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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

PUBLIC COPY



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DATE: Office: NEBRASKA SERVICE CENTER
DEC 13 2011

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Nebraska Service Center, denied the petition. On February 8, 2011, the Administrative Appeals Office (AAO) rejected the subsequent appeal as improperly filed. The AAO then reopened the matter on its own motion and permitted the petitioner 30 days in which to submit a brief or new evidence. The petitioner did not respond. The matter is now before the AAO on appeal. The appeal will be dismissed on its merits.

The petitioner is a farmer who seeks to employ the beneficiary permanently in the United States as an agricultural equipment operator. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established he had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date and found that he had not established the beneficiary met the experience requirement listed on the labor certification.

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 at 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 USDOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 that was accepted for processing on February 13, 2009 shows the proffered wage as \$9.09 per hour which equates to \$18,907.20 per year and that the position requires three months experience in the job offered.

The petitioner claims that his farming operation was established in 1971 and employs two workers when the petition was filed. The owner's IRS Forms 1040, U.S. Individual Income Tax Return, reflects he and his spouse file their tax return on a calendar year basis. On the ETA Form 9089 signed by the beneficiary on February 13, 2009, he stated that he began employment with the petitioner on December 1, 2007.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

A certified labor certification establishes a priority date for any immigrant petition later based on the ETA Form 9089. Therefore, the petitioner must establish that the job 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. The record before the director closed on May 4, 2010 with the filing of the instant appeal. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. The beneficiary's IRS Form W-2, Wage and Tax Statement, for 2009 show he received \$25,200 in PIK wages, or "payment-in-kind," from the petitioner for that year. However, these wages do not appear to represent the payment of cash to the beneficiary,. Rather, these represent the transfer of crops to the beneficiary and do not establish that the petitioner had the ability to pay money to the beneficiary. Therefore, the Form W-2 does not establish the petitioner's ability to pay the proffered cash wage of \$18,907.20 per year to the beneficiary. The certified ETA Form 9089 does not indicate that the wage could be paid in kind. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986) (USCIS may not impose additional requirements or ignore terms in labor certifications).

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 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 IRS Forms 1040 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 (or, in this case, farm income and expenses on Schedule F). 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, supra*, 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 case, the sole proprietor and his spouse have no dependents and their IRS Form 1040, U.S. Individual Income Tax Return, for 2009 lists their adjusted gross income as \$121,087. However, sole proprietors must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. The petitioner has not provided evidence that he could cover his personal expenses as well as pay the beneficiary the proffered wage because the record is devoid of evidence of the petitioner's personal liabilities including household expenses. 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)). It is determined the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and the appeal will remain dismissed for this reason.

The second issue is whether the beneficiary is qualified for the proffered position. 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. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

As noted above, the labor certification application was accepted on February 13, 2009 and states that the position requires three months of experience in the job offered. The position is described in Part H, Job Opportunity Information, # 11 of the ETA Form 9089 as follows:

Planting and harvesting of most crops. Have knowledge of working and repairing machinery. Knowledge of chemical and fertilizer applications. Knowledge of welding on the upgrade of buildings, welding pasture, corral fences and pipe fencing. Knowledge of taking care of livestock, calving, vaccinate, castrate, brand and cull cattle. Knowledge of flood irrigation and irrigation sprinkler systems.

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, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

On the ETA Form 9089, Part J, Alien Information, #21, the petitioner ticked the block indicating that the beneficiary did not gain any of the qualifying experience needed for the job while in his employ in a substantially comparable position. Therefore, an experience letter from the petitioner would not be appropriate in this case because the beneficiary did not work in the job offered prior to the priority date.

On the ETA Form 9089, Part K, Alien Work Experience, signed by the beneficiary on February 13, 2009, he listed his experience as follows:

1. Employed by [REDACTED] as an "agricultural equipment op" from December 1, 2007 until February 13, 2009. As noted above, based on the petitioner's assertions in Part 3, the beneficiary did not gain any experience qualifying him for the job with the petitioner.
2. Employed by [REDACTED] in Garden City, Kansas, as a "agricultural equipment opr" from September 1, 2001 until November 15, 2007.

The priority date of the petition is February 13, 2009, which is the date the labor certification was accepted for processing by the USDOL. See 8 C.F.R. § 204.5(d).¹ The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The regulation at 8 C.F.R. § 204.5(g)(1) requires:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

See also 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner has not submitted any employment verification letter(s) for the beneficiary. Therefore, as the beneficiary has not been shown to have met the three month experience requirement for the offered position prior to starting work for the petitioner, the petition shall be denied for this reason.

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the United States Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Page 6

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.