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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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FILE:



Office: TEXAS SERVICE CENTER

Date: APR 05 2011

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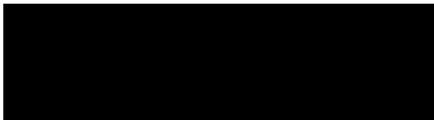
Petitioner:



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 \$630. 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 a maintenance business. It seeks to employ the beneficiary permanently in the United States as a plumber. 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 January 16, 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.

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 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 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$15.57 per hour (\$32,385.60 per year). The Form ETA 750 states that the position requires two years experience in the job offered or two years of related experience as a plumber's helper.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner does not indicate when it was established or the number of currently employed workers. On the Form ETA 750, signed by the beneficiary on January 10, 1998, 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 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 Sonegawa*, 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 he employed and paid the beneficiary the full proffered wage from the priority date in 1998 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); *Taco*

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).

Especial v. Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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.

On appeal, counsel asserts that the director inappropriately applied the average household expense amounts for 2008 to all other relevant years. However, counsel does not submit any additional information pertaining to the petitioner's average household expenses for the relevant years; therefore, the AAO will consider the figure used by the director to be accurate and appropriate for all the relevant years. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 the instant case, the following table reflects the sole proprietor's IRS Forms 1040 Adjusted Gross Income (AGI) amounts, minus its average yearly household (HH) expenses, minus the proffered wage amounts, and the remaining income.

YEAR	AGI	HH EXPENSES	REMAINING AMOUNT	PROFFERED WAGE	REMAINING AMOUNT
1998	-----	\$62,316.00	-----	\$32,385.60	\$00.00
1999	\$30,546.00	\$62,316.00	(\$31,770.00)	\$32,385.60	\$00.00
2000	\$30,865.00	\$62,316.00	(\$31,451.00)	\$32,385.60	\$00.00
2001	\$33,126.00	\$62,316.00	(\$29,190.00)	\$32,385.60	\$00.00
2002	\$53,968.00	\$62,316.00	(\$8,348.00)	\$32,385.60	\$00.00
2003	\$47,497.00	\$62,316.00	(\$14,819.00)	\$32,385.60	\$00.00
2004	\$86,620.00	\$62,316.00	\$24,304.00	\$32,385.60	(\$8,081.60)
2005	\$95,426.00	\$62,316.00	\$33,110.00	\$32,385.60	\$724.40
2006	\$96,150.00	\$62,316.00	\$33,834.00	\$32,385.60	\$1,448.40
2007	\$106,588.00	\$62,316.00	\$44,272.00	\$32,385.60	\$11,886.40

In order to determine the sole proprietor's ability to pay the proffered wage, his monthly expenses must be subtracted from the adjusted gross income amounts. The sole proprietor claims five dependents on his individual tax return in all the relevant years and his annual household expenses to be \$62,316.00. The sole proprietor's adjusted gross income less his annual expenses is insufficient to pay the proffered wage for 1998 through 2004. Although the record demonstrates the petitioner's ability to pay the proffered wage in 2005, 2006, and 2007, it is highly unlikely that the petitioning entity structured as a sole proprietorship could support himself and five dependents on what remains after subtracting the proffered wage amounts. It is further noted that, even if USCIS declined to apply all of the household expenses in 1998, 1999, and 2000, the petitioner did not even have enough AGI to cover the proffered wage.

Counsel asserts on appeal that the petitioner's net income amounts reported on Schedule C of his individual tax returns for the relevant years should only be considered rather than adjusted gross income amounts. Contrary to counsel's claim, the petitioner's business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return, where the adjusted gross income amounts are used to determine the petitioner's ability to pay the proffered wage. As explained above, a sole proprietorship does not exist as an entity apart from its owner. To consider net business income alone and not the sole proprietor's AGI could result in an inaccurate picture of the sole proprietor's financial capabilities. Regardless, even if the AAO considered only net business income, the petitioner's net business income was less than the proffered wage in 1999, 2000, 2001, 2002, and 2003. No evidence was submitted for 1998.

Counsel asserts that the balances (cash on hand) in the petitioner's business checking account for 2008 are sufficient to demonstrate his ability to pay the proffered wage. Counsel provides a copy of the petitioner's business checking account statements for 2008 as evidence. Contrary to counsel's claim, the funds from the petitioner's business checking account are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses, which are carried over to page one of the IRS Form 1040 and calculated into the adjusted gross income (AGI) amounts. Although USCIS will not consider gross income without also considering the expenses

that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Furthermore, counsel's reliance on the balances in the petitioner's business bank account is misplaced. First, business account 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, no evidence was submitted to demonstrate that the funds reported on the petitioner's business checking account bank statements somehow reflect additional available funds that were not reflected on his tax returns as noted above. Third, these bank statements only account for a narrow period of time. Therefore, the petitioner cannot establish his ability to pay the proffered wage through the demonstration of his business checking account bank statements.

On appeal, counsel asserts that the director erred in denying the petition and that the petitioner has established his ability to pay the proffered wage. Counsel also asserts that the value of the sole proprietor's home should be considered in determining the petitioner's ability to pay the proffered wage. The sole proprietor submits evidence of the value of his real property. Real estate is not a readily liquefiable asset. Further, it is unlikely that the petitioner would sell such significant assets to pay the beneficiary's wage. It is speculative to claim that funds from the sale of real property would be available specifically to be used to pay the proffered wage. *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)). Further, any funds which may be generated from the sale of any of the property would only be available at some point in the future. A petitioner must establish its ability to pay from the date of the priority date, which in this case is January 13, 1998. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. Counsel asserts on appeal that the petitioner's cash on hand (business bank account balances) was greater than the proffered wage. Contrary to counsel's claim, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to his IRS Form 1040 at page one, and it is included in the calculation of the petitioner's adjusted gross income (AGI), which is insufficient to establish the petitioner's ability to pay the proffered wage. The petitioner has not established that the relevant years were uncharacteristically unprofitable or a difficult period for the petitioner's business. The petitioner has not established its reputation within the industry. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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