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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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File:



Office: NEBRASKA SERVICE CENTER

NOV 16 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. 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 specialty bridal clothing shop. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a dress maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

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 April 4, 2008 decision, 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 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 September 27, 2002. The proffered wage as stated on the Form ETA 750 is \$7.00 per hour (\$14,560.00 per year). The Form ETA 750 states that the position requires two years 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.¹

The evidence in the record of proceeding shows that the petitioner is a sole proprietor. The petitioner indicates on its petition that it was established in 1975 and that it currently employs 3 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 26, 2003, the beneficiary does not indicate that she has been employed by the petitioner.

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, 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 onwards. The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to the beneficiary as shown in the table below.

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).

- In 2002, the Form W-2 stated total wages of \$5,265.00 (\$9,295.00 less than the proffered wage).
- In 2003, the Form W-2 stated total wages of \$4,657.50 (\$9,902.50 less than the proffered wage).
- In 2004, the Form W-2 stated total wages of \$6,300.00 (\$8,260.00 less than the proffered wage).
- In 2005, the Form W-2 stated total wages of \$6,520.00 (\$8,040.00 less than the proffered wage).
- In 2006, the Form W-2 stated total wages of \$12,971.00 (\$1,589.00 less than the proffered wage).

If, as in this case, 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 is not legally separate from its owner. See *Matter of United Investment Group*, 19 I&N Dec 248, 250 (Comm. 1984). 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 and 35, 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 shows that the sole proprietor has jointly filed her personal tax returns, and lists one dependent. The sole proprietor's IRS Forms 1040 reflect her adjusted gross income (AGI) as follows:

- In 2002, the proprietor's IRS Form 1040 stated AGI of \$78,048.00.
- In 2003, the proprietor's IRS Form 1040 stated AGI of \$49,580.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$39,377.00.
- In 2005, the proprietor's IRS Form 1040 stated AGI of \$135,305.00.
- In 2006, the proprietor's IRS Form 1040 stated AGI of \$53,191.00.

In order to determine the sole proprietor's ability to pay the prevailing wage, her monthly expenses must be subtracted from the adjusted gross income amount. The petitioner provided a statement of living expenses as noted in the following table.

- In 2002, the proprietor listed her expense total as \$74,811.00.
- In 2003, the proprietor listed her expense total as \$75,050.16.
- In 2004, the proprietor listed her expense total as \$76,098.60.
- In 2005, the proprietor listed her expense total as \$78,194.04.
- In 2006, the proprietor listed her expense total as \$78,753.60.

The sole proprietor's adjusted gross income minus her annual expenses is insufficient to make up the difference in the proffered wage for 2002, 2003, 2004, and 2006. Given these expenses, it is improbable that the sole proprietor could support a family of three on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The evidence demonstrates that from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage for 2002, 2003, 2004, and 2006.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that she has the ability to pay the proffered wage. Counsel further asserts that the petitioner's bank statements, fidelity retirement fund statements, savings account statement, and list of real estate property owned by the petitioner should be taken into consideration in weighing the totality of the circumstances in this matter.

Counsel'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 Form ETA 750 was accepted for processing by the DOL.

Although the petitioner submitted a list of real estate she owns jointly with her husband, there has been no evidence provided, such as real estate purchase agreements, land deeds or mortgage statements to substantiate her claim. 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)). Furthermore, a home is not a readily liquefiable asset. It is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. 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 petitioner submitted as evidence copies of the sole proprietor's husband's Fidelity Investments Retirement Savings Statements in 2002, 2003, 2004, 2005, 2006, 2007, and 2008, listing increasing balances in 2002 in the amount of \$13,597.99, up to \$38,646.01 in 2008. This account did not have sufficient funds to cover each year's deficiency between the salary paid and the proffered wage. Furthermore, it is unlikely that the sole proprietor's husband would withdraw funds from his retirement account, subjecting himself to penalties and early withdrawal fees, in order to pay the beneficiary's salary. The petitioner also submitted a bank statement from Bank of the West money market account dated December 2007 through January 2008. There is no evidence in the record to demonstrate when the account was first opened. Thus, this account does not show the ability to pay the proffered wage from the priority date.

The record of proceeding contains bank statements from the petitioner's husband's personal checking account covering the period December 12, 2007 through January 10, 2008, with an average monthly balance of \$1,845.96. The average balance is not sufficient to cover the full or remaining proffered wage as each month's balance could not alone support the full proffered wage for 2007. In addition, the monthly balance stated on the bank statement noted above is insufficient to demonstrate the petitioner's ability to pay the proffered wage since 2002. The petitioner submitted a copy of a bank statement for House of Brides covering the period from November 28, 2007 through December 26, 2007. This account appears to be the sole proprietor's business checking account; and therefore, the balances listed are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore the business bank statement will be reviewed only as part of the totality of circumstances. Furthermore, the business bank statement ending balance was \$52.34 which is insufficient to pay the proffered wage or the balance thereof for that tax year.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 Sonogawa*, 12 I&N Dec. 612. 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

² The AAO further notes 10 overdrafts from this account in the one month period.

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 as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The record is devoid of evidence pertaining to the petitioner's business reputation, or whether the beneficiary is replacing a former employee or outsourced service. The petitioner has not provided any evidence to demonstrate any uncharacteristic business expenses or losses which made 2002, 2003, 2004, or 2006 unusually difficult or unprofitable years. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage since the priority date.

Beyond the decision of the director, USCIS records show that the petitioner has filed multiple immigrant petitions subsequent to the priority date of the instant petition; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

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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.