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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: NEBRASKA SERVICE CENTER

**SEP 29 2010**  
Date:

IN RE:

Petitioner:



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:



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 dental practice. It seeks to employ the beneficiary permanently in the United States as a dental assistant. 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 June 9, 2009 denial, the 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. The AAO finds that the petitioner also failed to demonstrate that the beneficiary<sup>1</sup> had the requisite experience as of the priority date.

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>2</sup>

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

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<sup>1</sup> Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000).

In a letter dated April 16, 2009, the petitioner's owner indicated that the beneficiary is her brother-in-law. No evidence in the record indicates that DOL was notified about the familial relationship during the labor certification process. In any further filings, the petitioner should submit evidence that the DOL was made aware of the familial relationship during the labor certification process and establish that the job offer is *bona fide*.

<sup>2</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).

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.77 per hour (\$30,721 per year). The Form ETA 750 states that the position requires two years of experience as a dental assistant.

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 1999 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, 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 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 submitted no evidence that it ever employed or paid the beneficiary any wages.

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 (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).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts*, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

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, the petitioner submitted tax information for the following years. The sole proprietor's tax returns reflect that the family includes a spouse and four dependents in each year.

| <b>Tax Return for Year:</b> | <b>Sole Proprietor's AGI (1040)</b> | <b>Petitioner's Gross Receipts (Schedule C)</b> | <b>Petitioner's Wages Paid (Schedule C)</b> | <b>Petitioner's Net Profit from business (Schedule C)</b> |
|-----------------------------|-------------------------------------|---|---|---|
| <b>2007</b>                 | \$104,101                           | \$264,160                                       | \$38,966                                    | \$102,229   |
| <b>2006</b>                 | \$102,721                           | \$233,630                                       | \$41,737                                    | \$92,363  |
| <b>2005</b>                 | \$118,909                           | \$231,497                                       | \$38,084                                    | \$92,573  |
| <b>2004</b>                 | \$107,467                           | \$229,686                                       | \$37,812                                    | \$79,122  |
| <b>2003</b>                 | \$70,490                            | \$219,781                                       | \$39,701                                    | \$73,634  |
| <b>2002</b>                 | \$55,679                            | \$218,543                                       | \$37,186                                    | \$66,914  |
| <b>2001</b>                 | Not submitted                       | Not submitted                                   | Not submitted                               | Not submitted   |

This evidence does not establish the petitioner's ability to pay the proffered wage for 2001, 2002, and 2003. We will consider a sole proprietor's total income or AGI, reflected on the Form 1040 as a whole. *See Ubeda*, 539 F.Supp. 647. The petitioner did not submit a full copy of its Form 1040 for 2001 so that we are unable to determine the AGI for that year. The petitioner submitted a letter dated April 14, 2009 stating that she requested copies of the 2001 tax return from her accountant and from the IRS but that the return was unavailable from any source. On appeal, the petitioner submitted a copy of a letter from the IRS, which states that it enclosed a copy of the transcripts requested. However, the letter also states that transcripts are only available for three prior years and the petitioner did not attach anything received from the IRS. The petitioner's owner also submitted a statement of monthly household expenses showing that the total monthly expenses were \$4,049.82 (\$48,597 per year). It is unclear from the record that the petitioner's self-estimate is complete or

accurate.<sup>3</sup> The proffered wage plus the annual expenses of the owner are greater than the AGI in 2002 and 2003. As a result, the petitioner has not established its ability to pay the proffered wage while the sole proprietor supports herself for those years as well as in 2001 as the record lacks the tax returns for this year. While it appears that the petitioner can establish its ability to pay the proffered wage in 2004, 2005, 2006, and 2007, the sole proprietor's total expenses in each year should be clarified in any further filings.

On appeal, counsel asserts that we should consider the personal assets of the sole proprietor in determining the petitioner's ability to pay the proffered wage and states that the owner has rental property in the Philippines that generates \$1,000 income per month. Counsel also asserts that the statement of expenses submitted was the statement of expenses for 2009 and the sole proprietor's expenses were lower in previous years. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted no evidence of any rental income, rental property, or any cash assets or that the owner's expenses were lower in other years. In addition, no evidence was submitted to demonstrate that the rental income somehow reflects additional available funds that were not reflected on the owner's tax return.

Counsel also states that certain expenses especially in the form of wages paid would have been avoided with the employment of the beneficiary because of his efficiency and ability to multitask so that the number of employees could have been reduced. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner made no claim before the appellate brief that the beneficiary would be replacing workers currently employed. Counsel asserts that the beneficiary could take on the work of the receptionist or general office helper. The labor certification was certified for the position of a dental assistant, not for the beneficiary to work as a receptionist. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2).

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

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<sup>3</sup> The sole proprietor's self-estimate does not include regular expenses such as insurance costs, clothing, or child care (if required).

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 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 submitted no evidence to liken its situation to the one in *Sonegawa* including evidence of its reputation, unusual expenses, or one off year. The petitioner failed to submit any evidence to support its ability to pay in 2001. Further, nothing supports counsel's assertions on appeal regarding the sole proprietor's lower personal expenses or other assets. 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.

In addition to the issue of the petitioner's ability to pay the proffered wage, we have identified an additional issue of ineligibility upon appeal. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 requires two years of experience in the job offered as a dental assistant. The petitioner submitted a letter from [REDACTED] a dentist in Xavierville, Quezon City, Philippines, that states that the beneficiary worked in the author's dental practice from February 1987 to March 1989 as a dental assistant. This letter is undated and does not state that the beneficiary was employed in a full-time capacity instead of a

part-time capacity in order to accurately calculate the beneficiary's total length of experience. Additionally, the letter contains no information about the position's job duties so we are unable to determine that the experience is the same as the job duties contained on the Form ETA 750. As a result, we are unable to conclude that the beneficiary had the requisite experience as of the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.