

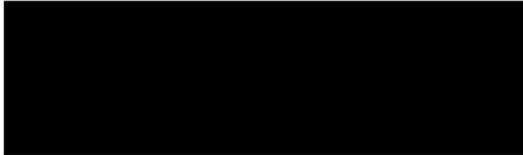
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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FILE:



Office: TEXAS SERVICE CENTER

Date:

SEP 28 2010

IN RE:

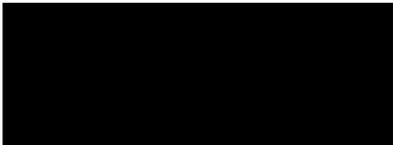
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker 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 Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director indicated that, according to the instructions on the Form I-140, Immigrant Petition for Alien Worker, and the regulations, the petitioner must file with the petition for an other worker, a labor certification application certified by the DOL, evidence that the alien meets the educational, training, experience and any other requirements of the labor certification, and evidence of the petitioner's ability to pay the proffered wage. The director stated that the petitioner filed the petition without all the required initial evidence. Therefore, the director denied the petition in accordance with 8 C.F.R. § 103.2(b)(8)(ii)[which states in relevant part that where the required initial evidence is not submitted with the petition, U.S. Citizenship and Immigration Services (USCIS) may deny the application for lack of initial evidence.]

The record shows that the appeal is properly filed, 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 October 27, 2008 denial, at issue here is whether the petitioner submitted evidence to demonstrate that the petitioner has the ability to pay the proffered wage from the June 11, 2003 priority date onwards and evidence that the beneficiary was qualified to perform the duties of the proffered position from the priority date onwards.

On appeal, the petitioner submitted evidence related to its ability to pay the wage and the beneficiary's qualifications for the proffered job.

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

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(l)(2) defines "other worker" as:

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).

a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), 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 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 petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 16, 2003.² The proffered wage as stated on the Form ETA 750 is \$8.74 per hour (\$18,179.20 per year). The Form ETA 750 states that the position requires one year of experience in the proffered position. There are no other experience requirements or educational requirements listed on the Form ETA 750.

The evidence in the record shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2001. It stated that it currently employs eight workers. The petitioner also stated that it has a gross annual income of \$305,549 and a net annual income of \$45,000. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on January 14, 2003, the beneficiary did not claim to have worked for the petitioner.

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

² USCIS records show that the petitioner submitted another Form ETA 750 for an additional beneficiary on March 5, 2001. The petition associated with that Form ETA 750 was approved on November 18, 2008 and the beneficiary in that matter adjusted to lawful permanent residence on December 3, 2009, based on the approved petition. Thus, the petitioner must show the ability to pay the instant beneficiary's wage and this additional sponsored worker's full-time wage from 2003 through 2009.

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. Here, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any portion of the wage during all or part of the relevant period of analysis.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

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.

Here, the record indicates that the sole proprietor has one dependent, a spouse. The proprietor's monthly household expenses are as follows: \$1,119.50 in 2003, (\$13,434 annual expenses); \$2,753.50 in 2004, (\$33,042 annual expenses); \$2,061 in 2005, (\$24,732 annual expenses); \$2,076 in 2006, (\$24,912 annual expenses); \$2,056 in 2007, (\$24,672 annual expenses); and \$2,106 in 2008, (\$25,272 annual expenses). The proprietor's 2003 through 2007 tax returns reflect the following information:³

- The 2003 Form 1040 was not submitted.
- The 2004 Form 1040, line 36, states adjusted gross income (loss) of -\$919.
- The 2005 Form 1040, line 37, states adjusted gross income of \$46,133.
- The 2006 Form 1040, line 37, states adjusted gross income of \$3,631.
- The 2007 Form 1040, line 37, states adjusted gross income of \$9,053.

The sole proprietor did not submit his tax return or other record of his financial information for 2003. Thus, he has not shown an ability to cover his annual household expenses and to pay the instant wage and his other sponsored worker's wage using his adjusted gross income in 2003.

In 2004, the proprietor suffered a loss. Thus, he has not shown the ability to cover his annual household expenses and to pay the instant wage and his other sponsored worker's wage using his adjusted gross income in 2004.

In 2005, the proprietor's adjusted gross income was \$46,133. After covering the proprietor's annual expenses in that year (\$24,732) and the proffered wage (\$18,179.20), only \$3,221.80 remains. While the record does not include information regarding the proffered wage associated with the proprietor's other petition which was pending during the relevant period, this office finds that \$3,221.80 would not be sufficient to cover any full-time salary. Thus, the proprietor has not shown an ability to cover his household expenses and to pay the instant wage and his other sponsored worker's wage using his adjusted gross income in 2005.

In 2006, the proprietor's adjusted gross income was \$3,631. This is not sufficient to cover the proprietor's annual expenses in that year (\$24,912), the proffered wage (\$18,179.20), and an additional sponsored worker's wage. Thus, the proprietor has not shown an ability to cover his household expenses and to pay the instant wage and his other sponsored worker's wage using his adjusted gross income in 2006.

³ The proprietor's tax returns for 2002 are also in the record. As this information pertains to the year before the priority date year, it will not be considered here. This office will consider it when addressing the totality of the proprietor's financial circumstances later in this discussion.

In 2007, the proprietor's adjusted gross income was \$9,053. This is not sufficient to cover the proprietor's annual expenses in that year (\$24,672), the proffered wage (\$18,179.20), and an additional sponsored worker's wage. Thus, the proprietor has not shown an ability to cover his household expenses and to pay the instant wage and his other sponsored worker's wage using his adjusted gross income in 2007.

In sum, the proprietor has not shown an ability to pay the proffered wage through an examination of actual wages paid and net income in 2003 through 2007.

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*, 12 I&N Dec. 612 (BIA 1967). The petitioner in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 incorporated in 2001 and it has eight employees. The petitioner has not established unusual growth since incorporating. Its gross sales or receipts have not steadily increased, but have fluctuated as follows: \$215,626 in 2002; no information provided for 2003; \$251,601 in 2004; \$287,474 in 2005; \$175,124 in 2006; and \$62,022 in 2007. Thus, the petitioner has not established that the growth of its business over the period of analysis justifies finding that it has the ability to pay the wage, despite the low adjusted gross income figures reported on its tax returns. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; 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 and its other sponsored worker's wage.

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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.