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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

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FILE:



Office: NEBRASKA SERVICE CENTER

NOV 08 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 furniture and cabinet manufacturer. It seeks to employ the beneficiary permanently in the United States as a woodworking machine operator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 23, 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)(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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.00 per hour (\$18,720.00 per year). The Form ETA 750 states that the position does not require any minimum amount of education, training, or experience for the job.

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.¹ The record before the director closed on October 15, 2008 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 2007 federal income tax return was the most recent return available. Relevant evidence in the record includes an "Annual Asset Income Sheet," a statement of assets, the petitioner's Form 1040 U.S. Individual Income Tax Returns for 2001, 2002, 2003, 2004, 2005, and 2006, and a statement of personal expenses for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. Although the petitioner submitted a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, for 2007, the record shows that the petitioner failed to provide tax records for 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on June 1, 1982 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on November 4, 2003 and again on March 3, 2007, the beneficiary does not claim to have worked for the petitioner.

On appeal, the petitioner asserts that his ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. The petitioner includes copies of previously submitted documentation in support of the appeal.

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, 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations 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).

that it employed and paid the beneficiary the full proffered wage from the priority date on April 30, 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported himself in 2001 and 2002, himself and two dependent children in 2003, and himself, his spouse, and two dependent children in 2004, 2005, 2006. The petitioner reported annual living expenses² as follows:

- 2001 – \$43,930.00
- 2002 – \$44,155.00.
- 2003 – \$30,200.00.
- 2004 – \$37,118.00.
- 2005 – \$37,850.00.

² The sole proprietor provided a self estimate of expenses. In any further filings the petitioner should submit documentation to verify such expenses.

- 2006 – \$46,936.00.
- 2007 – \$47,780.00.

Thus, it is necessary to show that the petitioner had the ability to pay the beneficiary the proffered wage of \$18,720.00 per year, plus the annual living expenses of the petitioner and his dependents. Those sums are set forth below:

- 2001 – \$62,650.00
- 2002 – \$62,875.00.
- 2003 – \$48,920.00.
- 2004 – \$55,838.00.
- 2005 – \$56,570.00.
- 2006 – \$65,656.00.
- 2007 – \$66,500.00.

The proprietor's tax returns reflect the following:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was \$31,157.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was <\$26,725.00>.³
- Proprietor's adjusted gross income (Form 1040, line 34) for 2003 was \$27,541.00.
- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was \$28,842.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was \$28,934.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was \$51,687.00.
- The petitioner failed to submit tax documents for 2007.

The record does not establish that the petitioner had the ability to pay the proffered wage plus family living expenses in 2001, 2002, 2003, 2004, 2005, 2006, and 2007.

The petitioner is correct in asserting that as a sole proprietor, his ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. The statement of assets provided by the petitioner lists two separate residential properties (including the petitioner's primary residence), seven motor vehicles, two trailers, and five separate bank accounts. Nevertheless, a review of the petitioner's "Annual Asset Income Sheet," for the years 2001 to 2007 reveals the petitioner sold the residential property that was not his primary residence in December 2007, sold five of the seven listed motor vehicles in December 2002, September 2004, September 2005, October 2006, and September 2007, respectively, totaled one of the seven listed motor vehicles in an accident on an unspecified date, and listed the one remaining motor vehicle as an asset only in 2005 and 2006. In addition, the petitioner's "Annual Asset Income Sheet" reflects that three of five bank accounts listed by the petitioner were not included as assets after 2001 and the remaining two bank accounts were closed by the petitioner in July 2002. Additionally, it is not credible that the petitioner would exhaust his remaining assets, a residential property that is his

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

primary residence and two trailers, to pay the proffered wage. It has also not been established that these assets would be readily liquidated or that any liens or encumbrances on the assets would not exceed their value. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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. 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 *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.

In this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The complete tax returns have not been submitted and the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are persuasive in this matter. USCIS records indicate that the petitioner has filed an additional Form I-140 petition [REDACTED]. The petitioner would need to demonstrate its ability to pay the proffered wage for both of the Form I-140 beneficiaries in 2001. See 8 C.F.R. § 204.5(g)(2). The AAO cannot conclude that the petitioner has established that he has had the continuing ability to pay the proffered wage.

Based on a review of the underlying record and argument submitted on appeal, it may not be determined that the petitioner has established his continuing financial ability to pay the proffered wage. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.