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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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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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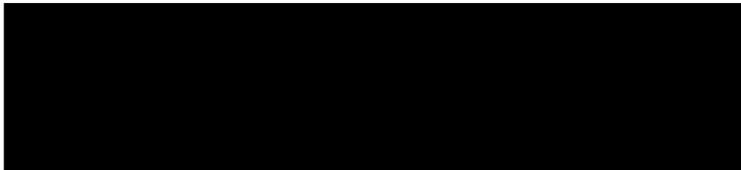
Petitioner:



Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide. 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, 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 May 28, 2009 denial, 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on December 3, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.30 per hour (\$17,264 per year). The ETA Form 9089 requires only high school education, but no training or experience for 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

██████████ is listed as the applicant on ETA Form 9089 and as the petitioner on the Form I-140. According to the records of the California Secretary of State, ██████████ registered with the State of California on June 13, 2006, and was in active status as of January 21, 2011.² The petitioner did not, however, provide copies of its corporate tax returns in support of the petition. The director requested, in a Request For Evidence (RFE) dated January 23, 2009, that the petitioner provide copies of its federal income tax returns, audited financial statements or annual reports for 2008, as well as a sole proprietor's statement of monthly expenses. It appears that the director was confused from the record as to the petitioner's actual filing status as the petitioner had initially submitted a copy of the "2007 tax return [Form 1040 and Schedule C] of . . . ██████████" with correspondence dated December 9, 2008. That tax return was the Form 1040 of ██████████ (the petitioner's licensee) and ██████████. Therefore, the director requested evidence related to the petitioner's monthly expenses as "it appears the petitioner is a sole proprietor." In the director's May 28, 2009 decision denying the petition for the reasons stated above, the director specifically noted that the petitioner was a registered corporation in California and would, therefore, be treated as a corporation. The director denied the petition noting that the petitioner did not submit corporate tax returns establishing its net income or net current assets. Despite these concerns, the petitioner did not address its filing status on appeal and resubmitted copies of its licensee's Form 1040s for 2007 and 2008.

The AAO agrees with the director's decision to treat the petitioner as a corporation for purposes of adjudicating the Form I-140 petition. The petitioner filed the Form I-140 as a corporation, and is registered in California as a corporation. Therefore, the corporation would file its tax returns on Form 1120 or 1120S. The petitioner has offered no explanation as to why its corporate tax returns were not submitted in support of the petition. As such, the petitioner has failed to establish its ability to pay the proffered wage as the record lacks the appropriate regulatory prescribed evidence at 8 C.F.R. § 204.5(g)(2). The petitioner cannot show its ability to pay the proffered wage based upon an examination of wages³ paid to the beneficiary, the petitioner's net income or net current assets. For this reason, the petition must be denied.

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 *See* ██████████ (accessed January 25, 2011).

³ Neither the petitioner nor the beneficiary claim that the beneficiary has worked for the petitioner. No W-2 Statements were submitted.

Even if the AAO considered the personal tax returns of the petitioner's stated licensee, which the petitioner has not established is applicable, the ability to pay the proffered wage has not been established. 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 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 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case,⁴ the petitioner submitted tax returns indicating that the petitioner supported a family of three in 2007 and 2008. The petitioner's owner's tax returns reflect the following information for the following years:

- The petitioner's owner's 2007 Form 1040 states adjusted gross income of \$12,563.
- The petitioner's owner's 2008 Form 1040 states adjusted gross income of \$76,613.

The petitioner submitted an estimate of monthly living expenses (\$7,341), which yields an annual sum of \$88,092. Thus, as a sole proprietor, the petitioner would need to establish sufficient income/assets to pay the necessary living expenses plus the proffered wage of \$17,264. The sum of these figures is \$105,556. The petitioner's adjusted gross income is insufficient to pay this sum in 2007 and 2008.

The petitioner submitted copies of its corporate bank statements for the months January through May 2009 to support its ability to pay the proffered wage. Those statements, however, are of little evidentiary value. If the petitioner were a sole proprietor, and the record does not establish that assumption, the business bank accounts would have already been considered in examining the petitioner's gross receipts on Schedule C. Finally, assuming the petitioner's correct filing status is that of a corporation, the corporate bank records would not establish the ability to pay the proffered wage from the priority date and would have likely been considered in a net current asset analysis

⁴The priority date in this instance is December 3, 2007. The record closed with the receipt by the director of the petitioner's March 3, 2009 response to the director's RFE. As of that date, the most recent tax return available would have been the petitioner's 2008 return.

based on a review of Schedule L. The records submitted are for 2009. The petitioner did not submit records for 2007 or 2008. Further, reliance on the balances in the petitioner's bank accounts is misplaced. First, 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 petitioner 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, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 petitioner has failed to provide copies of its corporate tax returns to support the corporate filing of the Form I-140 as raised by the director. The petitioner did not address this issue on appeal. If the petitioner was a sole proprietor, which it has not established, the personal tax returns submitted do not establish the ability to pay the proffered wage from the priority date plus the necessary living expenses submitted in the record. The record does not contain evidence of any liquefiable assets which could be used to pay the proffered wage. The record does not contain evidence establishing that the reputation of [REDACTED] is such that it is more likely than not that the petitioner would have the continuing ability to pay the proffered wage from the priority date. 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary possessed a high school diploma as of the priority date as required by the ETA Form 9089. As previously stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 [now ETA Form 9089], 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). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 143, 145 (3d Cir. 2004) (the AAO reviews appeals on a de novo basis). The petitioner submitted a copy of a diploma or certificate issued to the beneficiary from the Philippines Ministry of Education. The petitioner did not, however, submit a translation for the document as required by 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. Further, the beneficiary's passport and the Form I-140 state that the beneficiary was born in 1964. The diploma/certificate is dated 1980. It is unclear whether the diploma/certificate represents graduation from high school as the beneficiary would have possibly been only age 16 when completing the education evidenced by the diploma/certificate. For this additional reason, the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.