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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

**PUBLIC COPY**

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: **MAY 28 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 private household. It seeks to employ the beneficiary permanently in the United States as a cook. 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 Form ETA 750 was approved by the DOL with a priority date of April 27, 2001. 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, and that the beneficiary had not established her qualifications to perform the duties of the proffered position. 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 December 11, 2007 denial, the issues in this case are 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, and whether the beneficiary is qualified to perform the duties of the proffered position.

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, 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per basic hour (\$30,160.00 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered or as a specialty cook.

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<sup>1</sup>.

On appeal, counsel submits a brief stating that the petitioner has established its ability to pay the proffered wage throughout the requisite period, and that the beneficiary meets the qualifications requirements set forth on the ETA Form 750. Other relevant evidence in the record includes the beneficiary's W-2 forms for 2001 through 2003, and the petitioner's owner's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2001, 2002, 2003, 2005 and 2006. The petitioner also submitted letters from its bank stating that on May 15, 2007, the petitioner had \$32,745.69 in a checking account, and had five certificates of deposit totaling \$550,000.00. Experience letters were submitted from two of the beneficiary's prior employers attesting to the beneficiary's experience as a cook, as well as a business license for a business in which the petitioner is a partner.

The evidence in the record of proceeding shows that the petitioner is a private household with one employee who seeks to employ the beneficiary as a cook. The petitioner submitted her personal Form 1040 tax forms for the years noted above in support of her petition. The beneficiary does not claim to have previously worked for the petitioner.

On appeal, counsel asserts that the petitioner's bank statements and income tax returns establish the petitioner's ability to pay the proffered wage, and that the beneficiary is qualified to perform the duties of the offered position.

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 determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it

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<sup>1</sup> 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).

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 beneficiary does not claim to have been previously employed by the petitioner.

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 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should

be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner is akin to 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 (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 the instant case, the petitioner’s tax returns indicate that the petitioner supported herself and a daughter in 2005 and 2006, while supporting her daughter and a son in 2001, 2002 and 2003. The petitioner reported monthly expenses of \$6,650.00 (annual expenses of \$79,800.00). In 2001, 2002, 2003, 2005 and 2006, the petitioner filed individual income tax returns with appropriate schedules for expenses and income. The petitioner did not submit a tax return for 2004. The record before the director closed on October 1, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return is the most recent return available. The petitioner’s tax returns demonstrate its adjusted gross income for requisite years as shown in the table below.

- In 2001, the Form 1040 stated an adjusted gross income of \$84,911.00.
- In 2002, the Form 1040 stated an adjusted gross income of \$121,765.00.
- In 2003, the Form 1040 stated an adjusted gross income of \$190,292.00.
- In 2005, the Form 1040 stated an adjusted gross income of \$179,247.00.
- In 2006, the Form 1040 stated an adjusted gross income of \$182,060.00.

The petitioner’s adjusted gross income was sufficient to pay the proffered wage (\$30,160.00) plus the petitioner’s stated monthly living expenses (\$6,650.00) in 2002, 2003, 2005 and 2006. The adjusted gross income for the petitioner was not sufficient to pay the proffered wage plus living expenses in 2001, and the petitioner did not provide a copy of her 2004 tax return so it cannot be determined whether sufficient adjusted gross income was available to pay the required sum in that year. The petitioner states, on appeal, that it is unfair to compare the beneficiary’s living expenses in 2007 to her adjusted gross income in 2001 as expenses in 2001 would have been lower than in 2007. The petitioner did not,

however, present a list of her living expenses in 2001 to prove that assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 petitioner is a private household and her ability to pay is analyzed like a sole proprietor. It is also fitting to consider the petitioner's personal assets, savings or other unencumbered liquefiable personal assets when considering the totality of the circumstances to determine whether the petitioner had the ability to pay the proffered wage during each tax year. The petitioner states that she is part owner of a profitable business, and in support of that assertion submitted a copy of the business license ( [REDACTED] ) in her name. The tax returns of the petitioner support her assertion that she received business income from this organization in 2002, 2003, 2005 and 2006 in amounts ranging from \$132,691.00 to \$238,349.00. The petitioner submitted bank records showing that in 2007 she had certificates of deposit totaling \$550,000.00, and a checking account balance of \$32,745.69. In support of her ownership of the certificates of deposit and checking account, the petitioner submitted statements from [REDACTED]. The statements submitted indicate that the certificates of deposit were obtained in 2007, and that the bank checking account was opened in 2007. There is no evidence that the funds contained in these certificates and checking account were available to the petitioner in 2006. There are no other records, however, showing what liquefiable personal assets or deposits the petitioner had during any year of the requisite period from 2001 onwards. The petitioner must demonstrate its ability to pay at the priority date in addition to subsequent years. 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).

The petitioner states that she owns rental property which is an asset that should be considered when determining her ability to pay the proffered wage. She claims ownership of a ½ interest in a gas station (b) which provides her with business income. The business and rental income are noted on the petitioner's tax returns and were considered when arriving at the petitioner's adjusted gross income. The record does not contain credible evidence establishing the value of the business or rental property. The record does not establish how title to the real estate for those assets is held, or the extent, if any, of any encumbrance on the assets. The record lacks sufficient detail to permit consideration of the value of the properties, outside the income derived therefrom and noted on the petitioner's tax returns, as assets which could be used 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 in years 2006 and 2004.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree

or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The director also determined that the record did not establish the beneficiary's qualifications to perform the duties of the proffered position. The Form ETA 750 requires two years of experience in the job offered as a specialty cook. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The experience noted on the ETA 750 in the job offered, and attested to by the beneficiary, was a position held with [REDACTED] in Garden Grove, California from April of 1997 to May of 2000. The duties performed by the beneficiary at that location, as listed by the beneficiary, coincide with the duties required of the position on the ETA 750. The record, however, does not contain an experience letter from that employer stating the dates of employment by the beneficiary with that organization, and detailing the duties performed by the beneficiary. The beneficiary did submit employment letters from [REDACTED] and [REDACTED]. The experience listed with those organizations, however, cannot be considered because the beneficiary did not list that experience on the ETA 750. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.<sup>2</sup>

It should also be noted that the employment letter from [REDACTED] states that the beneficiary was employed with that organization from November 11, 2001 until February 7, 2004. The beneficiary states on a Form G-325A, Biographic Information Sheet, submitted with an application to adjust status to a lawful permanent resident under penalty of law, that she was so employed from November of 2002 until August of 2004. The discrepancy in employment information has not been explained. It is incumbent upon the applicant to resolve any inconsistencies in the record by

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<sup>2</sup> The beneficiary also submitted copies of Forms W-2 for 2001, 2002 and 2003. Those forms indicate that the petitioner was employed by [REDACTED] earning wages in those years respectively: \$2,618.75; \$8,856.03; and \$6723.00. Those forms were submitted to establish that the beneficiary was employed by [REDACTED]. A letter was submitted by the owner of [REDACTED] stating that she owned that business as well as the [REDACTED], and that the payroll for both companies was processed through the [REDACTED]. The Forms W-2, however, are not relevant to these proceedings as they do not establish relevant job experience. As previously noted, employment at [REDACTED] was not listed in the employment experience section of the Form ETA 750, and any such experience cannot be considered when establishing relevant work experience.

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The beneficiary has not established that she meets the qualifications requirements for the proffered position set forth on the ETA 750.

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.

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