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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



B6

FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 05 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, with a fee of \$585. 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 food catering company. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 April 8, 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 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires 2 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.

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 1991. The sole proprietor indicates in response to the director's Request for Evidence (RFE) that she currently employs 6 workers. On the Form ETA 750, signed by the beneficiary on April 12, 2001, 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 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 Sonegawa*, 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 record before the director, the sole proprietor did not indicate that she employed the beneficiary. However, on appeal, she submits copies of the beneficiary's Forms 1040, Amended U.S. Individual Income Tax Return, for 2001 through 2007, where the beneficiary states that she has worked for the petitioner as an independent contractor. The AAO notes that the beneficiary filed the amended returns in May, 2008 after the director denied the petition. The amended returns contain a schedule C indicating that the beneficiary earned \$23,920 as a caterer operating under the name of [REDACTED] from 2001-2007. The sole proprietor also filed amended returns in May, 2008, where she combined her two businesses, truck rental and catering under the rubric of catering on Schedule C, and also added costs of labor of \$72,000.

The petitioner maintains on appeal that the beneficiary's and the sole proprietor's amended income tax returns filed in May 2008 reflect that the beneficiary has been paid at or near the proffered wage since 2001. The AAO disagrees that the record establishes that the beneficiary worked for the

petitioner. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). There are no Forms 1099 from [REDACTED] attached to the returns, and no original forms 1040 filed by the beneficiary reflecting her Schedule C or wage income on her initially filed tax returns. Form G-325A, Biographic Information, signed by the beneficiary in August, 2007, does not reflect the beneficiary's association with the petitioner as an independent contractor. The petitioner does not explain why she eliminated the truck rental business from her Schedules C, or why she did not report \$72,000 in cost of labor paid on her initially filed returns. She also does not state that the beneficiary was paid from the \$72,000.<sup>1</sup> Without contemporaneous evidence of the beneficiary's work for the petitioner prior to the director's denial, the petitioner has not established that it is more probable than not that the beneficiary has been working for the petitioner since 2001.

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 2001 onwards.

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 (1<sup>st</sup> 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. 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 adjusted gross income is taken from the IRS Form 1040. 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

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<sup>1</sup> On appeal, counsel asserts that the beneficiary was paid from the \$72,000 figure. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 director considered the petitioner's total income amounts to determine the petitioner's ability to pay the proffered wage. However, as noted above, the AAO considers the Adjusted Gross Income (AGI) in evaluating the petitioner's ability to pay the proffered wage.

In the instant case, the sole proprietor's IRS Forms 1040 reflect the sole proprietor's AGI as follows:<sup>2</sup>

- In 2001, the sole proprietor's IRS Form 1040, line 32, stated AGI of \$29,354.00.
- In 2002, the sole proprietor's IRS Form 1040, line 35, stated AGI of \$28,701.00.
- In 2003, the sole proprietor's IRS Form 1040, line 34, stated AGI of \$37,619.00.
- In 2004, the sole proprietor's IRS Form 1040, line 36, stated AGI of \$40,945.00.
- In 2005, the sole proprietor's IRS Form 1040, line 37, stated AGI of \$46,998.00.
- In 2006, the sole proprietor's AGI was \$31,710.00.<sup>3</sup>
- In 2007, the sole proprietor's AGI was \$28,316.00.<sup>4</sup>

In order to determine the sole proprietor's ability to pay the proffered wage, her monthly expenses must be subtracted from the adjusted gross income amount. The sole proprietor claims 6 dependents on her individual tax return. She also indicated that her monthly expenses have been \$2,541.51 or \$30,498.12 per year. The sole proprietor's adjusted gross income less her annual expenses is insufficient to pay the proffered wage for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. In addition, it is improbable that the sole proprietor could support herself and 6 dependents on less per year than her monthly expenses require, which is what remains after reducing the adjusted gross income by the amount required that is required to pay the proffered wage.

Counsel's claim with respect to the sole proprietor's bank statements and reliance on the balances in the bank account, is misplaced. First, bank statements are not among the three types of evidence.

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<sup>2</sup> For the reasons discussed above, the AAO will not accept the petitioner's amended Forms 1040X filed after the director's denial. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi, supra*.

<sup>3</sup> This number was taken from the petitioner's amended return at Line 1A, page one, reflecting the original amount of the petitioner's 2006 AGI.

<sup>4</sup> This number was taken from the petitioner's amended return at Line 1A, page one, reflecting the original amount of the petitioner's 2007 AGI.

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. Third, 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.

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 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. 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 this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. There are no facts paralleling those in *Sonogawa* that are present in the instant case to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. The petitioner has failed to demonstrate the occurrence of any uncharacteristic business expenditures or losses in 2001, 2002, 2003, 2004, 2005, 2006, and 2007 to justify her inability to pay the proffered wage. The financial statements and bank statements submitted by the petitioner do not establish the petitioner's ability to pay the proffered wage. Furthermore, the petitioner failed to provide all evidence requested in the RFE. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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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.