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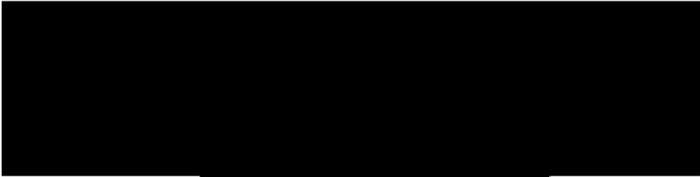
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted]

Office: NEBRASKA SERVICE CENTER

Date: **MAR 15 2010**

LIN 07 184 51716

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an 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.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has established its financial ability to pay the proffered wage.

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.

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).

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 Permanent 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 Permanent 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 Immigrant Petition for Alien Worker (Form I-140) was filed on June 4, 2007. The petitioner failed to indicate on Form I-140 the date it was established, its number of employees, or its gross and annual net income. The approved labor certification, Form ETA 750, was filed with DOL on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.54 per hour, which amounts to \$30,243.20 per year. On the Form ETA 750, signed by the beneficiary on November 9, 2005, the beneficiary claims to have worked for the petitioner full-time as a carpenter since January 1990.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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, United States² Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial

² It is noted on the Form G-325A, biographic information form that was signed by the beneficiary on May 10, 2007, and submitted in connection with his application for permanent resident status, that he states that he has worked for the petitioner beginning since February 1992 to the present (date of signing), rather than since January 1990 as stated on Part B of the ETA 750. Moreover, on both Part B of the ETA 750 and on the employment verification letter submitted by [REDACTED], it is claimed that the beneficiary was also employed full-time for this firm as a carpenter from January 1992 until March 1994, raising the need for further corroboration since the beneficiary is claiming simultaneous full-time employment with both of these companies during the January 1992 through March 1994, period of time. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on 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, 591-592 (BIA 1988). In any further filings, the petitioner must resolve this discrepancy in the beneficiary's claimed experience.

resources sufficient to pay the beneficiary's proffered wages, although the overall 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 director requested that the petitioner provide a Wage and Tax Statement (W-2) or Form 1099 (Miscellaneous Income) for the years 2001 through 2006. In response, the petitioner provided copies of the beneficiary's W-2s for 2001, 2002, 2003, 2004, 2005 and 2006. The W-2s indicate that the petitioner paid the following wages to the beneficiary:

Year	Wages	Difference from the Proffered Wage of \$30,243.20
2001	\$7,200	-\$23,043.20
2002	\$2,400	-\$27,843.20
2003	\$6,000	-\$24,243.20
2004	\$11,690	-\$18,553.20
2005	\$13,350	-\$16,893.20
2006	\$17,000	-\$13,243.20

The petitioner additionally submitted copies of hand-written pay stubs indicating that for a four week period from August 13, 2007 to September 14, 2007, the petitioner paid the beneficiary \$850 per week for full-time work.³

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).

³ It is not clear from the wages paid that the petitioner employs the beneficiary on a full-time basis. The regulation at 20 C.F.R. 656.3 defines *employment* as permanent, full-time work by an employee for an employer other than oneself. The job offer must be for full-time employment.

In support of its ability to pay the proffered wage of \$30,243.20 the petitioner submitted copies of the individual federal tax return (Form 1040) of the owner and his spouse for 2001 through 2006. They reflect that owner and his spouse filed jointly and claimed three dependents on the returns filed during these years. The tax returns contain the following information:

Year	2001	2002	2003	2004
Wages	\$7,413	\$11,329	\$ 11,572	\$6,166
Business Income	\$52,052	\$46,087	\$49,829	\$64,988
Adjusted Gross Income ⁴	\$55,829	\$55,917	\$57,919	\$60,656
Year	2005	2006		
Wages	none listed	none listed		
Business Income	\$69,378	\$79,818		
Adjusted Gross Income	\$58,519	\$72,445		

The entity specified on Schedule C of the individual tax returns submitted to the record indicate that the petitioner was operated as a sole proprietorship, or 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). For that reason, sole proprietors provide evidence of pertinent personal household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. In the instant case, the director requested an itemization of the petitioner's monthly recurring household expenses including but not limited to mortgage or rent, automobile payments, installment loans, credit card payments, etc. The petitioner's response indicates monthly household expenses of \$4,687 per month, which amounts to \$56,244 annually.

The petitioner also provided copies of its business checking account statements from January 2001 to September 2007.

⁴ Adjusted gross income is shown on line 33 in 2001; line 35 of the Form 1040 in 2002; line 34 in 2003; line 36 in 2004; line 37 in 2005 and 2006.

The director denied the petition on December 10, 2007. He compared the funds available to the sole proprietor after considering payment of household expenses and concluded that the funds available in each of the relevant years except 2006, was insufficient to cover the difference between the actual wages paid to the beneficiary and the proffered wage.

On appeal, counsel asserts that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), (Yates Memorandum) supports the approval of the petition. Counsel further maintains that the petitioner's checking account statements support its ability to cover the cash required to pay the proffered wage. Finally, counsel provides a copy of a 2007 property valuation related to the sole proprietor's personal residence as well as a copy of a vehicle title relevant to a 2001 truck in support of the assertion that the encumbrance or sale of these items would support payment of the proffered salary.

Counsel's assertions are not persuasive. With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁵ It does not supersede the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time.

Although the sole proprietor's current readily available cash or cash equivalent assets are considered in the determination of the ability to pay the proffered wage, the AAO does not consider real estate to be such a current readily available asset, but rather that it is a long-term asset. Moreover, the ability to encumber or sell a personal residence will not be considered as a means to demonstrate the ability to pay a proffered wage. Similarly, with regard to the encumbrance or sale of the 2001 truck, it is not clear if this item is used in the petitioner's business and would be part of the equipment or total assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Therefore, these items will not be considered in the calculation of the petitioner's ability to pay the proffered wage.

With respect to the petitioning business' checking account statements, it is noted that as counsel, asserts, the balances generally reflect sufficient cash to cover the payment of the proffered wage. It is noted however, that while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material such

⁵See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

as bank statements to be submitted “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) consisting of federal tax returns, audited financial statements or annual reports is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements generally reflect only a portion of a petitioner’s financial profile and are not indicative of other encumbrances affecting its position and are not an acceptable substitute for the required evidence over a prolonged period. Additionally, the petitioner has not demonstrated that the cash balances as shown on the business checking account statements somehow reflect additional funds of the business that are not already reflected in the financial information contained on the respective tax returns on Schedule C, Profit or Loss From Business. This schedule includes not only a statement of the business gross profits and cash flow, but is also balanced by the business expenses incurred during the applicable year.

In *Ubeda v. Palmer*, 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, although the sole proprietor has fewer dependents than *Ubeda*, in 2001, it is noted that the sole proprietor’s household expenses of \$56,244 exceeded his adjusted gross income of \$55,829 by -\$415 and would have been insufficient to cover the -\$23,043.20 difference between actual wages paid to the beneficiary and the proffered wage of \$30,243.20. In 2002, the sole proprietor’s adjusted gross income was less than the annual household expenses by -\$327, which was insufficient to cover the -\$27,843.20 difference between actual wages paid to the beneficiary and the proffered salary. In 2003, after covering household expenses, the \$1,675 remaining from the sole proprietor’s adjusted gross income was also insufficient to cover the -\$24,243.20 difference between the beneficiary’s actual wages paid and the proffered salary. Similarly, in 2004, after covering household expenses, only \$4,412 remained in adjusted gross income to cover the -\$18,553.20 difference between actual wages and the proffered salary. In 2005, \$2,275 remained after deducting household expenses and was insufficient to cover the -\$16,893.20 difference between the beneficiary’s actual wages and the proffered wage of \$30,243.20. Only in 2006, did the \$16,201 remaining after payment of household expenses demonstrate the petitioner’s ability to pay the full proffered salary because it was sufficient to cover the -\$13,243.20 difference between the beneficiary’s actual wages of \$17,000 and the proffered salary.

Except for 2006, and after consideration of wages paid to the beneficiary and annual household expenses, the evidence fails to demonstrate that the sole proprietor had sufficient funds to cover payment of the proffered wage. The petitioner has not demonstrated that it had the *continuing* financial ability to pay the proffered wage as of the priority date of April 30, 2001, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).

In some cases, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning

entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the record does not indicate how long the petitioning business has existed or how many employees it has. It is noted that its net profits reflected as business income on the respective tax returns set forth above, have been fairly modest, ranging between approximately \$46,000 and \$80,000. This income appears to represent the majority of the sole proprietor's reported income. The evidence does not establish that the sole proprietor could cover payment of the full proffered wage in any of the relevant years except 2006, after covering his household expenses. Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other unique circumstances that prevailed in *Sonegawa* are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

As set forth above, the petitioner has failed to demonstrate its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).

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.