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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



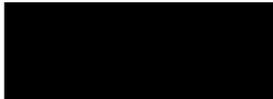
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FILE:



Office: TEXAS SERVICE CENTER

Date: JUL 30 2010

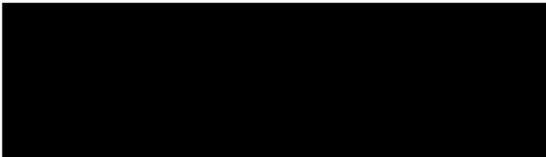
IN RE:

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:

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 \$585. 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 contractor. It seeks to employ the beneficiary permanently in the United States as a painter. 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.

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 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 Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.02 per hour (\$35,401.60 per year). The Form ETA 750 states that the position requires two years of experience in the position offered.

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.

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 1992 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since April, 1998.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 petitioner's ability to pay the proffered wage. In the instant case, the record does not contain evidence that the petitioner employed and paid the beneficiary in 2001, 2002, 2003 or 2006. Therefore, the petitioner must establish its ability to pay the full proffered wage in those years. The record contains copies of Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary for the years 2004 and 2005. These show that the petitioner paid the beneficiary \$38,000.00 in 2004 and \$30,000.00 in 2005. As the petitioner paid the beneficiary in excess of the proffered wage in 2004, it has established its ability to pay the proffered wage in 2004. For 2005, the petitioner must establish its ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary, which is \$5,401.60.

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); *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).

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, *aff'd*, 703 F.2d 571.

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 supported himself and his daughter in 2001 and 2002, and supported himself, his spouse and daughter in 2003. No information was provided for the years 2005 or 2006. The petitioner's adjusted gross income, as reflected in the petitioner's tax returns, is listed in the table below.

<u>Year</u>	<u>Petitioner's Adjusted Gross Income</u>
2001	\$21,246.00
2002	\$32,837.00
2003	\$12,746.00
2005	Tax return not provided
2006	Tax return not provided

In 2001, 2002 and 2003, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$35,401.60. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. As noted, tax returns for 2005 and 2006 were not provided. Therefore the sole proprietor has failed to demonstrate that his adjusted gross income was sufficient to pay the proffered in 2005 or 2006.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary or adjusted gross income of the sole proprietor.

On appeal, counsel asserts that, for 2001, the petitioner is only obligated to establish its ability to pay the proffered wage for the portion of the year that occurred after the priority date. However, the AAO 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. Further, as noted by counsel, considering the proffered wage only for the portion of the year which occurred after the priority date results in a prorated wage of \$23,859.70, which still exceeds the sole proprietor's adjusted gross income for 2001. Thus, even if this office were to prorate the proffered wage for 2001, it would still find that the petitioner failed to establish its ability to pay the prorated proffered wage.

Counsel acknowledges this and further states that the amount listed as depreciation on Schedule E of the sole proprietor's 2001 tax return should be added back to the sole proprietor's net income.¹ However, depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. As noted above, courts have already rejected the argument that depreciation should be added back to net income in determining a petitioner's ability to pay the proffered wage. See, e.g., *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

Counsel also notes that the sole proprietor is the owner of a two-family home with an estimated market value of \$529,000.00, and that the sole proprietor has an equity interest of \$309,000.00 in this home. Counsel asserts that the equity interest in the home is an asset which should be considered in determining the petitioner's ability to pay the proffered wage. However, there is nothing in the record to indicate that the petitioner would be willing to sell this home and use the proceeds to pay the proffered wage. Further, although the sole proprietor's equity interest in the home could be used to obtain a line of credit or a loan, in determining a petitioner's ability to pay the proffered wage USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility 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). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's

¹ Counsel also asserts that depreciation should be added back to the sole proprietor's adjusted gross income for 2002.

liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142.

Counsel also asserts that the director failed to give proper consideration for the sole proprietor's bank statements. Specifically, counsel states that the average monthly balance for the account in 2003 was \$4,880.06, and that this amount is sufficient to pay the proffered wage each month. Counsel is incorrect – an average monthly balance of \$4,880.06 does not mean that the sole proprietor had \$4,880.06 available each month to pay the proffered wage. Further, no evidence was submitted to demonstrate that the funds reported on the sole proprietor's bank statements somehow reflect additional available funds that were not reflected on the sole proprietor's tax return or audited financial statements.

Finally, counsel relies on the provisions of the American Competitiveness in the Twenty First Century Act of 2000 (AC21) to argue that the director erred in requiring the petitioner to establish its ability to pay the proffered wage in 2005 and 2006. The pertinent section of AC21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the petition.

Specifically, counsel argues that, pursuant to the provisions of AC21, the petitioner is only required to establish its ability to pay the proffered wage for 180 days after the filing of the Form I-485, Application to Register Permanent Resident or Adjust Status. Thus, counsel states that in this case, as the Form I-140 and Form I-485 were both filed on September 28, 2003, the petitioner need only

establish its ability to pay the proffered wage until March 21, 2004 (180 days after the filing of the Form I-485).²

As support for this argument, counsel cites a memorandum dated December 27, 2005 which states:

Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

Counsel's reliance on this memorandum is misplaced. 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. Ashkenazy 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.")

As noted above, 8 C.F.R. §204.5(g)(2) states that a petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Counsel's argument – that when an alien "ports" to a new employer, the original petitioner's ability to pay need only be established for 180 days from the date of filing – is inconsistent with the plain language of 8 C.F.R. §204.5(g)(2). There is nothing in the text or legislative history of AC21 to indicate that Congress intended to abrogate the requirements of 8 C.F.R. §204.5(g)(2) for aliens who port to a new employer.

² As discussed above, the petitioner failed to establish its ability to pay the proffered wage in 2001, 2002 and 2003. Thus, even if this office were to accept counsel's argument, the petitioner would still fail to establish eligibility for the benefit sought.

To hold otherwise would provide an “extra benefit” to those who change jobs. That is, where a beneficiary changed jobs, ability to pay would only need to be established for 180 days from the date of filing. However, where the beneficiary did not change jobs, the ability to pay would need to be established until the beneficiary obtains lawful permanent residence.

The Ninth Circuit Court of Appeals addressed a similar issue in *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). In that case, the Ninth Circuit determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff’s argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit stated that it was not the intent of Congress to grant extra benefits to those who changed jobs. Similarly, in this case, counsel argues that an alien who exercises portability should be shielded from denial of an unapproved petition. This is just as inconsistent with Congressional intent, if not more so, as the argument posed by the plaintiff in [REDACTED]

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.³

³ Furthermore, it is noted that the evidence in this matter does not warrant approval under a totality of the circumstances analysis. See *Matter of Sonogawa*, 12 I&N Dec. 612. The decision in *Sonogawa* related to a petition filed during uncharacteristically unprofitable or difficult years in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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. Clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in 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.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*. The petitioner did not establish a pattern of profitable or successful years or that it has a sound business reputation. Instead, as noted above, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the ability to pay the proffered wage.

Page 9

ORDER: The appeal is dismissed.
