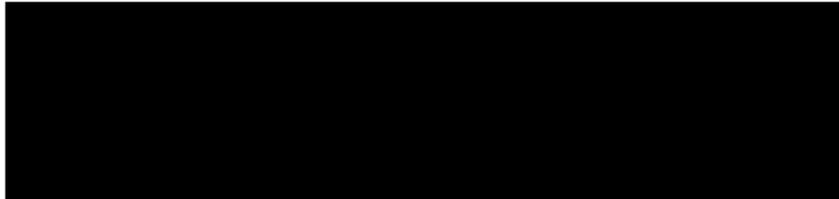


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: **JUN 22 2011** Office: NEBRASKA 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:

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 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 law office. It seeks to permanently employ the beneficiary in the United States as an accountant. 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, 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 January 17, 2008 denial, the single issue in this case is whether the petitioner has established its 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C.S. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 Form ETA 750 was accepted on October 3, 2002. The proffered wage as stated on the Form ETA 750 is \$27.53 per hour (\$57,262.40 per year). The Form ETA 750 states that the position requires a four-year Bachelor of Science degree in accounting and two years work 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 claimed to have been established in December 1999 and to currently employ 2 workers. On the Form ETA 750, signed by the beneficiary on September 23, 2002, the beneficiary claims to have been employed by the petitioner since October 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 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.

The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to the beneficiary as shown in the list below.

- In 2002, the Form W-2 stated total wages of \$11,670.00.²

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).

² The prorated proffered wage for 2002 from the priority date is \$13,962.61. However, the AAO will not consider wages paid to the beneficiary before the priority date of October 3, 2002 in evaluating the petitioner's ability to pay the proffered wage from October 3, 2002 to December 31, 2002. As the record does not contain evidence establishing when in 2002 the beneficiary

- In 2003, the Form W-2 stated total wages of \$16,050.00 (a deficiency of \$41,212.40).
- In 2004, the Form W-2 stated total wages of \$19,118.00 (a deficiency of \$38,143.72).
- In 2005, the Form W-2 stated total wages of \$16,800.00 (a deficiency of \$40,462.40).
- In 2006, the Form W-2 stated total wages of \$16,800.00 (a deficiency of \$40,462.40).

The petitioner has not established his ability to pay the full proffered wage in 2002, 2003, 2004, 2005, and 2006 through wages paid to the beneficiary.

If, as in this case, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

A sole proprietorship is 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 is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable 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. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 33, 35 and 37, respectively. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

received her \$11,670.00 in wages, or what portion (if any) was received after October 3, 2002, the Form W-2 is not persuasive in establishing the petitioner's ability to pay the proffered wage from October 3, 2002 to December 31, 2002. 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)).

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.

In the instant case, the sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) as follows:

- In 2002, the proprietor's IRS Form 1040 stated AGI of \$8,995.00.
- In 2003, the proprietor's IRS Form 1040 stated AGI of \$10,433.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$53,023.00.
- In 2005, the proprietor's IRS Form 1040 stated AGI of \$57,934.00.
- In 2006, the proprietor's IRS Form 1040 stated AGI of \$89,794.00.

Although the AGI amounts for 2004, 2005, and 2006 are in excess of the proffered wage, the sole proprietor must demonstrate he can cover his existing business expenses as well as pay the proffered wage out of his adjusted gross income or other available funds. In addition, the sole proprietor must show that he can sustain himself and his dependents. *See Ubeda v. Palmer, supra*.

With respect to the sole proprietor's personal expenses, the itemized deduction (ITD) amounts are listed below.

- In 2002, the proprietor's IRS Form 1040 stated ITD amount of \$15,979.00.
- In 2003, the proprietor's IRS Form 1040 stated ITD amount of \$38,682.00.
- In 2004, the proprietor's IRS Form 1040 stated ITD amount of \$34,310.00.
- In 2005, the proprietor's IRS Form 1040 stated ITD amount of \$46,476.00.
- In 2006, the proprietor's IRS Form 1040 stated ITD amount of \$92,725.00.

By subtracting the proprietor's ITD amounts from his AGI amounts, the evidence demonstrates the following.

- In 2002, the proprietor's remaining AGI amount of (\$6,984.00).
- In 2003, the proprietor's remaining AGI amount of (\$28,249.00).
- In 2004, the proprietor's remaining AGI amount of \$18,713.00.
- In 2005, the proprietor's remaining AGI amount of \$11,458.00.
- In 2006, the proprietor's remaining AGI amount of (\$2,931.00).

Therefore, the sole proprietor has failed to establish his ability to pay the full proffered wage as of the priority date. He has failed to establish that his AGI minus household expenses was sufficient to pay the difference between the wages paid to the beneficiary and the proffered wage in any relevant year.

On appeal, the sole proprietor asserts that based upon the totality of the circumstances, it has the ability to pay the proffered wage.

In support of his claim to have had sufficient assets to pay the proffered wage from the priority date on October 3, 2002, the petitioner submits banks statements from nine different accounts. Counsel argues that the balances in these accounts, when examined on a monthly basis, establish that he had access to combined pool of liquid assets sufficient to pay the proffered wage. However, upon close examination, these bank statements do not establish his ability to pay the proffered wage.

First, the petitioner submitted statements from his business "operating account" held at the . However, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612. Accordingly, these funds alone are not probative of the petitioner's ability to pay the proffered wage as these have already been considered in considering the petitioner's Forms 1040 and Schedules C.

Second, the petitioner submitted statements from his law practice's account. It is noted that, in almost every month in question, the vast majority of the funds that the petitioner claims are available to pay the proffered wage are in this account. For example, in his appellate brief, the petitioner claims that the total of all statement balances in December 2002 was \$25,415.04. Of this amount, the account balance was \$23,222.63. A similar proportion of funds exists for almost every month in question. The lowest monthly balance in this account after the priority date was in March 2006 (\$18,627.55), and the petitioner claims to have had \$35,209.67 available to pay the wage during that month. However, the AAO notes that the petitioner has not established that any of the funds in the account at any time were available to pay the proffered wage. account funds belong to clients, not to the attorney, and attorneys may not comingle their own funds with funds. *See generally* Cal. R. Prof. Conduct 4-100; *see also* <http://www.calbar.ca.gov/Attorneys/MemberServices/IOLTA/Guidelines.aspx> (accessed June 17, 2011).

Third, the petitioner submitted account statements for a business apparently owned by his spouse. It has not been established that these funds were truly available to pay the proffered wage.

Finally, the remaining account statements which pertain to a variety of personal accounts had on average such nominal balances that, without the addition of the account, do not establish that the petitioner had the continuing and sustained ability to pay the difference between the wages paid to the beneficiary and proffered wage since the priority date.³

³ In order to be probative of the petitioner's ability to pay the proffered wage, the proprietor's bank statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage which is the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which

Counsel submits unaudited financial statements on appeal. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Regardless, these statements are dated on the law practices gross income and expenses, not on the sole proprietor's AGI minus household expenses. The financial statements only show a part of the overall picture.

Counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

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.

The record of proceeding contains monthly bank statements from the sole proprietor's personal checking accounts covering the period 2002 through 2006. Totaling the average annual balances of the relevant years, the evidence demonstrates an average balance in 2002 of \$2,204.24, in 2003 of \$115.88, in 2004 of \$4,126.59, in 2005 of \$5,914.72, and in 2006 of \$82.53. The record also contains a copy of monthly bank statements from the sole proprietor's CD account ending in 0528 that reflects an ending balance of \$1,723.45. Counsel submitted other CD account statements however, they do not cover full years and they are not in the sole proprietor's name. Thus, the sole proprietor's cash assets as reflected in his personal checking and CD accounts fail to establish the petitioner's continuing ability to pay the proffered wage.

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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2002 through 2006. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years, other than those years just being unprofitable. Counsel asserts that the petitioner has been in business since 1999 and that the petitioner anticipates a steady increase in its income. Reliance on the petitioner's future receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance however, no detail or documentation has been provided to explain how the beneficiary's employment as a full-time accountant will significantly increase profits for a law firm. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Regardless, future projections of increased income are insufficient to demonstrate the petitioner's ability to pay the proffered wage in the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Overall, the record is not persuasive in establishing that the job offer was realistic in the relevant years.

Beyond the decision of the director, USCIS records indicate that the petitioner has filed other petitions since the petitioner's establishment in 2002, including a number of I-129 petitions, and another I-140 petition. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending

simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.⁴

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.

⁴ Beyond the decision of the director, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). The petition's wife and the beneficiary share the same sir name. Accordingly, if the appeal were not being dismissed for reasons set forth herein, this would call into question the bona fides of the job offer.