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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

[Redacted]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

SEP 16 2010

IN RE:

Petitioner:

[Redacted]

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:

[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

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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 barber shop/hair salon. It seeks to employ the beneficiary permanently in the United States as a manager of a beauty/barber shop. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 from the priority date of the visa petition onwards. Therefore, the director denied the petition.

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.

At 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.

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 on appeal.¹

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).

Here, the DOL accepted the petitioner's Form ETA 750 on April 30, 2001. The proffered wage as stated on the labor certification application is \$20.99 per hour or \$43,659.20 per year. The Form ETA 750 indicates that two years of experience in the proffered job are needed to perform the duties of the proffered position.

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 this 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).

The evidence in the record shows that the petitioner is structured as a sole proprietorship. The record indicates that the petitioner was established in 1987. The petition states that the petitioner currently employs 2 workers. The petitioner did not list its gross annual income and net annual income on the petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that form, 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, 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. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not indicate that he had worked for the petitioner. The petitioner did not submit any documentation of having paid the beneficiary the full proffered wage or a portion of that wage during the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 (IRS Form 1040, U.S. Individual Income Tax Return) federal tax return each year. The business-related income and expenses in this case are reported on Schedule C, Profit or Loss from Business, and are

carried forward to the first page of the tax return. To demonstrate an ability to pay the wage, 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.

Here, the record indicates that, in 2001 and 2002, the sole proprietor had three dependents, his spouse and two children. Thereafter, he had two dependents, his spouse and one child. The proprietor submitted a statement which lists his monthly household expenses in 2001 as \$1,060, or \$12,720 annually; as \$1,410 monthly or \$16,920 annually in 2002; as \$1,440 monthly or \$17,280 annually in 2003; as \$1,780 monthly or \$21,360 annually in 2004; as \$1,930 monthly or \$23,160 annually in 2005; as \$1,950 monthly or \$23,400 annually in 2006; and as \$2,050 monthly and \$24,600 annually in 2007.

In each year, with his list of monthly expenses, the proprietor stated an "uncommitted monthly income" amount, which he presented as funds available to pay the wage. The AAO cannot rely on such undocumented, unaudited statements regarding his monthly cash surplus. 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 statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record before the director closed on October 9, 2007 when the petitioner filed its response to the RFE. The sole proprietor's 2007 tax return was not yet available at that time. Thus, the 2006 tax return is the most recent return in the record. The proprietor's tax returns reflect the following information:

- The proprietor's 2001 Form 1040, line 33, states adjusted gross income of \$30,257.
- The proprietor's 2002 Form 1040, line 35, states adjusted gross income of \$36,353.
- The proprietor's 2003 Form 1040, line 34, states adjusted gross income of \$39,940.
- The proprietor's 2004 Form 1040, line 36, states adjusted gross income of \$41,865.²
- The proprietor's 2005 Form 1040, line 37, states adjusted gross income of \$40,934.
- The proprietor's 2006 Form 1040, line 37, states adjusted gross income of \$39,403.

² The amended 2004 Form 1040X in the record lists the same adjusted gross income.

In 2001 and 2002, after deducting the proffered wage of \$38,201.80 from the adjusted gross income, the proprietor had only a deficit remaining. Thus, he did not have sufficient funds in his adjusted gross income to cover the wage and his annual household expenses in 2001 and 2002.

In 2003, after deducting the proffered wage of \$38,201.80 from the adjusted gross income, the proprietor had only \$1,738.20 remaining. This amount is not sufficient to cover his annual household expenses. Thus, the proprietor has not shown the ability to pay the instant wage in 2003, using his adjusted gross income.

In 2004, after deducting the proffered wage of \$38,201.80 from the adjusted gross income, the proprietor had only \$3,663.20 remaining. This amount is not sufficient to cover his annual household expenses. Thus, the proprietor has not shown the ability to pay the instant wage in 2004, using his adjusted gross income.

In 2005, after deducting the proffered wage of \$38,201.80 from the adjusted gross income, the proprietor had only \$2,732.20 remaining. This amount is not sufficient to cover his annual household expenses. Thus, the proprietor has not shown the ability to pay the instant wage in 2005, using his adjusted gross income.

In 2006, after deducting the proffered wage of \$38,201.80 from the adjusted gross income, the proprietor had only \$1,201.20 remaining. This amount is not sufficient to cover his annual household expenses. Thus, the proprietor has not shown the ability to pay the instant wage in 2006, using his adjusted gross income.

The petitioner submitted a letter dated September 28, 2007 that indicates that [REDACTED] had approved the proprietor's request for a line of credit, or fixed rate loan (second lien) of \$150,000. The petitioner indicated through counsel that this line of credit represents funds available to pay the wage. This is incorrect. First, the record does not indicate that the petitioner had a line of credit available throughout the relevant period sufficient to cover the instant wage. Further, even if the line of credit was available throughout the relevant period, when calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income by adding in its credit limits, bank lines, or lines of credit. A line of credit is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Further, since a line of credit is a commitment to loan, rather than an existent loan, the petitioner has not established that funds from any line of credit were available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans

and debt as a means of paying salary since the debts will increase the proprietor's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Also, any claim made in these proceedings that the value of real property owned by the proprietor may be seen as funds available to pay the wage is misplaced. First, there is a copy of a Deed of Trust in the A-file which indicates that the proprietor and his wife received a loan from a bank to purchase a house. In addition, there is a property assessment and taxation record in the A-file which indicates that this same house, owned by the proprietor, was valued at \$634,010 in 2007. However, there is no evidence in the A-file to indicate what amount is owed on this property or whether the proprietor has any positive equity at all in this property. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *See 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if the proprietor did document that it had positive equity in real estate, real property is not a readily liquefiable asset that may be viewed as funds available to pay the wage. It is also not likely that a proprietor would sell his home or any real property to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe to be true. 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 sole proprietor cases, the AAO may, at times, consider funds in personal savings and checking accounts that are available to the proprietor throughout the relevant period, when analyzing the proprietor's ability to pay the wage. However, the proprietor's personal bank statements in the record do not reflect that he had sufficient, additional funds available to cover the wage and his household expenses throughout the relevant period in either of his bank accounts. For example, according to documentation in the record, one of the proprietor's bank accounts had a balance of only: -\$5.37 on January 18, 2007; -\$205.61 on May 26, 2006; \$1,759.35 on August 30, 2005; and \$824.02 on July 31, 2001. The other personal bank account of the proprietor, which is documented in the record, indicates that the proprietor had, in this account, only: \$155.24 on December 31, 2006; \$275.82 on July 31, 2005; and \$110.45 on June 30, 2004. The petitioner's checking account statements in the A-file demonstrate that the petitioner had, in this account, only: -\$33.23 on February 10, 2003; \$87.68 on March 11, 2002; and \$93.69 on May 17, 2001.

Thus, the documentation in the record does not show that the sole proprietor had in his personal bank accounts or that the petitioner had in its bank account the funds needed to show a sustainable ability to pay the wage throughout the relevant period. Also, the petitioner did not submit any evidence to demonstrate that the funds reported on these bank statements somehow reflect additional available funds that were not already considered when the AAO analyzed the petitioner's tax returns.

This office would add that it was suggested in these proceedings that language in the May 4, 2004 USCIS Interoffice Memorandum written by [REDACTED] supports the finding that information on the petitioner's bank statements are at times sufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. See Interoffice Memo. from [REDACTED], to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*(May 4, 2004). Regarding this, the AAO would underscore that USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

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 petitioner in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000 during the 1950s through the 1960s. 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 sole proprietor's adjusted gross income, savings or various liquefiable 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.

Here, the record indicates that the petitioner was established in 1987 and has 5 employees. The petitioner did not establish that it experienced unusual, steady growth since incorporating. Its gross receipts and sales have fluctuated as follows: \$60,687 in 2001; \$60,640 in 2002; \$60,945 in 2003; \$61,504 in 2004; \$59,917 in 2005; and \$59,396 in 2006. Further, the petitioner has not established: its reputation within the industry; the occurrence of any uncharacteristic business expenditures or losses; or whether the beneficiary will be replacing a former employee or an outsourced service. 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 from the priority date onwards.


Page 8

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.