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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
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Services**

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Office: NEBRASKA SERVICE CENTER

Date:

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IN RE:

Petitioner:

Beneficiary:

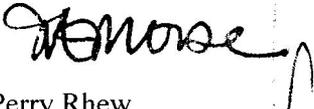
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 an ornamental iron work company. It seeks to employ the beneficiary permanently in the United States as a structural metal fabricator and fitter. 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 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.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, received on November 5, 2007, that he would be submitting a brief or additional evidence to the AAO within 30 days. *See* 8 C.F.R. § 103.3(a)(2)(viii)(which states that where counsel is granted additional time to submit a brief after the filing of the appeal, the appeal brief must be sent directly to the AAO.) The record indicates that, as of the date of this decision, no brief or additional evidence has been submitted. The AAO will consider the record complete.

As set forth in the director's October 6, 2007 denial, the single 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)(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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$15.65 per hour or \$32,552 per year. The Form ETA 750 states that the position requires four years of 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 on 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 in 1996 and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not claim to have worked for the petitioner. The petitioner did submit a copy of the Form W-2, Wage and Tax Statement, which it issued to the beneficiary for work performed during 2006.

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, 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 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

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).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in April 2001 onwards. The 2006 Form W2 in the record does establish that the petitioner paid the beneficiary \$30,048 in 2006. Therefore, the petitioner must demonstrate its ability to pay the difference between \$30,048 and the proffered wage in 2006, which is \$2,504, and its ability to pay the full proffered wage in 2001 through 2005.

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, Profit of Loss from Business, 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 sole proprietor submitted a declaration which indicates that his monthly household expenses are \$1,026 or \$12,312 per year. 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 \$53,400.00.
- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$45,369.00.

- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$27,572.00.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$31,146.00.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$30,083.00.
- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$24,871.00.

In 2001 and 2002, the sole proprietor's adjusted gross income of \$53,400 and \$45,369, respectively, is sufficient to cover his stated annual household expenses of \$12,312 per year and the proffered wage of \$30,048. In 2006, the sole proprietor's adjusted gross income of \$24,871 is sufficient to cover his annual household expenses of \$12,312 and \$2,504, the difference between the amount actually paid the beneficiary in 2006 and the proffered wage. Thus, the petitioner has demonstrated an ability to pay the wage in 2001, 2002 and 2006.

In 2003, the sole proprietor's adjusted gross income of \$27,572 fails to cover his stated annual household expenses of \$12,312 per year and the proffered wage of \$30,048. In 2004, the sole proprietor's adjusted gross income of \$31,146 fails to cover his stated annual household expenses and the proffered wage. In 2005, the sole proprietor's adjusted gross income of \$30,083 again fails to cover his stated annual household expenses and the proffered wage. Thus, the petitioner has failed to show an ability to pay the proffered wage from the priority date onwards.

The petitioner also submitted a copy of what appears to be its business checking account statement for June 2007 which indicates that on June 30, 2007, the petitioner had \$18,831 in its checking account. Business checking account statements are not among the three types of evidence, listed at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence "in appropriate cases," the petitioner in this case has not shown why the evidence listed at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Also, the June 2007 business checking account statement shows the amount in an account on a given date, and cannot show the continuing ability to pay a proffered wage. Further, the petitioner submitted no evidence that the funds reported on the petitioner's checking account statement somehow reflect additional available funds which were not factored into the sole proprietor's tax returns on its Schedule C as gross receipts and expenses, and then in turn reflected in the sole proprietor's adjusted gross income. This June 2007 business checking account statement may only be considered as one factor in a "totality of the circumstances" analysis. In this matter, the sole proprietor has not submitted evidence of his unencumbered, liquefiable assets, such as savings accounts, money market accounts, certificates of deposits, or other similar accounts; the AAO would consider the funds in such accounts as funds available to pay the proffered wage and to cover the sole proprietor's personal expenses.

On appeal, counsel indicated that the director should have considered this matter as involving exceptional circumstances in that the petitioner is a sole proprietor. Counsel suggested that USCIS should have overlooked that the petitioner did not establish an ability to pay the wage in 2003, 2004

and 2005. Counsel indicated that because the proprietor's 2006 Form 1040 shows \$60,096 paid in wages and gross profits of \$109,935, and because the proprietor has paid the beneficiary the proffered wage since 2006, USCIS should find that the petitioner has shown the continuing ability to pay the wage from the priority date onwards.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the record indicates that the petitioner was established in 1996 and it has two employees. The petitioner did not establish its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have fluctuated as follows: \$99,301 in 2001; \$94,789 in 2002; \$79,546 in 2003; \$120,889 in 2004; \$119,618 in 2005; and \$109,935 in 2006. 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.

The petitioner has failed to show an ability to pay the proffered wage 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.