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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]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date **SEP 07 2010**

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 professional accounting services business. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 (the 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 denial, an issue in this case is whether 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 unavailable.

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 on March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$11.33 per hour (\$23,566.40 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Accompanying the petition and labor certification, and in response to the director's request for evidence (RFE) dated August 27, 2008, counsel submitted its federal personal joint income tax (Forms 1040) returns for 2004,² 2005, 2006, and 2007; approximately 32 pages of the sole proprietorship's business checking account statements for the time period September 12, 2006, to January 9, 2008; approximately 42 pages of the sole proprietorship's business checking account statements for the time period January 10, 2005, to August 9, 2006; three unaudited financial statements from the sole proprietorship for 2005, 2006, and 2007;³ and a list of the sole proprietor's reputed family monthly expenses for 2005, 2006, and 2007.

Accompanying the appeal, counsel submitted a legal brief dated November 25, 2008; a cover letter dated June 22, 2009; five pay statements for 2008 from the sole proprietor to the beneficiary stating year-to-date earnings of \$6,356.00; an unaudited financial statement from the sole proprietorship for 2008; the sole proprietorship's Employers Quarterly Federal Tax Form (Form 941) Statement for the third quarter of 2008; approximately 4 pages of the sole proprietorship's business checking account statements for the time period November 11, 2008, to December 8, 2008; and approximately 19 pages of the sole proprietorship's business checking account statements for the time period March 1, 2005, to November 10, 2008, as well as evidence of two certificate deposit accounts having maturity dates of May 18, 2009.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

² Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the sole proprietor's 2004 federal income tax return generally. In 2004, the sole proprietor's adjusted gross income was \$37,692.00.

³ Counsel's reliance on the sole proprietor's unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Accordingly, all of the unaudited financial statements submitted by the petitioner are not probative of its ability to pay the proffered wage. It is further noted that the unaudited profit and loss statements for 2005, 2006, and 2007, exhibit net income figures for the business which are similar to those reported in the Schedules C to the corresponding Forms 1040 for those tax years. Accordingly, these unaudited statements do not supplement the information already present in the evidence mandated by the regulations. *See* 8 C.F.R. § 204.5(g)(2)

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 1989 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on March 18, 2005, the beneficiary did not claim to work for 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 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. 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 2005 and onwards.

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). 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.

Counsel has submitted a list of the sole proprietor's "family" expenses. The three exhibits were submitted in response to the director's RFE asking for the sole proprietor's monthly household expenses to include, but not be limited to, the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; and household expenses.

According to the exhibits all dated September 19, 2008, entitled "Monthly Expenses for [REDACTED]. [REDACTED]" the sole proprietor only listed monthly credit card payments of \$15.00 and clothing expenses of \$20.00 for years 2005, 2006, and 2007. The sole proprietor listed "N/A" for mortgage/rent; "N/A" for auto insurance, transportation and entertainment; health insurance-"None/Medicare husband;" installment loans - "-0-;" food and utilities - "husband." According to the intent of this response, the sole proprietor is making a distinction between what is reputedly necessary to sustain herself, and herself and her husband,⁴ contrary to the court decision of *Ubeda v. Palmer*.

The sole proprietor has not credibly estimated her and her husband's personal monthly expenses. The I-140 petitioner's business is a sole proprietorship. Therefore, to determine the ability of the sole proprietorship to pay the proffered wage and meet her and her husband's living costs, the director requested the petitioner submit a statement of recurring household expenses for the petitioner's family. Reasonably, this statement must indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

However, we note that the petitioner only provided two personal expense items in the monthly expense estimate while the director requested in his RFE dated April 25, 2007, at least five items. Further, the petitioner did not submit any documentary substantiation for the expense items provided. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested

⁴ Presumably the proprietor shares household expenses with her husband, although [REDACTED]'s response to the director's RFE would appear to indicate otherwise.

evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).⁵ If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the instant case, the sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

	<u>2005</u>	<u>2006</u>
Proprietor's adjusted gross income (Forms 1040)	\$20,635.00	\$20,890.00
	<u>2007</u>	
Proprietor's adjusted gross income (Form 1040)	\$23,731.00	

In 2005, 2006, and 2007, the sole proprietor's adjusted gross incomes fail to cover the proffered wage of \$23,566.40 and the proprietor's household expenses. As seen in 2007, the difference between the petitioner's adjusted gross income leaves \$164.60 for the sole proprietor to support a family of two. It is improbable that the sole proprietor could support herself on a deficit or on only a nominal adjusted gross income, which is what remains after reducing the adjusted gross incomes by the amount required to pay the proffered wage in 2005, 2006, and 2007, even assuming for the sake of argument, that the sole proprietor's family personal expenses are only \$420.00 per year.

On appeal, counsel asserts "as the evidence to follow will show, the petitioner's taxes [sic tax returns], which were submitted with the I-140 petition, clearly [show the] ability to pay the proffered wage." Counsel's assertion, as noted above, is misplaced.

As already stated above, in 2005 and 2006, the sole proprietor's adjusted gross incomes fail to cover the proffered wage of \$23,566.40, and in 2007, barely covered the proffered wage, leaving a nominal amount to pay her household expenses. Again, assuming for the sake of argument that the sole proprietor only expended \$420.00 in 2007 to pay her family's, or even just her own, personal expenses, there is insufficient adjusted gross income to pay the proffered wage and the \$420.00 reputed yearly personal expense stated in the sole proprietor's exhibit.

Counsel asserts on appeal that the sole proprietor's gross income is evidence of the ability to pay the proffered wage but offers no substantiation in either regulation or precedent decisions to support this contention. Counsel's assertion is misplaced. As discussed above, in *K.C.P. Food Co., Inc. v. Sava*,

⁵ If this matter is pursued, all the expenses items requested by the director in his RFE must be addressed along with evidence to document those expenses.

the court held that the USCIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Counsel also contends that the petitioner has numerous deductions for years 2005, 2006 and 2007, but fails to specify what they are in the tax return. No precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *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).

Counsel's reliance on the balances in the sole proprietor's bank accounts is misplaced. First, bank statements are not among the three types of evidence, 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.

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 the instant case, the petitioner was established in 1989 and, it has stated gross receipts (i.e. Form 1040, Schedules C) of 2005-\$36,687.00, 2006-\$43,974.00, and 2007-\$53,747.00 respectively. Based upon the tax returns submitted, the petitioner has been a viable and financially stable business throughout its existence with the exception that it has stated adjusted gross incomes for three years that have been shown above to be inadequate to pay the proffered wage from the priority date.

Based upon what is known, the sole proprietor has employed the beneficiary in 2008, but she has not chosen to pay the beneficiary the proffered wage. Counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. It is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. Furthermore, as noted above, the petitioner has grossly under reported, here, her household expenses, which undermines the credibility of the petition. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

This is an additional reason of ineligibility for the preference visa sought.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.