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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  
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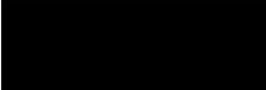
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NOV 10 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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. 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 child care and private learning center. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 June 28, 2009 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. 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 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, 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 17, 2003. The proffered wage as stated on the Form ETA 750 is \$38,168 per year. The Form ETA 750 states that the position requires a Bachelor of

Science degree in Commerce or Business Administration with finance being the major field of study. The Form ETA 750 also states that two years of experience in the proffered position is required, and that the following requirements must be met:

- The beneficiary must pass a pre-employment accounting test.
- The beneficiary must have verifiable work/personal references.
- The beneficiary the required education and work experience.
- The beneficiary must have the legal right to work in the United States.

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>

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 1997 and to currently employ eight workers. On the Form ETA 750B, signed by the beneficiary on April 11, 2003, the beneficiary claimed to work for the petitioner since March 2003.

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 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).

The record of proceeding closed with the receipt by the director of the petitioner's response to the director's request for evidence on March 13, 2009. As of that date, the most recent tax return available was for the 2007 tax year.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003

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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).

onwards. Documentation has been submitted, however, which shows that the beneficiary was paid wages by the petitioner as follows:

- 2003 W-2 Form - \$10,106.40.
- 2004 W-2 Form - \$15,395.20.
- 2005 W-2 Form - \$15,006.40.
- 2006 W-2 Form - \$12,532.75.
- 2007 W-2 Form - \$12,573.30.
- 2008 W-2 Form - \$9,112.53.<sup>2</sup>

Since the petitioner paid the beneficiary wages as set forth above, it must establish the ability to pay the difference between wages actually paid and the proffered wage. Those sums are as follows:

- 2003 - \$28,061.60.
- 2004 - \$22,772.80.
- 2005 - \$23,161.60.
- 2006 - \$25,635.25.
- 2007 - \$25,594.70.
- 2008 - \$29,055.47.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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).

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<sup>2</sup> As noted above, the record of proceeding closed with the receipt by the director of the petitioner's response to the director's request for evidence on March 13, 2009. As of that date, the petitioner's 2008 tax return was not due and it has not been filed of record. The petitioner did submit in its request for evidence response a copy of the beneficiary's 2008 W-2 Form as it was available at that time. We note that the pay stubs submitted for 2008 showed that the beneficiary worked a varying amount of hours over several two week time frames, some of which was less than full-time employment. 20 C.F.R. § 656.3 requires that the position be for full-time employment.

For the purpose of this appeal, tax years of 2003 through 2007 are relevant years in which the petitioner must establish the ability to pay the proffered wage or difference between the proffered wage and any wages paid to the beneficiary in those years.

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 (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 sole proprietor supported a family of three in 2003 and 2004, and a family of two from 2005 through 2007. The proprietor's tax returns reflect the following information for the following years:

- Proprietor's 2003 adjusted gross income (Form 1040, line 34) \$74,333.
- Proprietor's 2004 adjusted gross income (Form 1040, line 36) \$126,490.
- Proprietor's 2005 adjusted gross income (Form 1040, line 37) \$45,382.
- Proprietor's 2006 adjusted gross income (Form 1040, line 37) \$42,575.
- Proprietor's 2007 adjusted gross income (Form 1040, line 34) \$49,946.

While the adjusted gross income listed would be sufficient to pay the proffered wage of \$38,168 for the instant beneficiary, the proprietor must establish the ability to not only pay the proffered wage, but the ability to pay the necessary living expenses of herself and any dependents. In the director's February 3, 2009 Request For Evidence, he asked, in part, that the petitioner provide a list of monthly recurring household expenses, along with documentary evidence supporting those expenses. The requested expense list was to include, but not be limited to, the following:

- Mortgage or rent payments.
- Automobile payments.
- Installment loans.
- Credit card payments.
- Household expenses.

In response to the director's request, counsel stated that a list of recurring household expenses was "not essential because such information is not relevant and superfluous and [an] undue invasion of privacy and/or violation of [the] [p]etitioner's privacy." Counsel is incorrect. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983) which requires that sole

proprietors show that they can sustain themselves and dependents and pay the proffered wage. Counsel did not provide a list of expenses as requested, but supplied copies of various bills and statements. The documents, without explanation, are of little evidentiary value. For example, the following documents were provided:

- A monthly statement from [REDACTED] which shows various payment options on a home loan. The payment options show an interest only payment of \$3,288.45, a 15-year amortization payment of \$5,155.87 or an amortized payment choice of \$3,728.40. Other documentation shows that the petitioner made a \$3,500 payment on February 6, 2009, and that a payment of \$525.13 is due on March 1, 2009. It cannot be determined from this documentation what the precise payment would be.
- A statement of undetermined origin (appears to be a credit card or line-of-credit of some type) showing a balance due of \$207. It is unclear as to whether this is a recurring household expense.
- A \$70 statement from [REDACTED]. The nature this expense, as well as the frequency of the expense is not explained in the record.
- A cable bill showing a monthly service charge of \$29.95.
- A Direct TV statement showing a monthly charge of \$72.99 for lease equipment and service.
- A utility bill for \$402.43.
- A gas bill for \$81.99.

The director estimated the sole proprietor's monthly expenses as \$3,758, but the documentation is incomplete as it does not include other regularly recurring expenses such as food, clothing, transportation and insurance. Without explanation the listed bills/statements are of little evidentiary value and unresponsive to the director's request for evidence. It cannot be determined from the information provided what the recurring living expenses are for the proprietor and any dependents. Accordingly, it cannot be determined whether or not the petitioner had sufficient adjusted gross income in any year to pay the proffered wage plus required expenses.

Additionally, USCIS records reflect that the petitioner filed for two other individuals, one with a priority date of October 2001, and the second August 2006. Nothing shows that the other workers adjusted status. Thus, from 2003 through 2005, the sole proprietor must establish that she can pay for the two sponsored workers, and from 2006 onward that she can pay for three sponsored workers. From the record it is unclear that the petitioner can pay the wages of all its sponsored workers from each respective priority date onward and the sole proprietor's personal expenses.

On appeal, counsel asserts that the petitioner has submitted sufficient documentation to establish the continuing ability to pay the proffered wage from the priority date onward.

Counsel submitted copies of the petitioner's business bank statements from 2006 forward to establish the ability to pay the proffered wage. Those statements, however, will not sustain the petitioner's burden of proof. Reliance on the balances in the petitioner's bank accounts is misplaced. First, 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 why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. A review of the statements reveals several occasions when a particular monthly statement showed a running balance during the course of the month when sufficient funds would not have been available to pay the proffered wage. On occasion overdrafts were also noted. Even if the bank statements could establish the ability to pay the proffered wage, which they cannot, the sums in the accounts do not establish the continuing ability to pay the proffered wage from the 2003 priority date onward.

Counsel states that the petitioner has a \$50,000 line-of-credit which would insure the ability to pay the proffered wage if needed. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that any unused funds from the line of credit were available at the time of filing the petition. As noted above, 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. Nothing shows this line of credit was available at the time of the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase liabilities and will not improve overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).<sup>3</sup>

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<sup>3</sup> The bank statements submitted show that while the petitioner did, at one time, have a \$50,000 line-of-credit as reflected on the bank statement, that line-of-credit was subsequently removed from latter bank statements. It is unknown whether the credit line was removed by the petitioner or discontinued by demand of the bank.

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 [REDACTED] 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 has not established that it had, at any time, the ability to pay the proffered wage plus the proprietor's necessary living expenses and those of any dependents as well as the wages of the two other sponsored workers. The sole proprietor, though requested by the director, failed to sufficiently provide those living expenses. The sole proprietor did not provide proof of liquefiable assets which could be converted to cash to pay the required wage plus expenses. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date forward. 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.

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.