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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 0 5 2010

IN RE: Petitioner: Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 residential care home for the elderly which seeks to classify the beneficiary as a home health aide pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. The director also determined the petitioner had not established the beneficiary met the educational and experience requirements listed on the labor certification.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 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 above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 2, 2003. It lists the proffered wage as $1,505.60 per month based on a 40 hour workweek, which equates to $18,067.20 per year.

The petitioner is a sole proprietorship that employed two workers when the Form I-140 was filed. The owner's IRS Forms 1040, U.S. Individual Income Tax Return, reflects he and his spouse operate the business on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on March 21, 2003, she did not state she had been employed by the petitioner.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. The record contains an unsigned letter dated November 19, 2008 from [redacted] addressed to [redacted] "breakdown" of the purported income earned by the beneficiary from 2003 through 2008. He also sent [redacted] an unsigned copy of the beneficiary's earning card for the period from January 1 to November 15, 2008 as an attachment to the letter. The letter and attachment are not accompanied by any documentary evidence such as the beneficiary's IRS Forms W-2, Wage and Tax Statement, for Forms 1099-MISC, establishing she was actually employed by the petitioner during the requisite period. In view of this substantive shortcoming, the AAO finds that the unsigned letter and attachment have little probative value. In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 2, 2003 and onwards.[1]

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 (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).

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

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[1] It is noted that, according to [redacted] etter, the beneficiary was not paid the proffered wage in 2003, 2004, 2005, 2006, or 2007.

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 IRS Forms 1040 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, supra,* at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately $20,000 where the beneficiary's proposed salary was $6,000 (or approximately thirty percent of the petitioner's gross income).

In this case, the sole proprietor supports a family of four. The IRS Forms 1040 which he provided for the record reflect his adjusted gross income as follows:

2003 Line 34	2004 Line 36	2005 Line 37	2006 Line 37	2007 Line 37
not provided	not provided	$35,765	$68,272	$55,602

As indicated above, 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. The petitioner did not provide his IRS Forms 1040 for 2003 and 2004. Additionally, he has not provided evidence that he could cover his business expenses as well as pay the beneficiary out of his adjusted gross income less the proffered wage which would have left him with only $17,697.80 for 2005, $50,204.80 for 2006 and $37,534.80 for 2007 to provide support for his family. The record is devoid of evidence of the petitioner's monthly expenses, liquid assets, liabilities, and adjusted gross income in 2003 and 2004. 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)).

In some cases, 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 Sonegawa, supra.* That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the petitioner has not submitted any evidence demonstrating that uncharacteristic losses or other circumstances similar to *Sonegawa* are relevant. The record is insufficient to establish eligibility for the benefit sought.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue in this matter is whether the petitioner has established that the beneficiary is qualified for the proffered position.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS examines whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have an education level equivalent to four years of high school and three months experience in the job offered or one year of experience in a related occupation.

On Form ETA 750, Part B, Statement of Qualification of Alien, signed on March 21, 2003, the beneficiary indicated she was a student from June 1981 until March 1985 and that she received an "A.B. Communication Arts" degree after graduating from Philippine Women's University – Taft. On appeal, the petitioner submits the beneficiary's official transcript dated March 5, 2003 from the Office of the University Registrar of The Philippine Women's University System and its Affiliate Schools for Men and Women in Manila, Philippines. The transcript indicates that she graduated with the degree of Bachelor of Arts with a major in communication arts on March 23, 1985. The petitioner also submits the beneficiary's diploma dated March 20, 2008 from Stratford Career Institute in Washington, D.C. showing she completed a course of studies in psychology and social work along with identification cards showing she completed "heartsaver" first aid issued in August 2007, standard first aid issued on February 19, 2003, and "heartsaver" CPR issued on February 19, 2003. Based on the transcript dated March 5, 2003 it is determined the beneficiary met the educational requirements for the offered position when the labor certification was accepted for processing.

On Form ETA 750, Part B, signed on March 21, 2003, the beneficiary indicated that she worked as a caregiver/household domestic worker from January 1990 until October 1995 and from January 2002

until September 2002 at the private home of [redacted] Evidence relating to qualifying experience shall be in the form of letters from employers giving the name, address and title of the employer and a description of the experience of the alien. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A); *see also* 8 C.F.R. 204.5(g)(2). The applicant's asserted employment on Form ETA 750, Part B, is not verified by the required employment letter(s) establishing she had attained the required three months experience in the job offered or one year of experience in a related occupation when the labor certification was accepted for processing. Therefore, the appeal is dismissed for this additional reason.

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.