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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **OCT 05 2010**

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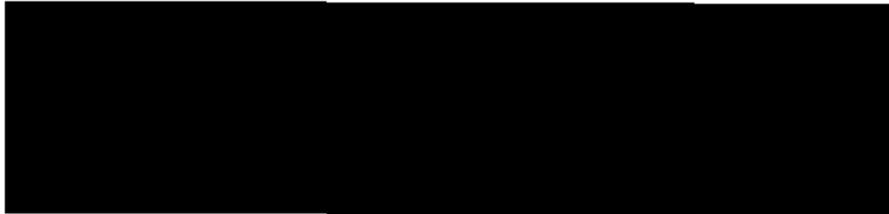
Petitioner:

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.

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 owns an adult theater. It seeks to employ the beneficiary permanently in the United States as a maintenance supervisor. 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 deemed the evidence in the record insufficient to establish by a preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date. 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 April 11, 2008 decision, 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)(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 ETA Form 750 was accepted for processing by the Department of Labor (DOL) on April 18, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$18.53 per hour

or \$38,542.40 per year. Further, the Form ETA 750 states that the position requires a minimum of 2 year experience in the job offered.

To prove that the petitioner has the ability to pay \$18.53/hour or \$38,542.40/year beginning on April 18, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Return, of Vasken Tatarian for 2001-2006;
- Forms W-2 issued to the beneficiary by various companies, including the petitioner, between 1995 and 1999 and from 2002 to 2004;¹
- Pay stubs for October 2007 from Sahara Theater; and
- The beneficiary's individual tax returns filed on IRS Forms 1040 for 2004-2006.

The evidence in the record of proceeding shows that [REDACTED] is the petitioner, choosing to run his business as a sole proprietor. On the Form I-140 petition, the petitioner claimed to have established his business in February 1995 and to currently employ 15 workers.

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.²

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).

¹ Between 1995 and 1999 and from 2002 to 2004, the AAO observes that the beneficiary received Forms W-2 from [REDACTED] (the petitioner), [REDACTED]
[REDACTED]

² 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).

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 this case, no evidence of record indicates that the petitioner employed or paid the beneficiary in 2001 or from 2005 onwards. Based on the evidence submitted, the beneficiary received \$12,495, \$12,600, and \$5,810 in 2002, 2003, and 2004, respectively, from the petitioner, which is substantially lower than the proffered wage of \$38,542.40 per year.

When the petitioner does not establish that it employed or 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner, as noted above, 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.

The director, before denying the petition, requested the petitioner to submit, among other things, a list of his monthly recurring household expenses, including mortgage payments, automobile payments, installment loans, credit card payments, and household expenses. This information, according to the director, is important to determine whether the petitioner can cover his business expenses and sustain himself and his dependents as well as pay the proffered wage out of his income.

The petitioner did not respond to the director's request, and the director subsequently denied the petition. In his decision, the director noted, however, that from 2001 to 2004 the petitioner had sufficient adjusted gross income to cover the beneficiary's wage. Nevertheless, the petition could not be sustained since no information regarding the petitioner's monthly expenses was submitted.

On appeal, counsel for the petitioner maintains that the petitioner has the ability to pay the proffered wage from the time of filing the petition to the present. Counsel contends that the petitioner has submitted his tax returns for the years 2001 through 2004, and in each of these tax returns, the petitioner had adjusted gross income of approximately \$400,000 per year, with 2001 gross income approaching \$900,000. Counsel also states on appeal that the petitioner's tax return for 2001 shows a net profit of \$245,095 with \$29,818 paid for employees' wages (cost of labor).

A review of the petitioner's tax returns reveals the following information:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Proffered Wage (PW)	Annual Household Expenses	AGI less Annual Household Expenses (Net Income)
2001 (line 33, Form 1040)	\$275,527	\$38,542.40	Unknown	Unknown
2002 (line 35, Form 1040)	\$220,245	\$38,542.40	Unknown	Unknown
2003 (line 34, Form 1040)	\$48,584	\$38,542.40	Unknown	Unknown
2004 (line 36, Form 1040)	\$67,308	\$38,542.40	Unknown	Unknown
2005 (line 37, Form 1040)	\$15,632	\$38,542.40	Unknown	Unknown
2006 (line 37, Form 1040)	\$1,390,566	\$38,542.40	Unknown	Unknown

Based on the table above, the AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage beginning on the priority date. Without further information or evidence about the petitioner's monthly recurring household expenses, this office cannot determine whether the petitioner has that ability or not. The director's request for a list of the petitioner's monthly recurring household expenses is authorized by regulation and is reasonable.

The regulation at 8 C.F.R. § 103.2(b)(14) states:

Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall

be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

As noted above, the director has specifically requested the petitioner to submit a list of his monthly recurring household expenses. The petitioner did not submit such a list. Such a list, if submitted, would demonstrate whether the petitioner has the financial resources to pay the proffered wage. The petitioner's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Further, counsel's assertion concerning employees' wages (cost of labor) is not supported by evidence that the beneficiary's wages were paid in full. While the petitioner's schedule C for the [REDACTED] may reflect wages paid, wages paid to other employees may not be considered in the determination of whether the petitioner has the ability to pay the beneficiary.

Moreover, the petitioner's adjusted gross income in 2005 is less than the proffered wage. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Finally, USCIS may also 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 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.

Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles,

awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*. Nor has it been established that the petitioner, especially between 2001 and 2006, had uncharacteristically substantial expenditures which prevented it from paying the beneficiary the proffered wage.

Other evidence in the record such as the beneficiary's individual tax returns and his W-2s from other companies is not relevant in this matter. No information about the petitioner's ability to pay can be concluded from the beneficiary's tax returns or from his W-2s from other companies. In addition, a review of the beneficiary's Forms W-2 shows that the beneficiary has the following social security number: 686-06-4687. A review of the beneficiary's tax returns, however, shows that the beneficiary filed his income tax returns under the following social security number: 911-80-6324. The Form I-140 petition as well as the Form I-485 and the Form G-325A accompanying the petition all state "N/A" (not available) for the beneficiary's social security number. The inconsistencies in the record concerning the beneficiary's social security number not only call into question whether the sole proprietor and the petitioner knowingly utilized a social security number belonging to another individual but also cast doubt on the petitioner's claim that it has employed and paid the beneficiary since 1995.

Although this is not the basis for the director's decision in this case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to the alien's removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010). In addition, 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, *supra*. After a review of the petitioner's tax returns and other evidence, the AAO concludes that the petitioner does not have the ability to pay the salary offered as of the priority date and continuing to present. 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.