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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

PUBLIC COPY

B4

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: **SEP 28 2010**

IN RE:

Petitioner:

[Redacted]

Beneficiary:

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 your 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual householder. She seeks to employ the beneficiary permanently in the United States as a housekeeper/cook.¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 also determined that the petitioner failed to establish that the beneficiary met the position's experience requirements. The director denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the financial ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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 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 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the priority date is November 6, 2007. The proffered wage as stated on the ETA Form 9089 is \$10.66 per hour, which amounts to

¹ The job is a live-in position. As reflected on the labor certification, DOL assigned the occupational code of 39-9099.99, Personal Care and Service Workers, All Other, to the proffered position.

\$22,172.80 per year. On the ETA Form 9089, signed by the beneficiary on April 4, 2008, the beneficiary does not claim to have worked for the petitioner.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on April 23, 2008. On Part 5 of the Form I-140, the petitioner claims that her gross annual income is \$150,000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 surrounding circumstances affecting the petitioner 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, or that its net income or net current assets² could cover the difference between the actual wages paid and 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 record does not indicate that the petitioner employed the beneficiary or paid the beneficiary any wages.

The director denied the petition because the petitioner failed to provide evidence of her ability to pay the proffered wage, as well as a summary of personal monthly expenses that would enable USCIS to evaluate the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel submits additional evidence and asserts that the petitioner's gross income and net worth justifies approval of the petition. Counsel submits copies of the petitioner's individual federal income tax returns (Form 1040) for 2006 and 2007. They reflect that the petitioner files her tax returns jointly with her spouse and declared three dependents. As the 2007 return covers the priority date of November 6, 2007, it is more relevant in determining the petitioner's continuing ability to pay the proffered wage. The returns indicate that in 2006 the petitioner reported an adjusted gross

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. The difference between these two figures may be characterized as net current assets.

income of \$405,647 (line 37). In 2007, the petitioner reported an adjusted gross income of \$8,830 (line 37). The petitioner also provided a copy of her Wage and Tax Statement for 2008. It shows that she was paid \$111,031.20 in 2008. No individual tax return for 2008 or audited financial statement for that year was provided.

It is noted that if the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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).

Where an individual or sole proprietorship is involved, unlike a corporation, assets and liabilities are indivisible from their owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the individual's or sole proprietor's adjusted gross income, assets and personal liabilities are 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. Any 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). For that reason, individuals and sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage.

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 this matter, the petitioner, through counsel, submitted a summary of monthly estimated household expenses totaling \$7,015 per month, which would amount to \$84,180. Even without considering payment of the proffered wage of \$22,172.80, the petitioner's 2007 adjusted gross income of \$8,830 is \$75,350 less than the petitioner's yearly household expenses. The petitioner has not established that she had the ability to pay the proffered wage in 2007. For 2008, without a tax return or audited financial statement that would reflect not only the petitioner's salary as indicated on her 2008 W-2, but other expenses and liabilities, it may also be concluded that she has not established her continuing ability to pay the proposed wage offer. 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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 *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.

In this case, on appeal, the petitioner has also submitted an undated, unsigned, undocumented listing of real estate owned by the petitioner and her husband or a company identified as [REDACTED] and a partner. Substantial values have been assigned to these properties. Although USCIS will consider a sole proprietor's or individual petitioner's overall personal assets and liabilities, they must clearly represent cash or cash equivalent assets that would be a readily available resource out of which the proffered wage could be paid during a given period. Real estate is considered a long-term asset and is not readily convertible to be available to pay the proffered wage. Moreover, if it is considered part of a petitioner's total depreciable assets used in a business or, for example, a personal residence, it would not be converted to cash during the ordinary course of business or events, and would not, therefore, become funds available to pay the proffered wage. It is additionally noted that with respect to 2008, no tax return or audited financial statement as required by the regulation at 8 C.F.R. § 204.5(g)(2), has been provided relevant to the petitioner's financial condition. The two tax returns provided, although indicating that the petitioner has reported a wide variation of adjusted gross income of over \$400,000 in 2006, to less than \$8,900 in 2007, are not sufficiently persuasive of the ability to pay the proffered wage during the period represented beginning at the priority date. It is not concluded that the petitioner has submitted any evidence of analogous circumstances similar to *Sonogawa* that would overcome the evidence submitted to the record thus far. The petitioner has not established its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

Relevant to work experience, the regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation*—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

- (D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification. The petitioner must establish that the beneficiary has all the education training, and experience specified on the labor certification as of the petition's priority date.

It is noted that a certification, dated February 12, 2009, signed by [REDACTED], [REDACTED] confirms the beneficiary's required experience. [REDACTED] states that the beneficiary was her live-in housekeeper from February 1999 to November 2000. Her duties included cooking, serving meals, cleaning and laundry. We find that this employment verification sufficiently demonstrates that the beneficiary's experience satisfied the terms of the labor certification, which required 12 months of experience in the job offered.

Based on a review of the underlying record and argument submitted on appeal, although the petitioner established that the beneficiary had the requisite work experience as set forth in the labor certification, it may not be determined that the petitioner has established her continuing financial ability to pay the proffered wage. She must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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.