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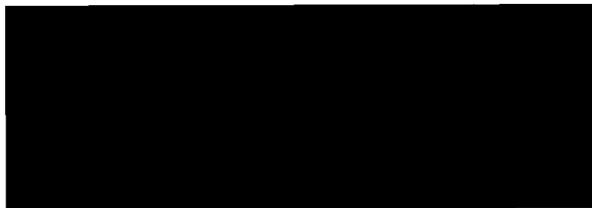
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAR 10 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:

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 construction business. It seeks to employ the beneficiary permanently in the United States as a head/senior welder. 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 May 9, 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$30.80 an hour, or \$64,064 per year. The Form ETA 750 states that the position requires two years in the proffered position or in the related occupation as arc welder, tack welder, welding machiner, operator gas welder.

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 December 10, 1979, and to currently employ 0 (zero) workers. On the Form ETA 750B, signed by the beneficiary on January 13, 2004, the beneficiary claimed to work for the petitioner since March 1994.

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. In response to the director's NOID dated January 23, 2007, the sole proprietor submitted copies of the beneficiary's Forms 1099-MISC that indicated the sole proprietor paid the beneficiary the following compensation: \$22,955 in 2001; \$24,830 in 2002; \$25,462.50 in 2003; \$18,815 in 2004; \$14,925 in 2005; and \$12,110 in 2006.²

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).

² The sole proprietor submitted the beneficiary's multiple Forms 1099-MISC that documented the

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. Thus the sole proprietor has to establish its ability to pay the difference between the beneficiary's actual compensation and the proffered wage of \$64,064. These differences would be \$41,109 in 2001; \$39,234 in 2002; \$38,601.50 in 2003; \$45,249 in 2004; \$49,139 in 2005, and \$51,954.

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.

In the instant case, the sole proprietor supports himself and one dependent in tax years 2001 and 2002. During tax years 2003 to 2005, he supports only himself. The proprietor's tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040, lines 33, 35, and 34 respectively)	\$13,206	\$24,898	\$34,593

beneficiary's compensation from other companies who do not appear to be related to the sole proprietor in tax years 2001 to 2005.

	2004	2005	2006
Proprietor's adjusted gross income (Form 1040, lines 36, 37, and 37 respectively)	\$40,085	\$54,025	\$52,810

Thus the petitioner could have paid the difference between the beneficiary's actual wages of \$14,925 and \$12,110 and the proffered wage of \$64,064 only in tax years 2005 and 2006, when the difference was \$49,139 and \$51,954, respectively,³ and the sole proprietor's adjusted gross income was \$54,025 and \$52,810, respectively. However, the AAO notes that a sole proprietor has to establish both his ability to pay the difference between the beneficiary's pay and the proffered wage and his ability to pay his yearly household expenses.

In response to the director's NOID dated March 28, 2007, counsel submitted the sole proprietor's list of monthly household expenses that indicated monthly expenses of \$2,550, or annual household expenses of \$30,600. The AAO notes that in tax years 2001 and 2003, the sole proprietor's yearly household expenses were higher than his adjusted gross income, which makes it highly improbable that the sole proprietor could have established his ability to pay the difference between the beneficiary's actual wages and the proffered wage based on his adjusted gross income during these two years. Further, the record does not reflect that the sole proprietor could have paid both the difference between the beneficiary's actual wages and the proffered wage and also pay his yearly household expenses, based on his adjusted gross income for any tax year in the relevant period of time in question.

As counsel asserts on appeal, the director did not examine the evidence submitted by counsel with regard to the sole proprietor's personal financial assets that could be utilized to establish the petitioner's ability to pay the difference between the beneficiary's actual compensation and the proffered wage in any of the relevant tax years, or explain why she did not examine these documents. The AAO will examine them in the present proceedings.

In response to the director's January 2007 NOID, the sole proprietor submitted copies of statements from three documents: a Smith Barney SSB IRA Rollover Custodian account, a Smith Barney SSB SEP IRA Custodian account; and a TD Ameritrade Bank Custodian brokerage account. The documents for tax years 2001, 2002, 2005 and 2006 are dated December 31 of the respective year. The bank and brokerage statements for 2003 are dated September 28, 2003.⁴ The financial assets identified in these three specific documents are available to pay the beneficiary's compensation, although most likely with penalty. The following is a breakdown of the combined assets of all three accounts: \$50,024.81 in 2001; \$34,216.26 in 2002; \$39,744.47 in 2003; \$50,348.98 in 2004; and \$52,341.68 in 2005.

³ As previously stated, the differences between the beneficiary's wages and the proffered wage in tax years 2001 to 2005 are \$41,109 in 2001; \$39,234 in 2002; \$38,601.50 in 2003; \$45,249 in 2004; \$49,139 in 2005; and \$51,954 in 2006.

⁴ Thus, the AAO cannot determine what bank or brokerage assets were actually available to the sole proprietor at the end of tax year 2003, but will consider the assets available as of September 2003 for purposes of these proceedings.

The AAO notes that although the sole proprietor could have used the combined assets in his IRA and brokerage accounts to pay the difference between the beneficiary's 2001 actual compensation and the proffered wage and the difference between his adjusted gross income and his yearly household expenses, the sole proprietor would have that much less additional financial assets available in the following year to pay both the difference and pay his household expenses.

For example, in the 2001 priority date year, the sole proprietor would have to utilize his additional financial assets to both pay the difference between his adjusted gross income and his claimed yearly household expenses of \$30,600, namely, \$17,394, and pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$41,109. The total sum to be paid out of the sole proprietor's additional financial resources is \$58,503, a sum greater than the available additional financial resources. The AAO also notes that in 2002, the sole proprietor appears to have taken a significant withdrawal from the larger Smith Barney Account and thus, even less funds would have been available during tax year 2002 and 2003. Further, the sole proprietor's adjusted gross income in both tax year 2001 and 2002 were both less than his documented yearly household expenses, and the sole proprietor might have had to use his available additional financial assets to pay his own household expenses in these two years. The use of the sole proprietor's additional financial resources does not appear to be a reasonable way to establish the sole proprietor's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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 the instant case, the sole proprietor employed the beneficiary in tax years 2001 to 2006. Based on the multiple Forms 1099 submitted to the record that documented the beneficiary's compensation from other companies, the beneficiary does not appear to have worked fulltime for the sole proprietor

The I-140 petition indicates that the sole proprietor has no employees and the sole proprietor's tax returns do not clearly identify any wages paid to any workers during the relevant period of time in question. Counsel on appeal asserts that the magnitude of the sole proprietor's business is reflected in the sole proprietor's "substantial" gross receipts that increased from \$354,697 in 2001 to \$390,036 in 2006. The AAO does not view this documented increase as sufficient to establish the sole proprietor's business viability. The record does not contain any evidence as to the sole proprietor's long term history within the construction business, or any other evidence that would establish further the petitioner's ability to pay the proffered wage. 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 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.