

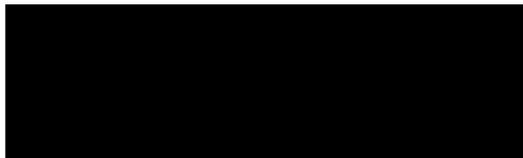
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: **NOV 05 2010**

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

Thank you,

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, [REDACTED] Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). This office issued a request for evidence (RFE) and the petitioner replied to that request on September 30, 2010. The appeal will be sustained. The petition will be approved.

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a farm worker [REDACTED]. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 from the priority date of the visa petition onwards. Therefore, the director denied the petition.

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.

At issue in this case is whether 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 it also has the ability to pay the wages of its other sponsored workers whose petitions were pending during the relevant period.

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 on appeal.¹

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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 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).

Here, the DOL accepted the petitioner's Form ETA 750 on August 31, 2004.² The proffered wage as stated on the labor certification application is \$20,280.00 per year. The Form ETA 750 states that the position requires three months of experience in the proffered job and that the applicant for the position be available to work all shifts.

The petitioner submitted copies of four additional labor certification applications which reflect each of its other sponsored workers' proffered wages, as certified by the DOL. The wage of the sponsored worker with a priority date in 2004 is \$20,080. The wage of the sponsored worker with a priority date in 2007 is \$15,600. \$15,600 is also the wage of each of the sponsored workers with priority dates in 2008.

Thus, the petitioner must show an ability to pay total wages of \$40,560 in 2004; \$40,560 in 2005; \$40,560 in 2006; \$56,160 in 2007; \$87,360 in 2008; and \$87,360 in 2009.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner stated that it was established in 1984 and that it currently employs 4 workers. The petitioner listed \$1,200,000 in gross annual income and \$65,000 in net annual income on the petition. On the Form ETA 750B, signed by the beneficiary on August 15, 2004, the beneficiary did not claim to have worked for the petitioner.

² United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has also filed four other labor certification applications and immigrant visa petitions for four additional sponsored workers which USCIS has approved. The first of these petitions (SRC 07 245 51629) has an August 13, 2004 priority date. USCIS approved that petition on June 3, 2008. The beneficiary in that matter has not adjusted to lawful permanent resident status. The second additional sponsored worker (A87 352 015) has a priority date of September 7, 2007. USCIS approved this petition on January 2, 2009. The beneficiary in that case has not adjusted to lawful permanent resident status. The third additional sponsored worker (SRC 09 034 51407) has a March 14, 2008 priority date. USCIS approved that petition on April 9, 2009. The beneficiary in that case has not adjusted to lawful permanent resident status. The fourth additional sponsored worker (SRC 08 235 52851) has a March 14, 2008 priority date. USCIS approved that petition on September 19, 2008. The beneficiary in that matter has not adjusted to lawful permanent resident status. Thus, during the relevant period (2004 onwards), the petitioner had an additional petition pending. The petitioner had two additional petitions pending from 2007 onward, and it had four additional petitions pending from 2008 onward. The petitioner must show an ability to pay the instant wage and the proffered wages for one additional sponsored worker from 2004 onwards, for two additional workers from 2007 onward, and for four additional sponsored workers from 2008 onward. We note that the petitioner filed other petitions which were denied and not appealed to this office. We need not consider those petitions in this analysis.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that form, 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, and its other sponsored workers' 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. Here, the Form ETA 750, signed by the beneficiary on August 15, 2004, does not indicate that the petitioner employed the beneficiary. The petitioner did not submit any documentary evidence of having employed and paid the beneficiary or any of its other sponsored workers' during the relevant period. Thus, here, the petitioner has not established that it employed and paid the beneficiary or any of its other sponsored workers the full proffered wage or a portion of that wage from the priority date 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (IRS Form 1040, U.S. Individual Income Tax Return) federal tax return each year. The business-related income and expenses in this case are reported on Schedule F, Profit or Loss From Farming, 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 instant proffered wage and any additional sponsored workers' wages 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.

Here, the record indicates that the sole proprietor, his wife and son formed one household in 2004 and 2005. Thus, in 2004 and 2005, the proprietor had to cover the expenses of a household of three. Since that time the proprietor's son has not been a dependent or part of the proprietor's household, and the proprietor has had a household of two. The sole proprietor and his wife each submitted a statement listing monthly household expenses. The record is not clear regarding whether the statements are each meant to be considered expenses for the entire household or if one lists household expenses paid by the proprietor and the other lists the share of the household expenses covered by the proprietor's wife. As the monthly expense amounts differ somewhat, the AAO will consider the list of expenses signed by the proprietor, the proprietor's share of the monthly household expenses, and the list signed by his wife, his wife's share of the monthly household expenses.³ The proprietor listed his expenses as \$993.75 per month or \$11,925 annually. His wife listed her expenses as \$900 per month or \$10,800 annually in 2004 through 2006. She indicated that her annual expenses increased to \$11,400 in 2007, \$11,700 in 2008, and \$12,000 in 2009. Thus, the proprietor's total household expenses were \$22,725 in 2004 through 2006. They were \$23,325 in 2007, \$23,625 in 2008, and \$23,925 in 2009.

The record before the director closed on July 13, 2008 when the proprietor filed its response to the director's RFE. This office issued an RFE on August 23, 2010. The proprietor submitted a response on September 30, 2010. The sole proprietor's 2009 tax return was not yet available at that time. Thus, the 2008 tax return is the most recent return in the record. The proprietor's tax returns reflect the following information:

- The proprietor's 2004 Form 1040, line 36, states adjusted gross income of \$107,519.
- The proprietor's 2005 Form 1040, line 37, states adjusted gross income of \$79,787.
- The proprietor's 2006 Form 1040, line 37, states adjusted gross income (loss) of -\$44,892.
- The proprietor's 2007 Form 1040, line 37, states adjusted gross income of \$985,252.
- The proprietor's 2008 Form 1040, line 37, states adjusted gross income of \$116,663.

In 2004, the petitioner had sufficient net income to cover the proffered wage (\$20,280), the wage of its other sponsored worker whose petition was pending in 2004 (\$20,280), and its annual household expenses (\$22,725), or a total of \$63,285. Thus, the petitioner has shown an ability to pay the instant wage and its other sponsored worker's wage using its net income in 2004.

³ The proprietor and his wife file the Form 1040, U.S. Individual Tax Return, jointly.

In 2005, the petitioner had sufficient net income to cover the proffered wage (\$20,280), the wage of its other sponsored worker whose petition was pending in 2005 (\$20,280), and its annual household expenses (\$22,725), or a total of \$63,285. Thus, the petitioner has shown an ability to pay the instant wage and its other sponsored worker's wage using its net income in 2005.

In 2006, the sole proprietor suffered a loss. Therefore, the petitioner had only a deficit to cover the proffered wage (\$20,280), the wage of its other sponsored worker whose petition was pending in 2006 (\$20,280), and the sole proprietor's annual household expenses (\$22,725), or a total of \$63,285. Thus, the proprietor has not shown the ability to pay the instant wage and its other sponsored worker's wage using its net income in 2006.

In 2007, the petitioner had sufficient net income to cover the proffered wage (\$20,280), the wages of its two other sponsored workers whose petitions were pending in 2007 (\$20,280 + \$15,600), and its annual household expenses (\$23,325), or a total of \$79,485. Thus, the petitioner has shown an ability to pay the instant wage and its other sponsored workers' wages using its net income in 2007.

In 2008, the petitioner had sufficient net income to cover the proffered wage (\$20,280), the wages of its four other sponsored workers whose petitions were pending in 2008 (\$20,280 + \$15,600 + \$15,600 + \$15,600), and its annual household expenses (\$23,625), or a total of \$110,985. Thus, the petitioner has shown an ability to pay the instant wage and its other sponsored workers' wages using its net income in 2008.

In sum, the petitioner has shown an ability to pay the instant wage and its other sponsored workers' wages using net income in 2004, 2005, 2007 and 2008. It did not demonstrate this ability in 2006.

The petitioner submitted a printout which it indicated is a list of balances in the sole proprietor's certificate of deposit (CD) account throughout 2006, 2007, 2008, 2009, and for the final months in 2005 and the initial months in 2010. This printout is on a plain sheet of typing paper. It simply lists columns of typewritten balances and dates without any indication of who prepared the lists and without any formal indication regarding whether the information presented is even associated with a CD account. The printout suggests that throughout 2006 the proprietor had over \$250,000 in a CD account. Yet, the petitioner failed to submit an accompanying cover letter on letterhead stationery from the financial institution which set up the stated CD account. The petitioner would need to provide such a letter that lists the proprietor's name and address, and basic information regarding this CD account as well as a statement indicating that the printout in the record relates to that CD account to demonstrate that this printout does indeed reflect the 2006 balances in a CD account which belongs to the proprietor. Such a letter might be sufficient to confirm that the proprietor had over \$250,000 in liquefiable assets available to pay the instant wage and its other sponsored worker's wage in 2006. However, on the printout in the record, which is the only evidence provided of this CD account, the only indication that the balances on the printout relate to a CD account is the handwritten phrase "CD" added at the top of the printout. In sum, the printout lists only the proprietor's name, various dates, various balances, etc. on a plain sheet of paper. The AAO finds that this is not reliable evidence and is not probative in this matter.

In sole proprietor cases, the AAO may, at times, also consider funds in personal savings and checking accounts, bond accounts, etc. that are available to the proprietor throughout the relevant period, when analyzing the proprietor's ability to pay the wage. For instance, if the proprietor demonstrates that, in 2006, he had available in such accounts amounts sufficient to pay the total of his annual expenses plus the wages of both his pending petitions in that year (\$63,285), this office might find that he had shown an ability to pay in 2006, using the funds in these accounts. However, the proprietor must show that the \$63,285 amount was available throughout 2006. Here, the proprietor has submitted monthly account statements for various accounts for only some months in 2006. For instance, the record includes a packet of 2006 monthly statements for a [REDACTED] checking account in the proprietor's name. However, the packet does not include the statements issued in, for instance, February and March of 2006. Further, the statements that were submitted list, for example, a balance of only \$7,281.02 on March 25, 2006, much less than the amount needed to show an ability to pay. Also, in the record is a packet of [REDACTED] checking account monthly statements for 2006 which lists as names on the account, in addition to the proprietor and his wife, an additional party, [REDACTED] and the name [REDACTED] (who may be the proprietor's son; the record is unclear on this point.) Further, a packet of 2006 monthly statements for a [REDACTED] "special account" in the record lists on the account: the proprietor and [REDACTED]. Thus, the record indicates that funds from these two accounts were not exclusively the proprietor's funds. Again, regarding all the monthly account statements in the record, the petitioner submitted only an incomplete set of such statements for 2006. Thus, it is not clear from the record if the accounts even carried a positive balance throughout 2006, or if the proprietor needed to use all the funds in these accounts for his various expenses.

The AAO notes that the petitioner also submitted a copy of its January 2006 (farm) checking account statement. This indicates that the petitioner's checking account balance went as low as \$12,595.91 on January 13, 2006. Thus, the petitioner clearly did not have sufficient funds in this account to pay the instant wage, its other sponsored worker's wage and the proprietor's annual expenses throughout 2006. This office would also underscore that the petitioner failed to provide all its 2006 monthly statements for this account.

In addition, the proprietor submitted a letter from a Certified Public Accountant (CPA) dated April 4, 2008. The letter indicates that this CPA has prepared the proprietor's taxes since 1991. The CPA indicated that he believes that based on the proprietor's net worth, his cash reserves and his business acumen, the proprietor has the continuing ability to pay the wage offered. Similarly, the record includes a letter dated September 21, 2010 from the proprietor's current CPA. In this letter, the CPA indicates that she believes that the proprietor has sufficient net worth, cash reserves and other liquid assets, as well as sufficient business acumen to be able to pay the proffered wage on a continuing basis. However, the proprietor has not documented for the record that, for example, throughout 2006, he had cash reserves and other liquefiable assets, beyond those reflected on the 2006 tax return, available to pay the instant wage and an additional sponsored worker's wage. The proprietor has not documented for the record that he enjoys a strong reputation in the field of dairy farming or other proof of exceptional business acumen on his part. Going on record without supporting documentary evidence is not sufficient to meet 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)). The unsupported assertions of the petitioner and its agents are not

evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In these proceedings, the proprietor has indicated that he need only show the ability to pay the prevailing wage, not the proffered wage in this matter. This is not correct. The proprietor must show the continuing ability to pay the proffered wage as listed on the Form ETA 750 as certified from the priority date onwards. *See* 8 C.F.R. § 204.5(g)(2)

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000 during the 1950s through the 1960s. 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a sole proprietor's adjusted gross income, savings or various liquefiable 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.

Here, the record indicates that the petitioner was established 26 years ago in 1984 and has four employees. Its gross sales of livestock, produce, grain and other products raised has been consistently strong as follows: \$1,285,370 in 2004; \$1,153,245 in 2005; \$1,615,569 in 2006; \$1,631,874 in 2007; and \$1,540,836 in 2008. The petitioner demonstrated an ability to pay the wage and its other sponsored workers' wages in 2004, 2005, 2007 and 2008. It suffered a loss in only one year in the relevant period, 2006, and could not show an ability to pay using its net income in that year. However, this office is aware of unusual circumstances in the dairy market in that year. The price paid for raw milk supplied by dairy farmers dropped over 15% in 2006 which caused many independent farmers in [REDACTED] and throughout the country to fold. *See* [REDACTED]

[REDACTED] (which indicates that, according to the USDA Milk Market Administrator, the price paid per 100 pounds raw milk was \$24.13 in 2004; \$16.62 in 2005; \$13.75 in 2006; and \$20.84 in 2007; and that lower milk prices of 2006 caused many dairies to suffer losses in that year); *see also* [REDACTED]

[REDACTED] (which states that due to a run-up in production in 2005 and early 2006, milk prices declined over 15% in 2006 from a year earlier, causing many dairy farms to fold; and that in 2007, due to farmers move to slow the rate of production, milk prices rebounded in 2007). The record also shows though that the petitioner not only immediately recovered from the loss it suffered in 2006, it produced a net income that was more than 10 times beyond what was needed to show an ability to pay in the following year. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.