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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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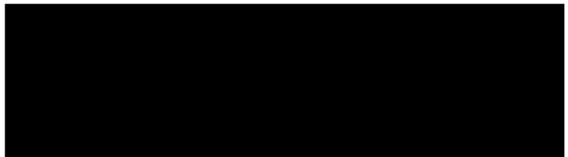
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FILE:  Office: TEXAS SERVICE CENTER Date: OCT 05 2010

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a contractor/painter. It seeks to employ the beneficiary permanently in the United States as a spray painter. 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 denied the petition, finding that the petitioner did not have sufficient income or assets to pay the proffered wage. The director also found no evidence establishing the beneficiary's employment with the petitioner.

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 May 31, 2008 denial, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 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 for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage set by the DOL and agreed to by the petitioner, as stated on the Form ETA 750 labor certification, is \$475 per week or \$24,700 per year. The Form ETA 750 further states that

the prospective employee must have a minimum of 1 year and 6 months experience in the job offered or as a painter. The petitioner indicated on part B of the Form ETA 750 that the beneficiary had worked as a spray painter for the petitioner from February 2000 to present.

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

To prove that it has the ability to pay \$475/week from April 30, 2001, the petitioner submitted the following evidence:

- Copies of [REDACTED] individual tax returns for 2001, 2004, 2005, and 2006;
- Copies of [REDACTED] tax transcripts from Internal Revenue Service (IRS) for 2002 and 2003;
- A statement detailing [REDACTED] monthly household expenses for fiscal year 2007;
- A letter from [REDACTED] stating he has employed [REDACTED] as a painter from 1999;
- A letter from [REDACTED] accountant, [REDACTED] stating that any wages paid by [REDACTED] to [REDACTED] are reflected on line 37, schedule C, of [REDACTED] tax returns;
- A copy of [REDACTED] individual tax return for 2006; and
- Copies of [REDACTED] tax transcripts from IRS for 2002-2005;

The evidence in the record of proceeding reflects that the petitioner is structured as a sole proprietorship. [REDACTED] is the sole proprietor of [REDACTED]. In a letter dated March 16, 2008, [REDACTED] states that he has employed the beneficiary as a painter since 1999.

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

¹ 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).

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, 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.

As noted above, the petitioner claimed to have employed and paid the beneficiary as a painter since 1999. To support this claim, the petitioner submitted a letter from his accountant, [REDACTED] who stated that any wages paid by [REDACTED] are reflected on line 37, schedule C, of [REDACTED] tax returns.

In his decision, the director concluded that since no tangible evidence such as W-2s was submitted, the petitioner had not established that it employed or paid the beneficiary from the priority date.

On appeal, counsel for the petitioner states that the petitioner did not issue any W-2 to the beneficiary during the qualifying period but claims that the petitioner did pay cash to compensate the beneficiary for his work. The amounts for these cash payments, according to counsel, are reflected in schedule C, line 37 (cost of labor), of the petitioner's tax returns.²

Nonetheless, since the petitioner fails to submit tangible evidence such as pay stubs, W-2s, 1099-MISCs, payroll or accounting records, or any other evidence indicating employment or payment by the petitioner to the beneficiary at any time before or after the priority date, the AAO agrees with the director that the petitioner has not established that it employed or paid the beneficiary during the qualifying period. [REDACTED] the petitioner's accountant, also failed to support his statement by any corroborating documents.³ A mere claim or assertion by the petitioner or his accountant concerning the beneficiary's employment cannot by itself demonstrate the reliability of that claim or statement. 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)).

The beneficiary also submitted copies of his tax return for 2006 and tax transcripts for 2002-2005 as evidence of the petitioner's ability to pay.

² The cost of labor for 2005 and 2006 as reflected on line 37, schedule C, is \$32,415 and \$33,252, respectively, more than the proffered wage; however, the cost of labor for 2001 and 2004 is less than the proffered wage, and no information is available concerning the petitioner's cost of labor for 2002 and 2003.

³ In 2006, the beneficiary had gross receipts of \$17,000, as reflected on line 1, schedule C, of his 2006 tax return. The petitioner, according to his 2006 tax return, incurred \$33,252 for cost of labor.

However, a review of the beneficiary's tax return and tax transcripts reveals no information about where the beneficiary received his wages or income during the qualifying period. The AAO will not consider the beneficiary's tax return and tax transcripts as evidence of the petitioner's ability to pay.

When 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 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.

In this case, the petitioner, according to his tax returns, claimed to be single without any dependents between 2001 and 2006. In response to the director's request for additional evidence (RFE), the petitioner [REDACTED] stated that his monthly household expenses for fiscal year 2007 is \$2,155 (or \$25,860 a year). He also indicated that the figures for 2002-2006 are slightly lower than the total for 2007 due to inflation but gave no further detail.

A review of the tax returns submitted and other evidence of record reflects the following information:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Proffered Wage (PW)	Annual Household Expenses	AGI less PW (Net Income)
2001 (line 33, Form 1040)	\$21,647	\$24,700	Unknown	(\$3,053)
2002 (line 35, Form 1040)	\$19,668	\$24,700	Unknown	(\$5,032)
2003 (line 34, Form 1040)	\$16,674	\$24,700	Unknown	(\$8,026)
2004 (line 36, Form 1040)	\$17,132	\$24,700	Unknown	(\$7,568)
2005 (line 37, Form 1040)	\$16,276	\$24,700	Unknown	(\$8,424)
2006 (line 37, Form 1040)	\$18,856	\$24,700	Unknown	(\$5,844)

The director reviewed the petitioner's tax returns and concluded that the petitioner did not have the ability to pay the proffered wage. Based on the tax returns submitted, the director stated that the petitioner's adjusted gross income between 2001 and 2006 is less than the proffered wage.

The AAO agrees with the director. 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 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.

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 is not persuaded that the petitioner has that ability. 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.