

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

PUBLIC COPY



B6

DATE: DEC 13 2011 Office: NEBRASKA SERVICE CENTER

File:

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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed.

The petitioner is a restaurant. The petitioner seeks to employ the beneficiary as a cook helper. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been 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 beneficiary could not be found to be qualified for the position offered as the petitioner failed to provide evidence of the required 12 months of experience prior to the priority date. The director denied the petition accordingly.

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 ETA Form 9089 was accepted on December 27, 2006. The proffered wage as stated on the ETA Form 9089 is \$12.10 per hour (\$25,168.00 per year). The ETA Form 9089 states that the position requires 12 months of work 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 and on motion.<sup>1</sup>

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 on January 1, 2001 and to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on March 17, 2008, the beneficiary does not claim to have been employed by the petitioner.<sup>2</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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. The record of proceeding contains copies of IRS Forms W-2, Wage and Tax Statements as shown in the table below.

- In 2006, the IRS Form W-2 stated total wages of \$7,200.00 (a deficiency of \$17,968.00).

---

<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 at 8 C.F.R. § 103.2(a)(1).

<sup>2</sup> It is noted that although the beneficiary does not claim to have been employed by the petitioner as of March 17, 2008, the petitioner asserts that it has employed the beneficiary since 2006, and submits copies of Forms W-2 for 2006, 2007, and 2008 that were allegedly issued to the beneficiary. The instructions to Part K of the ETA Form 9089 specifically state that all jobs held in the three prior years should be listed. There has been no explanation given for this inconsistency. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

- In 2007, the IRS Form W-2 stated total wages of \$5,400.00 (a deficiency of \$19,768.00).
- In 2008, the IRS Form W-2 stated total wages of \$7,200.00 (a deficiency of \$17,968.00).
- In 2009, the petitioner did not provide any evidence of wages paid to the beneficiary.

Although the petitioner submitted copies of Forms W-2, they are not persuasive evidence of any wages having been paid to the beneficiary by the petitioner because information contained in these forms is inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury. The Forms W-2 state that the wages were paid by the petitioner to a person having social security number [REDACTED]. However, the petitioner indicated "n/a" in response to the query in the Form I-140 asking for the beneficiary's social security number. Absent clarification of this inconsistency in the record, the AAO will not accept the W-2 Statements as persuasive evidence of wages paid to the beneficiary.

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 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that he paid wages in excess of the proffered wage is insufficient.

A sole proprietorship is 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 is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable 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. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 37. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

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 sole proprietor's IRS Forms 1040 reflect her adjusted gross income (AGI) as follows:

- In 2006, the proprietor's IRS Form 1040 stated AGI of \$27,992.00.
- In 2007, the proprietor's IRS Form 1040 stated AGI of \$40,192.00.
- In 2008, the petitioner's IRS Form 1040 stated AGI of \$48,119.00.
- In 2009, the petitioner's IRS Form 1040 stated AGI of \$45,714.00.

Although the AGI amounts for 2006, 2007, 2008, and 2009 are in excess of the proffered wage, the sole proprietor must demonstrate she can cover her existing household expenses as well as pay the proffered wage out of her adjusted gross income or other available funds. In addition, the sole proprietor must show that she can sustain herself. *Id.*

With respect to the sole proprietor's personal expenses, she stated in response to the director's request for evidence that her monthly household expenses were \$450.00 for rent and \$700.00 for all other expenses or (\$14,400.00 per year).<sup>3</sup> By subtracting the proprietor's claimed personal expense amounts from her AGI amounts, the evidence demonstrates the following.

- In 2006, the proprietor's remaining AGI amount of \$13,592.00.
- In 2007, the proprietor's remaining AGI amount of \$25,792.00.
- In 2008, the proprietor's remaining AGI amount of \$33,719.00.
- In 2009, the proprietor's remaining AGI amount of \$31,314.00.

Therefore, the sole proprietor has failed to establish her ability to pay the proffered wage in 2006. She has failed to establish that her AGI minus household expenses was sufficient to pay the wage deficiency of \$4,376.00 in 2006. Moreover, because the petitioner's claimed

---

<sup>3</sup> It is noted that the petitioner's household expenses appear to have been understated. The petitioner submitted as evidence a copy of rent receipts showing that she pays \$450.00 a month in rent at [REDACTED]. However, there is no evidence in the record such as a lease agreement to demonstrate that she pays such a limited amount in rent every month for a 1,615 square foot single family home that is worth an estimated \$711,200.00, with an estimated rent value of \$2,750.00 per month. In addition, it is unlikely that \$700.00 is sufficient to cover household expenses for the above noted single family home including: insurance, food, transportation, telephone, cable, internet service, utility bills, medical bills, education, electric, gas, and other miscellaneous expenses. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. *Matter of Ho* at 591.

household expenses appear to be understated she has also failed to establish her ability to pay the proffered wage in 2007, 2008, and 2009.

On motion, the sole proprietor asserts that based upon the totality of the circumstances, she has established the ability to pay the proffered wage in 2006.

The sole proprietor asserts that she has cash balances and business assets sufficient to pay the proffered wage. In support of her claim, the sole proprietor submitted copies of business bank statements from Citibank N.A. in San Francisco, California for 2009 and 2010, and stated that the balances in 2009 and 2010 were evidence of her company's readily available cash flow. The sole proprietor asserts that throughout 2006 she had readily available cash flow in the business' bank account sufficient to cover the \$4,376.00 deficiency in that year. The sole proprietor further asserts that the business bank statements for that year were not available because the bank account was closed and transferred to another bank, and that the previous bank was unable to provide copies of statements from several years back. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regardless, even if the petitioner were to submit copies of its 2006 business bank account statements, 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 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. Accordingly, these funds alone would not be probative of the petitioner's ability to pay the proffered wage as these would have already been considered in considering the petitioner's Forms 1040 and Schedules C.

The petitioner further asserts that her business has additional assets, which were not readily evident from her 1040 tax returns, but which should be considered. The petitioner further states that her business assets, such as business equipment and delivery vehicle, are assets whose net worth is in excess of the \$4,376.00 wage deficiency in 2006. Contrary to the petitioner's claims, such assets are not readily liquidable assets. Further, it is unlikely that a sole proprietor would sell such significant business assets to pay the beneficiary's wage. Regardless, there is no evidence in the record to demonstrate the availability of any personal assets owned by the sole proprietor. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage since 2006.

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 *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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2006. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant year. Overall, the record is not persuasive in establishing that the job offer was realist.

A second issue in the instant matter is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had the 12 month employment experience as a cook helper. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's one year of work experience in the job offered, she represented that she was employed by [REDACTED] located at [REDACTED] as a cook helper from October 1, 1993 through December 31, 1995. The petitioner did not submit any evidence to substantiate this claim. The petitioner asserts on motion that [REDACTED] has been out of business since approximately 1997; and therefore, she was unable to obtain a verification letter for that period from that employer.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

In support of the beneficiary's claimed work experience, the petitioner submitted a copy of the beneficiary's 1995 IRS 1040 tax return and asserts that all other efforts have failed to produce evidence of the beneficiary's past employment. Although the beneficiary's tax return lists total wages in the amount of \$18,697.00 for 1995, the tax return is a joint return with [REDACTED] and therefore, the beneficiary's individual wage amount cannot be ascertained. Regardless, the tax return does not indicate that the beneficiary was employed by [REDACTED] in Boston, Massachusetts. It is further noted that an internet search for [REDACTED] address [REDACTED] [REDACTED] that was listed by the beneficiary on the ETA Form 9089 shows that the address does not exist. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is December 27, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. Accordingly, it has not been established that the beneficiary has the requisite 12 months of job experience for the proffered position. 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

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.