the record. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(where the BIA notes that if the beneficiary's claimed qualifying experience is not listed by the beneficiary and certified by the DOL on the Form ETA 750B, this undermines the credibility of the assertion that the beneficiary has such experience.)

⁷ The letter does not specify if [REDACTED] is male or female. For purposes of this analysis, the AAO will refer to [REDACTED] as male as the name [REDACTED] appears as a boy's name at websites,

through October 1998. [REDACTED] stated that the beneficiary became proficient “in hair cutting, highlighting, perming, styling, updo’s, dying, tinting, bleaching, curling, blow drying and washing of hair under his father’s instructions.” This letter does not address whether the beneficiary’s employment was part-time or full-time.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The director pointed out that during the period that the beneficiary’s father stated that the beneficiary worked in his salon the beneficiary was fourteen years old to sixteen years old. The director indicated that a child of this age would not be permitted to do more than assist the adults working in the salon and would not have gained experience cutting hair and working as a hair stylist himself. The AAO concurs with the director. In addition, it is questionable that the beneficiary’s employment was full-time for this entire period. None of the letters submitted adequately document that the experience was full-time for the entire period such that this office might assess whether the beneficiary has the required two years of prior full-time experience in the position offered. The letter written by the beneficiary’s co-worker and submitted on appeal does not overcome the deficiencies in the experience letters already in the record.

In addition, the AAO would underscore that in his letter dated January 30, 2001 the beneficiary’s father specified that his son, the beneficiary, was not a hair stylist, but was an assistant hair stylist during the period that he was employed at his salon in Istanbul. The Form ETA 750 was not drafted or certified to allow an individual to qualify for the position offered based on experience in a related occupation, such as assistant hair stylist. However, in his letter dated June 25, 2007 the beneficiary’s father stated that the beneficiary worked as a hair stylist during this same period. Such inconsistencies call the accuracy of the experience letters in the record further into question.

such as [REDACTED] (accessed February 2, 2010), which identify the gender and meaning of various names.

Doubt cast on any aspect of the proof submitted by an applicant or petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Further, the petitioner failed to provide evidence that the beneficiary was licensed or eligible to become licensed as a hair stylist in Washington, D.C. (D.C.) as of the April 30, 2001 priority date as required by the Form ETA 750. As stated by the director in the notice of decision, it is insufficient for the petitioner to document only that the beneficiary became licensed in Virginia during 2007. On appeal, counsel suggested that this 2007 Virginia hair stylist license is evidence that the beneficiary was able to become licensed in D.C. on the priority date because having such license in another jurisdiction is one of the requirements for licensing in D.C. This overlooks the fact that the petitioner must show that the beneficiary was eligible to become licensed in D.C. on April 30, 2001. A petitioner must establish that the beneficiary has the qualifying experience at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that the beneficiary was licensed or able to become licensed as a hair stylist as of the priority date.

Thus, the petitioner has not shown that, as of the priority date, the beneficiary had the necessary qualifications for the proffered position as stated on the Form ETA 750; namely, the petitioner failed to show that the beneficiary had acquired two years of experience as a hair stylist and that he was licensed or able to become licensed as a hair stylist as of the April 30, 2001 priority date.

Therefore, the petitioner has not shown that the beneficiary was qualified as of the priority date to perform the duties of the proffered position as those qualifications are defined on the Form ETA 750. The petitioner has also failed to show an ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on both of these grounds, with each considered an independent and alternative basis of dismissal.

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.