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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

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[REDACTED]

OCT 21 2010

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

[REDACTED]

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 hair salon based in . It seeks to employ the beneficiary permanently in the United States as a hairdresser, hairstylist, or cosmetologist. 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 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 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 July 21, 2009 denial, the chief 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 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 priority date fell on April 25, 2001 as that was the date when the Form ETA 750 was accepted for processing by the DOL. The proffered wage as stated on that form is \$12 per hour or \$24,960 per year. The Form ETA 750 further states that the prospective employee must have a minimum of 2 years experience in the job offered and a cosmetologist license or equivalent. The petitioner indicated on the Form ETA 750 part B that the beneficiary worked as a beauty specialist for [REDACTED] from 1990 to 1996.

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.<sup>1</sup>

Relevant evidence in the record includes copies of the following documents:

- [REDACTED] tax returns for 2001-2007 on IRS Forms 1040, U.S. Individual Income Tax Return;
- A business license and a business tax permit;
- A printout of a certificate of deposit account showing an opening deposit of \$41,401 on August 28, 2008 and a balance of \$42,596.96 as of March 27, 2009;
- Various checking and savings accounts owned by [REDACTED] showing various deposits, withdrawals, and interest payments between 2001 and 2008; and
- A signed statement from [REDACTED] stating that his total recurring household expenses are \$12,700 a year, which he takes out of rental property and not out of the salon.

The evidence in the record of proceeding shows that [REDACTED] the petitioner, is owned by Mr. [REDACTED] structured his business as a sole proprietorship. It is not clear from the record when [REDACTED] first started the business or how many individuals his business currently employs.

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

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<sup>1</sup> 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 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. Here, the record does not show that the petitioner has employed or paid the beneficiary since the priority date.

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 (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 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 (7<sup>th</sup> 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 the instant case, according to his tax returns, the petitioner and his wife claimed to support three dependent children between 2001 and 2004, two dependent children in 2005, two children and one grandchild in 2006 and 2007, and one child and one grandchild in 2008. In response to the director's request for additional evidence, [REDACTED] states in a statement dated March 30, 2009 that his recurring yearly household expense is \$12,700 a year. He also notes that he uses the income from his rental property to pay the \$12,700 annual household expense.

The petitioner's tax returns reflect the following information:

| Tax Year                  | The<br>Petitioner's<br>Adjusted<br>Gross Income<br>(AGI) (\$) | Proffered<br>Wage (PW)<br>(\$) | Household<br>Expenses<br>(\$) | AGI less<br>Household<br>Expenses (\$) |
|---------------------------|---|--------------------------------|-------------------------------|--|
| 2001 (line 33, Form 1040) | 24,777  | 24,960                         | 12,700                        | 12,077                                 |
| 2002 (line 35, Form 1040) | 26,078  | 24,960                         | 12,700                        | 13,378                                 |
| 2003 (line 34, Form 1040) | 27,555  | 24,960                         | 12,700                        | 14,855                                 |
| 2004 (line 36, Form 1040) | 29,596  | 24,960                         | 12,700                        | 16,896                                 |
| 2005 (line 37, Form 1040) | 32,389  | 24,960                         | 12,700                        | 19,689                                 |
| 2006 (line 37, Form 1040) | 32,851  | 24,960                         | 12,700                        | 20,151                                 |
| 2007 (line 37, Form 1040) | 28,752  | 24,960                         | 12,700                        | 16,052                                 |
| 2008 (line 37, Form 1040) | 21,910  | 24,960                         | 12,700                        | 9,210                                  |

The director denied the petition, finding that the petitioner did not have the ability to pay the proffered wage. Specifically, the director stated that the petitioner failed to show how the petitioner could support a family of four or five (not including himself) in addition to paying the beneficiary's proffered wage.

On appeal, counsel for the petitioner maintains that the petitioner has the ability to pay the proffered wage.

Upon review, the AAO finds that it is improbable that the petitioner could afford to pay the beneficiary's wage of \$12 per hour or \$24,960 per year – even without considering any household expenses – during the qualifying period, from 2001 to 2008. Under the best circumstances in 2006 when the petitioner's adjusted gross income was the highest during the qualifying period, it is highly unlikely that the petitioner could support his wife, two children, and a grandchild on an adjusted gross income (AGI) of \$32,851 where the beneficiary's proposed salary was \$24,960.

The record does not support the petitioner's statement regarding rental property. Evidence of record shows that the petitioner has had rental loss instead of income since 2006.<sup>2</sup> More importantly, the sole proprietor's rental business is also conducted as a sole proprietorship as recorded on Schedule E of the IRS Form 1040, and any rental income or loss is already factored into the sole proprietor's adjusted gross income on the Form 1040. Schedule E does not reflect any wages paid to the sole proprietor. No further money from the rental property is thus available to pay the beneficiary's wage. If the petitioner has other rental income not reported on the Form 1040 from which he could pay the proffered wage, he has not submitted any evidence of such additional income. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden

<sup>2</sup> According to the tax returns submitted, the petitioner had (\$5,114), (\$13,208), and (\$15,172) rental loss in 2006, 2007, and 2008, respectively.

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)).

As identified above, the record contains various bank statements owned by the petitioner and his wife showing multiple deposits, withdrawals, and interest payments between 2001 and 2008

While it is true that a sole proprietor can use his or her personal savings to pay the proffered wage, no evidence has been found in the record showing the sole proprietor's willingness and ability to pay the beneficiary's wage out of his personal bank accounts. The record of proceeding contains bank statements from the sole proprietor's two savings accounts with Chase Bank together covering the period from January 2001 through December 2008. The petitioner has not shown that the modest balances in these two savings accounts from 2001 to 2006 are sufficient to cover the proffered wage beginning on the priority date and continuing through 2008. In 2007, the average balance in one of these accounts is sufficient to pay the proffered wage in 2007. Alternatively, the certificate of deposit opened in 2008 would be sufficient to pay the beneficiary's wage in 2008.<sup>3</sup> Further, if one or more of these bank statements represent the sole proprietor's business accounts, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. No evidence has been offered to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the Schedule C of his individual tax returns. For these reasons, the bank evidence does not establish the ability to pay in any period.

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

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<sup>3</sup> The amount in the combined savings accounts and certificate of deposit would not cover the beneficiary's full wage in both 2007 and 2008.

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 *Sonegawa*, 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 during the qualifying period between 2001 and 2008 had uncharacteristically substantial expenditures.

Considering the totality of the circumstances, the evidence does not establish that the petitioner has the continuing ability to pay the proffered wage of \$12 per hour or \$24,960 per year. 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.