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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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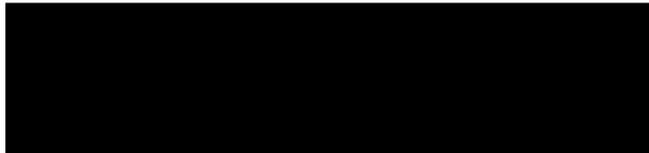
Date: **APR 12 2011** Office:

FILE:   
SRC 08 066 51153

IN RE: Petitioner:   
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:



**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,

*Kerai S. Pontas for*

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a hostess. 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 denied the petition accordingly.

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 November 5, 2008 denial, the primary 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)(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, 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 ETA Form 9089 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 ETA Form 9089 was accepted on July 16, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.16 per hour, which equates to \$16,972.80 per year. The ETA Form 9089 states that the position requires three months of experience in the job offered.

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>1</sup>

The evidence in the record of proceedings shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on October 23, 1990, have a gross annual income of \$96,311.00, a net annual income of \$20,586.00, and to employ four workers. On the ETA Form 9089, signed by the beneficiary on November 5, 2007, the beneficiary claimed to have worked at "various jobs" since March 29, 2001, and to have previously worked as a hostess at [REDACTED] Portugal from January 15, 1997 to December 30, 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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 submitted any evidence to establish that it ever employed and paid the beneficiary. Therefore, the petitioner must establish that it can pay the beneficiary an amount at least equal to or greater than the proffered wage in 2007.<sup>2</sup>

If, as in this case, 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

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<sup>1</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).

<sup>2</sup> The record before the AAO closed on October 14, 2008, with the receipt by the director of the petitioner's submissions in response to a Request for Evidence (RFE) dated September 19, 2008. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's 2007 income tax return was the most recent return available as of the date of the petitioner's response.

depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 (AGI), 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 AGI or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *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 petitioner 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 record reflects that the sole proprietor supports a family of two. The tax returns submitted by the sole proprietor reflect his AGI in 2007 as \$26,060. The sole proprietor also submitted an estimate of his family's recurring household expenses, dated September 29, 2008, as totaling \$5,107.69 monthly.<sup>3</sup>

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<sup>3</sup> Including payments for mortgage (\$2,312.79); automobile lease (\$500.00) and fuel (\$120.00); gas, electricity and water (\$350.00, \$500.00 and \$125.00, respectively); food/groceries (\$500.00); telephone (\$64.90); grounds maintenance (\$35.00); and miscellaneous credit cards (\$600.00). It is noted that this estimate for October 2007 does not include or specify a breakdown of the sole proprietor's costs for auto (unless included in lease agreement, of which there is no evidence), home or health insurance.

The proffered wage constitutes 65.13% of the sole proprietor's AGI in 2007. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains in 2007 after reducing his AGI by his estimated household expenses and the amount required to pay the beneficiary the proffered wage.

On appeal, counsel asserts that the director erroneously denied the petition and abused his discretion by denying the petition based upon the net income figure reflected on the petitioner's federal income tax returns. Counsel cites a memorandum issued by [REDACTED] and asserts that the petitioner may submit financial statements such as profit and loss statements, bank account records or personnel records in demonstrating its ability to pay. Counsel also cites a non-precedent decision<sup>5</sup> issued by the Vermont Service Center as holding that the Department of Homeland Security (DHS) must consider the normal accounting practices of the company even if the ability to pay is not reflected in the tax returns. In support of the appeal, counsel submits a list of the petitioner's personal assets, deeds for the petitioner/sole proprietor's real estate properties, the sole proprietor's personal bank account statements, and the petitioner's business bank account statements.

Where accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money may be considered to be available for the sole proprietor to pay the proffered wage. If the accounts represent what appear to be the sole proprietor's business checking accounts, some of these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses.

The sole proprietor submitted an undated, unaudited list showing his personal assets as totaling \$1,333,200.00.<sup>6</sup> He also submitted a list showing his yearly gross rental income as totaling \$29,400.00<sup>7</sup> and a list showing his liabilities as totaling \$221,081.00.<sup>8</sup> While the petitioner submitted deeds for three properties, he did not submit evidence of the loans he has on those properties. The petitioner also did not submit appraisals of his automobiles, jewelry, furniture, and miscellaneous items, nor any evidence that he owned the autos, jewelry, furniture and miscellaneous items in 2007. 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.

<sup>4</sup> Memorandum from [REDACTED] *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

<sup>5</sup> While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

<sup>6</sup> Including the sole proprietor's estimated value of his real estate (a three-family house, a commercial building, the petitioner's business and the sole proprietor's personal residence) as \$1,266,000, his automobiles valued as \$32,000; and, his jewelry, furniture and miscellaneous items valued at \$35,000.

<sup>7</sup> Including \$19,200.00 for a three-family house and \$10,200.00 for a commercial building.

<sup>8</sup> Including mortgage payable on his residence of \$169,112.00, an automobile loan of \$30,569.00, and unsecured loans of \$21,400.00.

1972)). Further, the value of the sole proprietor's business is not a liquid asset, as it is unlikely that the sole proprietor would liquefy his business to pay the beneficiary's wage. The petitioner has not verified his ability and willingness to sell these assets to pay the proffered wage.

The petitioner also provided personal bank account statements in the name of the sole proprietor and his spouse as follows:

BANK OF FALL RIVER<sup>9</sup>

	<u>2007 (\$)</u>	<u>2008 (\$)</u>
JAN	1,073.88	1,332.09
FEB	496.39	382.43
MAR	622.53	272.71
APR	337.25	348.77
MAY	350.34	424.82
JUN	916.76	416.80
JUL	400.98	63.85
AUG	68.55	568.90
SEP	556.59	483.95
OCT	182.63	267.02
NOV	242.68	347.11
DEC	319.98	1,332.09

As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its AGI, the proprietor's personal bank statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. In this case, the proprietor's annual average balance in 2007, the year of the priority date, is \$434.85, and, therefore, not sufficient to cover the full proffered wage. Thus, the sole proprietor's personal bank statements do not establish the petitioner's continuing ability to pay the proffered wage.

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 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

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<sup>9</sup> Account # ending in 004.

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.

The petitioner submitted a letter from his accountant, dated November 2, 2007, stating that based on the accountant's familiarity with the petitioner and his 25 years of accounting experience, it is his opinion that the petitioner has the ability to pay the beneficiary the proffered weekly wage. The accountant did not submit any audited financial statements and does not state the basis for his opinion other than his 25 years accounting experience. 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)).

The petitioner also submitted monthly bank statements. The funds in these accounts represent the sole proprietor's business accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of an entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

The petitioner is a small restaurant, established in 1990 with four employees.<sup>10</sup> No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. There is no evidence of the petitioner's sustained historical growth,<sup>11</sup> 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 would be deemed relevant to the petitioner's ability to pay the proffered wage. Furthermore, the petitioner's business bank statements do not establish its ability to pay the proffered wage. No evidence was submitted to demonstrate that the funds reported on the bank statements somehow

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<sup>10</sup> The sole proprietor's Forms 1040, Schedule C, Part II, Line 26, show modest wages paid of \$21,679.00 in 2006 and \$20,800.00 in 2007.

<sup>11</sup> While the petitioner's gross receipts or sales (shown on the sole proprietor's Schedule C, Part I, Line 1, increased from \$96,311.00 in 2006, to \$102,184.00 in 2007, there is no evidence of its sustained growth from the date of its establishment in 1990 through to the priority date of the petition.

reflect additional funds that were not reflected on its Schedule C. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has the continuing ability to pay the proffered wage.

Based on the evidence submitted, the AAO affirms the decision of the director. The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.