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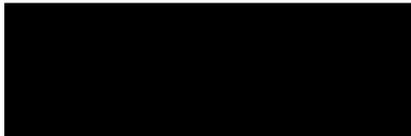
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: DEC 14 2011 Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by 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 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 October 13, 2010 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 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). 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 March 19, 2009. The proffered wage as stated on the ETA Form 9089 is \$17.27 per hour (\$35,921.60 per year). The ETA Form 9089 indicates that the position requires 24 months (two years) 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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner indicates that it was established in 2006, and that it currently employs ten workers. On the ETA Form 9089, signed by the beneficiary, 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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2009 onwards.

If, as in this matter, 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

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).

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).

It is claimed that the prospective employer 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 or a limited liability company, 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 \$20,000.00 where the beneficiary's proposed salary was \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

The following table reflects the sole proprietor's IRS Forms 1040 Adjusted Gross Income (AGI) amounts, minus average yearly household (HH) expenses, minus the proffered wage amounts, and the remaining income.

YEAR	AGI	HH EXPENSES	REMAINING AMOUNT	PROFFERED WAGE	REMAINING AMOUNT
2008 ²	\$149,291.00	\$193,715.28 ³	-\$44,424.28	\$35,921.60	-\$80,345.88
2009	\$00.00	\$193,715.28	-\$193,715.28	\$35,921.60	-\$229,636.88
2010	\$00.00	\$193,715.28	-\$193,715.28	\$35,921.60	-\$229,636.88

² It is acknowledged that the 2008 tax return concerns a time period prior to the instant priority date and is thus not directly relevant. Nevertheless, the AAO will consider this return generally in addressing the likelihood of the petitioner's ability to pay the beneficiary's proffered wage in 2009.

³ It is noted that this total is the lowest range of the petitioner's disclosed expenses. The highest range disclosed was \$205,715.28 per year.

In order to determine the sole proprietor's ability to pay the proffered wage, the monthly expenses must be subtracted from the AGI. The sole proprietor's adjusted gross income less annual expenses is insufficient to pay the proffered wage for 2008, 2009, and 2010. The petitioner failed to submit his 2009 or 2010 tax return even though specifically and repeatedly requested by USCIS. Failure to submit requested evidence which precludes a material line of inquiry is grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

On appeal, counsel asserts that the company financial statements and the CPA letter submitted on appeal have calculated the petitioner's net income to be \$198,388.00 in 2007, \$178,386.00 in 2008, and \$152,425.00 in 2009, thus demonstrating the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, the adjusted gross income (AGI) amounts are what the AAO considers in determining the petitioner's ability to pay the proffered wage. The pertinent regulation clearly requires the submission of tax returns, audited financial statements, or annual reports to establish a petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). The financial statements submitted by the petitioner are unaudited. The CPA states in the letter submitted on appeal that the net income figures, minus payroll amounts paid to employees, should be used to determine the petitioner's ability to pay the proffered wage. On appeal, counsel re-submitted the petitioner's financial statements for 2007, 2008, and 2009, and indicates that they should be referenced in determining the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel infers that the balances (cash on hand) in the sole proprietor's bank accounts are sufficient to demonstrate his ability to pay the proffered wage. Counsel provides a copy of business checking account statements from California Bank & Trust and Union Bank of California.

Counsel's reliance on the balances in the business bank accounts is misplaced. First, business checking 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 sole proprietor 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 business checking account bank

statements somehow reflect additional available funds that would not have been reflected on these tax returns. These funds would likely be shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Finally, some of the statements appear to belong to other business entities perhaps affiliated in some way with the sole proprietor. However, because these bank statements do not belong to the sole proprietor presented in this matter, they are not relevant to an evaluation of the sole proprietor's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel asserts that money taken from the petitioner's bank account to pay for renovation services to his other restaurant, if added back, would be sufficient to pay the proffered wage. As evidence on appeal, the petitioner submits copies of contractor invoices and copies of checks paid by the petitioning business to contractors for renovations on the petitioner's other restaurant. Although counsel claims that the funds used to renovate the petitioners other restaurant would have been sufficient to pay the proffered wage in the instant matter, the amounts do not appear as retained income on the part of the petitioner, and it appears that the monies paid to the contractors were liabilities not assets of the petitioner. Therefore, the petitioner cannot establish an ability to pay the proffered wage through the demonstration of these business checking account bank statements.

The record of proceeding contains monthly statements from the sole proprietor's combined personal checking and savings accounts from Union Bank of California, covering the period 2009 and 2010, with average annual balances of \$54,490.80 and \$45,728.54 for the years 2009 and 2010, respectively. As in the instant case, where the petitioner has not established its ability to pay the proffered wage the difference between the proffered wage and the wages paid to the beneficiary in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage the difference between the proffered wage and the wages paid to the beneficiary. Although the average annual balances in the years 2009 and 2010 exceed the proffered wage, the amounts are insufficient to establish the petitioner's ability to pay such wage amounts after subtracting his annual expenses amount (\$193,715.28) from the average annual bank balance amounts. Therefore, the average annual balances in the years 2009 and 2010 are not sufficient to cover the proffered wage. The petitioner submitted a copy of his personal checking account statement which shows a deposit in the amount of \$50,000.00 on June 8, 2010. As noted above, the amount, minus the petitioner's annual personal expenses (\$193,715.28), is insufficient to establish the petitioner's ability to pay the proffered wage in that year. Thus, the sole

proprietor's cash assets as reflected in his personal checking and savings accounts fail to establish the petitioner's continuing ability to pay the proffered wage, especially in the absence of any required evidence, i.e., tax returns or audited financial statements.

Counsel asserts on appeal that the two real estate properties owned by the petitioner should be taken into consideration in weighing the totality of the circumstances in this matter. However, there has been no evidence provided, such as real estate purchase agreements, land deeds or mortgage statements to substantiate this claim. 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)). Furthermore, real estate is not a readily liquefiable asset. It is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that 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 (5th 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).

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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*. 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.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has two years experience in the job offered. On the ETA Form 9089 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a chef. The beneficiary stated on the ETA Form 9089 at part K section a. that he was the owner of [REDACTED] from February 1, 1980 through July 1, 2006. The beneficiary further stated at part K section b. that he was employed by [REDACTED] as a general manager from February 1, 1978 through December 1, 1979. The beneficiary did not list any other employment on the ETA Form 9089.

The petitioner submitted a translated license for [REDACTED] to operate its restaurant business from September 1, 2004 through August 31, 2010. The petitioner submitted a document entitled "Certificate of Licensed Cook" in which it was stated that the document was to certify that the beneficiary had met the standards of the law required for completion of a licensed cook. The petitioner also submitted a transcript that shows a Bachelor of Sociology degree was granted to the beneficiary in 1978. On the ETA Form 9089 at part H section 11 the petitioner described the job duties in part as: "Preparation of authentic Japanese dishes including sushi, tempura, and Okonomiyaki (pan-fried batter cake)." There is no evidence in the record to demonstrate that the beneficiary has any job experience as a chef. The materials in the record do not describe the beneficiary's job duties abroad. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the priority date, which as noted above, is March 19, 2009. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved. 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 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145.

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.