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U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

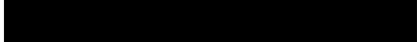


U.S. Citizenship  
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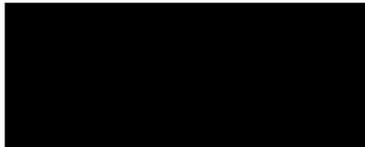


FILE:  Office: NEBRASKA SERVICE CENTER Date: **JUN 22 2010**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer repair and service business which seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition 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 at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. See 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted for processing on April 23, 2001. It lists the proffered wage as \$28,000 per year based on a 40 hour workweek. The position requires two years experience in the job offered.

The petitioner is a sole proprietorship established in 1987 which had no employees when the Form I-140 was filed on November 13, 2006. The owner's IRS Forms 1040, U.S. Individual Income Tax Return, reflects he operates the business on a calendar year basis.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on June 26, 2002, he stated he had not been employed by the petitioner. Additionally, on his Form G-325A, Biographic Information, the beneficiary signed on October 27, 2006, he stated he was unemployed from March 2000 until October 27, 2006. In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date until September 2007, when the company began paying the beneficiary \$2,170 per month as evidenced by monthly checks written to him in that amount.

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 next examines 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 (1<sup>st</sup> 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 IRS Forms 1040 each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover

their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, the sole proprietor supports a family of four. His adjusted gross income from his IRS Forms 1040 are listed in the table below:

2001 Line 33	2002 Line 35	2003 Line 34	2004 Line 36	2005 Line 37	2006 Line 37
\$61,740	\$24,880	\$39,875	\$52,736	\$43,492	\$82,474

Although the petitioner may have been able to pay the proffered wage in 2001 and 2006, his adjusted gross income in 2002 is even lower than the offered wage of \$28,000 which would have left nothing for household expenses during that year. Additionally, the adjusted gross income amounts listed for 2003 through 2006 are inadequate to pay the household expenses for a family of four after a \$28,000 per year deduction, based on a remaining balance of \$11,875 for 2003, \$26,736 for 2004 and \$15,492 for 2005. This inadequacy is reinforced by a September 5, 2007 letter from counsel itemizing some of the family's household expenses for 2006. The letter indicates that the family's mortgage and automobile loans had been paid and household expenses only totaled \$1,000 per month. However, installment loans and credit card payments totaled \$1,450 per month for a total of \$29,400. If this amount were to be extrapolated to the 2003 through 2005 years, and added to the \$28,000 proffered wage in those years, there would have been a shortfall of \$17,525 in 2003, \$6,664 in 2004 and \$15,908 in 2005. Sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer, supra*.

On appeal, counsel states the owner possesses two commercial building properties, a ranch, a house and three businesses. Counsel further states that the owner's home is paid off and the total value of the house of about \$180,000 is considered as available. Counsel submits a copy of a release of lien from the County of Collin, Texas, to show that the petitioner's home is not encumbered by debt. Counsel submits property tax invoices and agreements to substantiate the petitioner's ownership of other properties and copies of bank statements from 2002 to 2005. Counsel asserts the bank balances show the petitioner's net income from every month after all expenses are deducted and argues the petitioner's balances show he had enough funds to pay the beneficiary. Counsel explains that the beneficiary has started to work for the petitioner and submits copies of checks paid to him for wages. It is noted that the checks written to the beneficiary that date from February 28, 2007 through September 29, 2007, are for work performed by the beneficiary for the business for only seven months in 2007 and thus are of limited evidentiary value since the evidence of ability to pay from the priority date onwards is deficient.

Regarding the sole proprietor's ownership of valuable properties, investment properties or one's home are not readily liquefiable assets. Further, it is unlikely that a sole proprietor would sell or encumber significant personal assets to pay the beneficiary's wage. On appeal, counsel submits copies of the petitioner's bank statements from January 4, 2002 through January 15, 2006. One account (last four digits are 8298) is a business checking account whose funds are most likely shown on Schedule C of the proprietor's returns as gross receipts. His second account (last four digits are 4093) and his third account (last four digits are 1329) are chronological and show a wide range of ending balances. However, during 2003, 2004 and 2005, the balances were less than \$1,000 for some of the months in each of those years. The sustained balances in the second account and third account would not have provided sufficient supplemental funds to cover the remaining proffered wage in 2003, 2004 and 2005. It is noted the record also contains copies of the petitioner's checking account statements (last four digits are 9180) from September 29, 2006 through June 29, 2007, showing a June 30, 2006 balance of \$46,868 and a June 29, 2007 balance of \$9,410. However, as shown above, it has been determined that the petitioner established adequate income to pay the beneficiary the proffered wage in 2006.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date through the date the Form I-140 was filed.

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.