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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



B6

Date:

JUN 09 2011

Office: TEXAS SERVICE CENTER



IN RE:

Petitioner:



Beneficiary:

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

The petitioner is a farming/ranch operation. It seeks to employ the beneficiary permanently in the United States as a livestock rancher. 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 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 June 10, 2008 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 Form ETA 750, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 Form ETA 750 was accepted on May 1, 2001. The proffered wage as stated on the Form ETA 750 is \$11.29 per hour (\$23,483 per year). The Form ETA 750 states that the position requires two years and six months experience in the proffered position.

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 claimed to have been established in 1980 and to currently employ two full-time workers plus seasonal workers. On the Form ETA 750, signed by the beneficiary on November 7, 2004, the beneficiary claimed to have worked for the petitioner since May 1995.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form 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. *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 onwards. The petitioner did submit evidence, however, showing that the beneficiary was paid wages as follows:

- 2007 W-2 Form - \$21,824²

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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).

² The petitioner submitted a copy of the front side of the a check dated February 16, 2008 made payable to the beneficiary for \$480, which the petitioner states shows it was paying the beneficiary wages exceeding the proffered wage (\$451.60 per week) in 2008. A copy of the back of the check

- 2006 W-2 Form - \$20,924
- 2005 W-2 Form - \$20,871
- 2004 W-2 Form - Not submitted³
- 2003 W-2 Form - \$19,800
- 2002 W-2 Form - Not submitted
- 2001 W-2 Form - Not submitted

Since the W-2 Forms state wages that were paid to the beneficiary in 2003, 2005, 2006 and 2007, though less than the full proffered wage, the petitioner need only establish the ability to pay the difference between the wages paid and the full proffered wage for those years. Those sums are as follows:

- 2007 - \$1,659
- 2006 - \$2,559
- 2005 - \$2,612
- 2003 - \$3,683

The petitioner must establish the ability to pay the full proffered wage in 2001, 2002 and 2004.⁴

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).

was not presented to establish that the check was actually cashed. The petitioner should submit such evidence in any further filings.

³ The petitioner did not submit copies of the beneficiary's W-2 Forms for 2001, 2002 and 2004 even though they were specifically requested by the director in his March 19, 2008 request for evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

⁴ The director noted in his decision that the petitioner failed to submit W-2 Forms in these years, however, the petitioner did not submit any additional W-2 Forms or pay records for these years on appeal despite the petitioner's claim that it employed the beneficiary since 1995 onward.

The petitioner appears to be a sole proprietorship,⁵ 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. See *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 petitioner 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 record of proceeding closed in this instance with receipt by the director of the petitioner's response to the director's request for evidence on April 17, 2008. As of that date, the petitioner's 2007 tax return would have been the most recent return available. The petitioner submitted evidence that it had requested an extension to file its 2007 return when the response was submitted. Thus, the petitioner's 2006 tax return would have been the most recent tax return available.

In the instant case, the sole proprietor's tax returns show that he supported a family of six in 2004, 2005 and 2006. The sole proprietor did not submit a copy of his 2001, 2002 or 2003 tax returns even though the director specifically requested copies of those returns in his March 19, 2008 request for evidence.⁶ The proprietor's tax returns reflect the following information for the following years:

- Proprietor's 2004 adjusted gross income (Form 1040, line 36) was \$100,308
- Proprietor's 2005 adjusted gross income (Form 1040, line 36) was \$112,948
- Proprietor's 2006 adjusted gross income (Form 1040, line 36) was \$107,257

While a sole proprietor would submit Schedule C to report business income, a farm would report its business related "Profit or Loss from Farming" on Schedule F filed with the Form 1040. Schedule F would state farm income, and farm expenses as well as applicable loans and other pertinent

⁵ Texas state business records do not show that the petitioner is incorporated. <https://corecpa.cpa.state.tx.us/coa/Index.html>. (Accessed May 25, 2011). The petitioner's owner stated in a letter dated March 19, 2007 that he did "not incorporate" his business. He states in an affidavit that he is the sole owner. Thus, in the absence of further information, the petitioner appears to be a sole proprietor. In any further filings the petitioner must submit information to confirm this.

⁶ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

information, including net profit. The sole proprietor did not submit his full Form 1040 with Schedule F and other schedules with any of the tax returns submitted. Therefore, we are unable to fully assess the petitioner's circumstances to determine its ability to pay and the totality of the circumstances.

As stated above, the sole proprietor did not submit copies of his 2001, 2002 or 2003 tax returns. Thus, it cannot be determined whether or not the petitioner had sufficient adjusted gross income to pay the proffered wage in those years. While the petitioner's 2004, 2005 and 2006 tax returns would show sufficient adjusted gross income to pay the proffered wage, or the difference between wages paid to the beneficiary and the proffered wage, it must also be noted, however, that the petitioner failed to submit his monthly living expenses and those of any dependents for years 2001 through 2006. As noted above, the sole proprietor must not only establish that he has sufficient adjusted gross income to pay the proffered wage, but to pay his necessary living expenses and those of any dependents. The record does not establish the sole proprietor's ability to pay the proffered wage and those expenses in any relevant year because the petitioner did not submit those expenses.

On appeal, counsel states that the sole proprietor has established his ability to pay the proffered wage. Specifically, counsel states that the beneficiary receives free housing, utilities, gasoline and the use of a vehicle as part of his compensation, and that the value of these items should be considered as additional wages paid to the beneficiary. Counsel further asserts that the law does not require the petitioner to pay the proffered wage from the priority date and cites 20 C.F.R. § 656.10(c)(4). This regulation states that the employer is not "required to pay the offered wage until after permanent residence is granted." While this is a correct statement, that the petitioner is not required to *pay* the proffered wage until permanent residence is granted, the petitioner, pursuant to 8 C.F.R. § 204.5(g)(2), must however, establish that it has the ability to pay the proffered wage from the priority date onward.

Counsel states that based on a memorandum dated May 4, 2004, from [REDACTED] Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), the sole proprietor has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). The AAO does not agree. It is counsel's position that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," and urges USCIS to consider the current wage rate being paid to the beneficiary as satisfying the petitioner's ability to pay.

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 1, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only presently, but it must also show its continuing ability to pay the proffered wage from 2001 onward. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

The AAO does not agree that the value of extra benefits given to the beneficiary (housing, utilities, a vehicle and gasoline) should be added to the beneficiary's monthly wages in the ability to pay analysis. A fringe benefit is a form of pay for the performance of services. A fringe benefit is taxable to the recipient employee unless the law specifically excludes it. See <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed May 23, 2011).⁷ Counsel relies on *Kids "R" Us*, 89-INA-311, 312, 344; 90-INA-20, 75, 81, 181, 187 and 216 (Jan. 28, 1991) (en banc)⁸ in stating that the value of the referenced benefits should be considered as additional wages paid to the beneficiary. In *Kids "R" Us* the Board held an employer's proffer of fringe benefit compensation may be considered in determining the relevant prevailing wage for purposes of 20 C.F.R. § 656.20(c)(2) and 656.40. An employer making such a contention, however, bears a heavy burden to demonstrate the fairness and bona fides of the fringe benefit as part of its wage offer. At a minimum the employer must establish the value of its fringe benefits and show that they are not common to the comparable jobs upon which the prevailing wage is based. Unique fringe benefits must be disclosed in the advertisements and posted notices. See *Peddinghaus Corp.*, 88-INA-79 (July 6, 1988). The certified labor certification contains no reference to those benefits in the certified wage. See also

⁷ For federal tax purposes, an employer reports taxable fringe benefits in box 1 of an employee's IRS Form W-2. Nontaxable fringe benefits are excluded from box 1 of an employee's IRS Form W-2.

⁸ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions and BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Board of Alien Labor Certified Appeals (BALCA), *In the Matter of Koba Corporation*, 91-INA 11- (BALCA May 29, 1991), where the Board remanded the labor certification to the certifying officer in consideration of *Kids "R" US* to consider fringe benefits. Here, the labor certification is certified with a wage of \$11.29 and nothing shows that the Department of Labor considered fringe benefits to be included in the certified wage. Accordingly, the AAO will not accept the assertion that fringe benefits can be used to establish the petitioner's ability to pay. Nothing in the record shows that the Department of Labor considered any fringe benefits in determining the wage, or that any fringe benefit was disclosed in any advertisement or posting notice supporting the labor certification.

The record presented does not establish the value of the fringe benefits (other than the sole proprietor's assertion, not supported by underlying documentation of the fair rental value of the residence provided, the utilities paid, and the value of providing the beneficiary a vehicle and gasoline). Furthermore, the sole proprietor does not establish that the referenced benefits are not common to comparable jobs upon which the prevailing wage is based. The petitioner merely states that those benefits are not common in the industry for the beneficiary's particular position but provides no basis for such a statement. 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)). The estimated value of the referenced benefits, therefore, shall not be considered as additional wages paid to the beneficiary.

The petitioner supplied a copy of a tax bill showing that he owned additional real estate which the petitioner asserts should be considered in an ability to pay analysis. The assessed value of the real estate on the tax bill is not an indication of that real estate's fair market value. Further, the petitioner did not submit a title examination or other such documentation to show that the petitioner held sole title to that real estate or that the real estate was unencumbered. Real estate is generally not a readily liquefiable asset through which to pay the proffered wage. The tax bill is, therefore, of little evidentiary value.

The petitioner submitted one page of a bank statement dated May 31, 2007 in the name of [REDACTED]. It is unclear whether this statement is for a business or personal account and only shows funds during the month of May 2007.⁹ The account would not, therefore, show the petitioner's continuing ability to pay from the May 1, 2001 priority date onward. The statement also references agricultural loans. As previously noted, the petitioner did not submit Schedule F with any of his tax returns and it is not, therefore, possible to determine the profitability or liabilities of the farming operation considering the totality of the circumstances. Similarly, it is unclear whether a second statement submitted dated October 31, 2004 relates to business or personal funds. This is also only a one page statement, reflects only funds as of October 31, 2004, and would not show a continued ability to pay the proffered wage from the 2001 priority date onward.

⁹ If the bank account is a business account, the funds should be reflected on Schedule F of the petitioner's Form 1040 and would be reflected in his adjusted gross income.

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 (Reg. Comm. 1967). 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 the instant case, the sole proprietor did not submit copies of his full tax returns in any year and failed to submit any part of his tax returns for 2001, 2002 or 2003. The petitioner has not, therefore, established that its adjustable gross income in 2001, 2002 or 2003 was sufficient to pay the proffered wage. The petitioner did not submit copies of his regular living expenses and those of any dependents from 2001 through 2006. Thus, it cannot be determined in any year that the petitioner had sufficient adjusted gross income to pay the proffered wage plus those expenses. The record does not contain the relevant Schedule F for any year to demonstrate the revenue that the business generates without which we cannot assess the petitioner's totality of the circumstances. The record does not contain evidence of liquefiable personal assets held by the sole proprietor from the priority date onward, which could be considered in determining his ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.