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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
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B6.

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 08 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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.

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 an electronic repair shop. It seeks to employ the beneficiary permanently in the United States as electronic repairer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been 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, 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 March 1, 2008 denial, the 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 at 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 ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was accepted on May 19, 2006. The proffered wage as stated on the ETA Form 9089 is \$12.50 per hour (\$26,000.00 per year). The ETA Form 9089 states that the position requires 24 months experience in the job offered.

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.

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 in 1996 and to currently employ 2 workers. On the ETA Form 9089, signed by the beneficiary on May 4, 2006, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, 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 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 2006 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 evidence in the record of proceeding shows that the petitioner is a sole proprietorship. The petitioner has failed to establish by documentary evidence that it employed the beneficiary during that period at a salary equal to or greater than the proffered wage; therefore, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, to determine its ability to pay the beneficiary the proffered wage with sufficient funds remaining to support the proprietor's family.

A 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 is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable 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. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 33, 35 and 37, respectively. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

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.

The record in this case closed on October 22, 2007, with the receipt by the director of the petitioner's response to the request for evidence. At that time, the petitioner's 2007 tax return was not yet due. Thus the petitioner's 2006 tax return is the relevant tax return in the record.

In the instant case, the sole proprietor's IRS Form 1040 reflects his adjusted gross income (AGI) for 2006:

- In 2006, the proprietor's IRS Form 1040 stated AGI of \$53,218.00.

In the instant matter, the sole proprietor's adjusted gross income appears sufficient to pay the proffered wage of \$26,000.00. However, as a sole proprietor, the petitioner must show that he can sustain himself and his dependents. *See Ubeda v. Palmer, supra*. The petitioner has failed to provide a list of recurring household expenses although specifically requested by the director in the request for evidence. In response to the director's request for evidence, the petitioner provided its company bank statements, company utility bills, a 2006 mortgage statement, and company credit card statements. This evidence cannot be used to assess the petitioner's household expenses. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the sole proprietor declined to provide a list of his recurring household expenses. The list of expenses would have further revealed the petitioner's ability to pay the proffered wage.

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner asserts on appeal that the director erred in his decision and failed to accurately examine and assess all evidence found in the record. The petitioner further asserts that Schedule C and Schedule E on his 1040 income tax returns demonstrate that he realized a profit after payment of his mortgage and business expenses. The petitioner's reliance on Schedules C and E is misplaced. In order to determine whether a sole proprietor has the ability to pay the proffered wage, USCIS must consider the proprietor's adjusted gross income (AGI) found on page one of the Form 1040, which includes the business income from Schedules C and E, less any required adjustments to income. The 2006 AGI of the petitioner exceeds the prevailing wage, but the AAO cannot determine whether the funds are sufficient to cover the proprietor's household expenses and the proffered wage.¹

The petitioner submits as evidence on appeal a copy of the beneficiary's W-2 and 1099, MISC tax forms for 2007, the beneficiary's income tax return for 2007, and a copy of the petitioner's mortgage approval. The Form 1099 indicates that the beneficiary was paid the proffered wage in 2007. The petition cannot be approved, however, as the petitioner has not established the ability to pay the proffered wage in 2006.

The proprietor submitted a copy of a loan approval statement for real property which indicates the property's tax value and current value. Regarding the sole proprietor's property values, real estate is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant asset to generate the necessary funds to maintain its workforce. It is highly speculative to state the value of a certain parcel of real property on the open market. In addition, it is highly speculative to claim funds granted from such a sale would be available specifically for paying the petitioner's payroll. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The sole proprietor submitted copies of its business bank statements. The funds represented in these statements have most likely already been considered on Schedule C of the sole proprietor's returns as gross receipts and expenses. Further, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated that the documentation specified at 8 C.F.R.

¹ In his decision, the director deducted business expenses from the sole proprietor's AGI to determine that the petitioner did not have the income to pay the beneficiary's wage in 2006. This portion of the director's decision is erroneous and will be withdrawn. The business expenses of the petitioner's real estate and electronics repair business are entered onto the proprietor's Schedule C and are deducted from the total income earned by the business prior to carrying the business income forward to page one.

§ 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The bank statements, to the extent that they represent assets, have not been submitted in the context of audited financial statements which would also consider the sole proprietor's debts and other obligations. Accordingly, these bank statements are not probative to the petitioner's ability to pay the proffered wages.

The petitioner's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. 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 this matter, the totality of the circumstances does not establish that the petitioner has nor had the ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that fiscal year 2006 was uncharacteristically unprofitable or a difficult period for the petitioner's business. The petitioner has not established its reputation within the industry or whether the beneficiary is replacing an employee or outsourced service. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petition will also be denied because it has not been established that the beneficiary is qualified for the proffered position with two years (24 months)

of experience in the job offered. On the ETA Form 9089 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary. The petitioner submitted a letter of employment from the owner of [REDACTED] stating that [REDACTED] employed the beneficiary from July 15, 2001 through December 30, 2003 as an electronic repairer. The beneficiary submitted a letter in connection with a separate application dated April 30, 2001 from the technical manager at Sears Repair Services in [REDACTED] New Jersey in which he stated that the company employed the beneficiary as a service technician, for the laundry division, since March 27, 2000. The letters do not include a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Accordingly, the petition will be denied for this additional reason. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is July 7, 2004. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an alternative ground for dismissal. 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.