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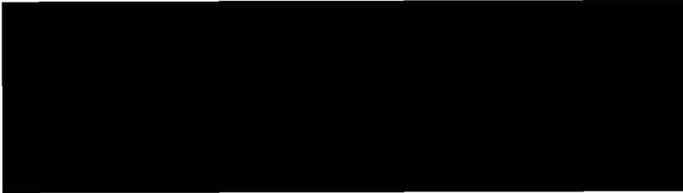
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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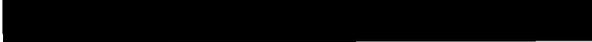
B6



FILE: 
LIN-07-014-51380

Office: NEBRASKA SERVICE CENTER

Date: **MAR 23** 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 concerning your case 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 R. Hew
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 printing shop. It seeks to employ the beneficiary permanently in the United States as a printing machine operator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), 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 and timely filed, 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 January 24, 2008 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 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).

The Form ETA 750 was accepted on March 27, 2001 and certified on September 4, 2002 initially on behalf of the original beneficiary.¹ The proffered wage as stated on the Form ETA 750 is \$16.80 per hour (\$34,944.00 per year based on working 40 hours per week as set forth on the Form ETA 750²). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition on behalf of the instant beneficiary was submitted on September 27, 2006. The instant petition is for a substituted beneficiary.³ On the petition the petitioner claimed to have been established on January 30, 1988, and to currently employ 12 workers, but did not provide information on its gross annual income, net annual income. With the petition the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary but not dated, the beneficiary did not claim to have worked for the petitioner.

¹ The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records show that the petitioner withdrew the I-140 immigrant petition filed on behalf of the original beneficiary on March 6, 2008.

² The petitioner was in error in calculating the weekly proffered wage as \$640 on the Form I-140 and the annual proffered wage as \$33,280 in the letter dated September 26, 2006.

³ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28_96a.pdf (March 7, 1996).

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.⁴

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, 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 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.

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).

⁴ 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).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. Sole proprietorship is 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. Counsel's reliance on the gross income of the business reflected on Schedule C in determining the petitioner's ability to pay the proffered wage is misplaced. 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 a family of five. The record contains the proprietor's tax returns for 2001 through 2005. These tax returns reflect the following information for the following years:

2001	2002	2003	2004	2005
\$79,830 ⁵	\$18,435	\$59,655	\$30,127	\$23,676

USCIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, counsel submits bank statements for the petitioning entity's business checking account and asserts that the balance of the bank account can be used to establish the petitioner's ability to pay the proffered wage. The statements represent the sole proprietor's business checking account, and these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the balance of the sole proprietor's business checking account cannot be considered extra liquefiable assets in addition to the sole proprietor's adjusted gross income.

If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. Counsel also submits bank statements for sole proprietor's personal saving accounts (Interest Maximizer and Investment CD). The statements

⁵ The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005.

show that the sole proprietor had balance of \$97,898.43 as of December 14, 2004 and \$150,000 in his 12 month (September 3, 2004-September 4, 2005) CD account. The record does not contain any other documents showing the sole proprietor had any other liquefiable assets in any other years. Therefore, the sole proprietor had the total available income and assets as follows:

2001	2002	2003	2004	2005
\$79,830	\$18,435	\$59,655	\$128,025	\$173,676

In 2002, the sole proprietor's adjusted gross income and any other available liquefiable assets fail to cover the proffered wage of \$34,944. It is improbable that the sole proprietor could support his family of five on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The sole proprietor would have the balance of \$44,886 in 2001, \$24,711 in 2003, \$93,081 in 2004 and \$138,732 in 2005 respectively after reducing the adjusted gross income and extra liquefiable assets by the amount required to pay the proffered wage. The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietorship established its ability to pay the proffered wage as well as to sustain his family's living expenses for these years. While the balances for 2004 and 2005 are sufficient to sustain the sole proprietor's family of five, it is unlikely for a family of five to survive the year 2001 or 2003 with \$44,886 or \$24,711 respectively.

Without the statement of the sole proprietor's household monthly expenses, the AAO cannot conclude that the petitioner established its ability to pay the proffered wage as well as to sustain his family's living expenses for 2001 and 2003. Therefore, the petitioner failed to establish its ability to pay the proffered wage and the sole proprietor's household living expenses for 2001 through 2003. The record does not contain any documentary evidence showing that the sole proprietor had sufficient funds to pay the instant beneficiary the proffered wage and sustain his family of five in 2006 onwards.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) and five of them were approved by USCIS for which the petitioner is obligated to demonstrate its ability to pay each of them the proffered wages during the partial or whole period of years 2001 through 2008.⁶ Therefore, the petitioner would need to demonstrate its ability to pay five proffered wages in 2001 through 2004, four in 2005, three in 2006 and two in 2007 and 2008 including the instant beneficiary. The record does not contain any evidence showing that the petitioner employed and paid the proffered wages to all these beneficiaries of the approved petitions, nor does the record contain evidence that the petitioner employed and paid the instant beneficiary the proffered wage.

As previously discussed, the sole proprietor had available funds of \$79,830 in 2001 which were sufficient to pay only two proffered wages;⁷ the total funds of \$18,435 in 2002 were insufficient to pay even one single proffered wage; \$59,655 in 2003 were sufficient to pay one full proffered wage; and even the total funds of \$128,025 in 2004 were just sufficient to pay three instead of five. The funds of \$173,676 in 2005 were sufficient to pay the four proffered wages the petitioner was obligated that year, however, it is not likely that the sole proprietor could sustain his family of five's living expenses with the balance of \$33,900 after reducing the total available funds by the amounts of four full proffered wages.

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

⁶ USCIS records show that there are at least eight Form I-140 immigrant petitions filed by the instant petitioner, and five of them were approved. The detailed information about these approved immigrant petitions is as follows:

- WAC-02-026-58474 filed on October 10, 2001 with the priority date of October 10, 1997, and approved on May 26, 2002. The beneficiary was adjusted to lawful permanent resident status on September 8, 2004.
- WAC-02-095-51689 filed on January 23, 2002 with the priority date of February 13, 2001, and approved on June 26, 2002. The beneficiary was adjusted to lawful permanent resident status on January 31, 2006.
- WAC-02-095-51813 filed on January 23, 2002 with the priority date of August 16, 1999, and approved on December 9, 2002. The beneficiary was adjusted to lawful permanent resident status on June 16, 2005.
- WAC-02-288-52035 filed on September 23, 2002 with the priority date of February 13, 2001, and approved on August 11, 2003. The beneficiary was adjusted to lawful permanent resident status on March 30, 2005.
- SRC-07-119-51140 filed on March 6, 2007 with the priority date of March 14, 2006, and approved on February 13, 2008.

⁷ The AAO assumes that proffered wages in those approved petitions are identical to the one in the instant case.

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. As in *Sonegawa*, 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, given the record as a whole, the petitioner's history of filing petitions and the fact that the number of immigrant petitions reflects an increase of fifty percent (50%) of the petitioner's workforce, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had established that it had the continuing ability to pay the beneficiaries the proffered wages as well as to sustain the sole proprietor's family living expenses as of the priority date through an examination of wages paid to the beneficiaries, or the sole proprietor's adjusted gross income and other liquefiable assets.

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.