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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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JAN 03 2011

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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.

Elizabeth McCormack

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 dentist, seeking to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director deemed the evidence in the record insufficient to establish by a preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date. 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 April 24, 2009 decision, the single 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 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 Form ETA 750 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 Form ETA 750 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 750 was accepted for processing by the Department of Labor (DOL) on May 3, 2002. The rate of pay or the proffered wage specified on the Form ETA 750 is \$9.86 per hour or \$20,508.80 per year. The proffered position as a dental assistant does not require any minimum education, training, or work experience. The beneficiary claimed at part B of the Form ETA 750 that she had been working for the petitioner since September 2000. No evidence has been submitted to support that claim, however. The record contains no Form W-2, 1099-MISC, paystub, or payroll record.

Along with the petition and the approved Form ETA 750, copies of the following evidence were initially submitted to demonstrate that the petitioner has the ability to pay \$9.86/hour or \$20,508.80/year beginning on May 3, 2002:

- Pages one and two of [REDACTED]'s Forms 1040, U.S. Individual Income Tax Return, for the years 2002 through 2006;

Upon receipt, the director notified the petitioner to send additional evidence, such as a copy of Dr. [REDACTED] schedule C (Profit or Loss from Business) for 2002-2006, his individual tax returns for 2007 with all schedules and attachments, a list of his monthly recurring household expenses, including his mortgage or rent payments, food, automobile payments, installment loans, credit card payments, and other household expenses, and copies of his bank statements showing cash and other investments from 2002 to 2007.

In response to the director's notice, the petitioner through its counsel submitted copies of Dr. [REDACTED] schedules C for 2002-2006 and his 2007 tax return with all schedules and attachments. The petitioner stated nothing about Dr. [REDACTED] monthly recurring household expenses and did not provide any evidence showing Dr. [REDACTED] household expenses.

The director denied the petition, finding that the petitioner failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, counsel contends that the petitioner has submitted sufficient evidence to establish its ability to pay the proffered wage. The tax returns submitted, according to counsel, contain adequate information to determine the petitioner's ability to pay the beneficiary's wage of \$9.86/hour or \$20,508.80/year from the priority date.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form I-140 petition, the petitioner claimed to initially establish its

business in 1987, to currently employ three workers, and to have gross annual income and net annual income of \$140,874.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 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.

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.

However, as stated earlier, no evidence of record indicates that the petitioner ever employed or paid the beneficiary.

When the petitioner does not establish that it employed or 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.

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.

The petitioner, as noted above, 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.

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 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

A review of the petitioner's tax returns reveals that the petitioner, Dr. [REDACTED] was married with one dependent child between 2002 and 2004 and with two dependent children from 2005 to 2007. The table below shows the following information about the petitioner's income and ability to pay the beneficiary's wage:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Proffered Wage (PW)	Annual Household Expenses	AGI less Annual Household Expenses (Net Income)
2002 (line 35, Form 1040)	\$184,700	\$20,508.80	Unknown	Unknown
2003 (line 34, Form 1040)	\$134,208	\$20,508.80	Unknown	Unknown
2004 (line 36, Form 1040)	\$132,137	\$20,508.80	Unknown	Unknown
2005 (line 37, Form 1040)	\$136,954	\$20,508.80	Unknown	Unknown
2006 (line 37, Form 1040)	\$130,375	\$20,508.80	Unknown	Unknown
2007 (line 37, Form 1040)	\$156,758	\$20,508.80	Unknown	Unknown

Based on the table above, the AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage beginning on the priority date. Without further information or evidence about the petitioner's monthly or annual recurring household expenses, this office cannot determine whether the petitioner has that ability. The director's request for a list of the petitioner's monthly recurring household expenses is authorized by regulation and is reasonable.

The regulation at 8 C.F.R. § 103.2(b)(14) states:

Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

The director, before issuing a decision, has specifically requested the petitioner to submit a list of his monthly recurring household expenses. The petitioner failed to submit such a list. Such a list, if submitted, would demonstrate whether the petitioner has the financial resources to pay the proffered wage. The petitioner's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Finally, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage.

The petitioning entity in [REDACTED] 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 [REDACTED] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in [REDACTED] 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.

Unlike [REDACTED] the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*. Nor has it been established that the petitioner, especially between 2002 and 2007, had uncharacteristically substantial expenditures which prevented it from paying the beneficiary the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of* [REDACTED] After a review of the petitioner's tax returns and considering the absence of evidence establishing the sole proprietor's household expenses, the AAO concludes that the petitioner does not have the ability

to pay the salary offered as of the priority date and continuing to present. 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.