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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

[REDACTED]

B6

FILE: [REDACTED]

Office: TEXAS SERVICE CENTER

Date:

FEB 02 2011

IN RE: [REDACTED]

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:

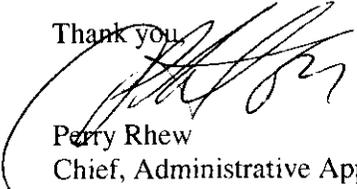
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INSTRUCTIONS:

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 your 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 an individual householder. He seeks to employ the beneficiary permanently in the United States as a domestic housekeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification¹ 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.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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 Form ETA 750, Alien Employment Certification, was accepted

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is \$538.56 per week, which amounts to \$28,005.12 per year. On the Form ETA 750, signed by the beneficiary on April 14, 2001, the beneficiary claims to have worked for the petitioner since April 2001. The Form I-140 (Immigrant Petition for Alien Worker) was filed on December 18, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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 one of the essential elements 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 overall circumstances affecting the petitioner 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 petitioner has provided no evidence of employment or payment of wages to the beneficiary.

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 (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). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

In this case, the sole proprietor provided documentation of his continuing ability to pay the proffered wage through the submission of copies of his Form 1040, U.S. Individual Income Tax Return(s) for 2001, 2002, 2003, 2004, 2005, 2006 and 2007. These tax returns indicate that the petitioner filed jointly with his spouse and declared three dependents in 2001, 2002, and 2005, and declared two dependents in 2003, 2004, 2006, and 2007. The tax returns also indicate:

	Year	Adjusted Gross Income
Proprietor's adjusted gross income (line 33 in 2001; line 35 in 2002; line 34 in 2003; line 36 in 2004; and line 37 in 2005, 2006, and 2007)	2001	\$119,540.26
	2002	\$102,355.26
	2003	\$117,973.00
	2004	\$104,339.82
	2005	\$ 97,293.21
	2006	\$121,863.53
	2007	\$118,373.93

The petitioner also submitted monthly household expenses for each of the 2001 through 2007 years. They amounted to the following:

Year	Monthly Expenses
2001	\$7,985 per month or \$95,820 annually ²
2002	\$8,035 per month or \$96,420 annually
2003	\$8,310 per month or \$99,720 annually
2004	\$8,210 per month or \$98,520 annually
2005	\$8,610 per month or \$103,320 annually
2006	\$9,110 per month or \$109,320 annually
2007	\$9,360 per month or \$112,320 annually

² The estimate includes expenses under the heading "car" and lists two separate car entries. From the record, it is unclear whether the car expense relates strictly to car payments, or whether it includes insurance and gas expenses. The statement does not include separate entries for car insurance and gas. The petitioner should clarify this expense in any further filings.

The petitioner additionally provided a monthly household expense statement, dated May 7, 2009, but did not indicate which year was applicable to the total monthly expenses of \$10,093 as stated.

Further, the petitioner also submitted a copy of the beneficiary's 2008 individual tax return, along with a copy of a Wage and Tax Statement for 2008. It is noted that the W-2 reflected the beneficiary's spouse's wages of \$31,831 from "SHS Queens Village LLC" and not any wages that the petitioner paid the beneficiary. The other income listed on this tax return is business net income of \$23,292 reflecting income from child care/housekeeping services as shown on Schedule C, Profit or Loss from Business, with the business address listed as the beneficiary's personal residence. The tax return, however, does not indicate the origin of this income and the petitioner has not provided a copy of a properly filed Wage and Tax Statement (W-2) or a Form 1099 (Miscellaneous Income) for any year in question. Therefore, the source of this income is not shown.

It is additionally noted that in the petitioner's response to the request for evidence, counsel requests consideration of the petitioner's tax-exempt interest income as shown on line 8b of his personal income tax returns. Copies of the 2001 through 2007 returns show -\$0- claimed in 2001; \$1,626.89 claimed in 2002; \$2,286.55 claimed in 2003; \$10,016.53 claimed in 2004; \$22,453.40 claimed in 2005; \$33,559.07 claimed in 2006; and \$42,476.49 claimed in 2007.

It is noted 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.

The director denied the petition on June 20, 2009, on the basis that the petitioner had failed to establish the continuing ability to pay the proffered wage. The director rejected consideration of the tax-exempt interest income, but observed that even if it had been considered, the petitioner had not established his continuing ability to pay the proffered wage.

The appeal is filed on July 21, 2009. Counsel requested an additional (30) days to file a brief and additional evidence. Evidence subsequently submitted consisted of copies of amended personal federal income tax returns filed by the beneficiary and her spouse with the Internal Revenue Service (IRS) for the tax years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and IRS transcript for 2008, along with copies of the 2008 tax return and W-2 previously submitted as mentioned above. The IRS filing date for all of these returns was August 10, 2009. Part II of the amended tax return(s), Form 1040X provided no explanation of any of the changes. The figures on all of the changes showed substantial increases. Counsel asserts on appeal that these documents show that the petitioner paid the beneficiary the proffered wage throughout the period at issue. We do not concur. Like the copy of the beneficiary's 2008 tax return and corresponding copy of the beneficiary's spouse's W-2 submitted to the underlying record, none of these amended returns mentions payment by the petitioner or any other source. They merely show that the beneficiary is declaring additional income and are not accompanied by any properly filed Form 1099 or W-2 to exhibit who paid the wages to the beneficiary. 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)). Further, we note that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

We do concur with counsel, that the tax exempt interest income, which is not included in the petitioner's adjusted gross income, would be appropriate to consider in determining the petitioner's ability to pay the proffered wage from the priority date onward.

Thus, for 2006 and 2007, the petitioner would be able to establish its ability to pay the proffered wage of \$28,005.12 because its combined adjusted gross income and tax-exempt interest in 2006³ minus household expenses, left \$46,102.60 to cover the full proffered wage. In 2007, the petitioner's combined adjusted gross income and tax-exempt interest income, minus household expenses, left \$48,530.42 to cover the proffered salary. In these years, the petitioner would be able to establish its ability to pay the full proffered wage, upon submitting the corroborating IRS forms reflecting tax-exempt interest income. However, in the remaining years as noted below, after deducting household expenses from the petitioner's combined adjusted gross income and tax-exempt interest income, the petitioner did not have sufficient funds to cover the full proffered wage.

For 2001, no tax-exempt interest income was reported, so the petitioner's adjusted gross income of \$119,540.26 less household expenses of \$95,820, leaves \$23,720.26 to cover the proffered wage of \$28,005.12. The petitioner did not establish the ability to pay the full proffered wage in 2001.

In 2002, the petitioner's adjusted gross income of \$102,355.26 plus the tax-exempt interest income of \$1,626.89 amounts to \$103,982.15, less household expenses of \$96,420, leaves \$7,562.15 to cover the proposed wage offer of \$28,005.12. The petitioner failed to demonstrate the ability to pay the proffered wage in 2002.

In 2003, the petitioner's adjusted gross income of \$117,973 plus the tax-exempt interest income of \$2,286.55 equals \$122,259.55, less household expenses of \$99,720 leaves \$22,539.55 to cover the proffered wage of \$28,005.12. The petitioner's ability to pay the full proffered salary was not established in this year.

For 2004, the petitioner's adjusted gross income of \$104,339.82 plus the tax-exempt interest income of \$10,016.53 amounted to \$114,356.35. As household expenses were \$98,520, this leaves \$15,836.35 to cover the certified wage of \$28,005.12. The petitioner failed to demonstrate his ability to pay the full proffered wage in 2004.

In 2005, the petitioner's adjusted gross income of \$97,293.21 plus the tax-exempt interest income of \$22,453.40 equaled \$119,746.61, less household expenses of \$103,320, left \$16,426.61 to cover the

³ The petitioner should submit any forms related to tax-exempt interest income claimed to document such income in any further filings.

full certified wage of \$28,005.12. The petitioner did not establish the ability to pay the full certified salary in 2005.

Additionally, it is noted that the petitioner's federal income tax return for 2008 was not provided. Therefore, it may be concluded that the current record does not establish his ability to pay the proffered wage in this year.

The petitioner has not submitted sufficient evidence to establish its *continuing* ability to pay the proffered wage beginning as of the priority date pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2).

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In this matter, there is insufficient evidence upon which to conclude that the petitioner's circumstances justify approval based on *Sonogawa*, when six out of the eight years mentioned above, have not shown the petitioner's income enough to cover the full proffered wage. No evidence similar to that discussed in *Sonogawa* has been provided that would demonstrate that such unusual and unique circumstances would apply here.

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.