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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:

MAR 11 2011

IN RE: Petitioner:

Beneficiary:



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:



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.

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 The director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The petitioner is a property management business. It seeks to employ the beneficiary permanently in the United States as a maintenance and repair worker. 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 March 5, 2009 denial, the single issue in this case is whether 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 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 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 May 5, 2003. The proffered wage as stated on the Form ETA 750 is \$10.79 per hour (\$22,443.20 per year). The Form ETA 750 states that the position requires one year of 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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed that his business was established in 1970. The sole proprietor does not claim to currently employ any workers (the query regarding the number of employees was left blank). On the Form ETA 750B, signed by the beneficiary on April 9, 2003, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 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 in 2003 onwards even though the petitioner claimed in a letter dated July 19, 2007 to have employed the beneficiary since May 5, 2003. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

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<sup>1</sup> 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).

reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 (1<sup>st</sup> 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 (7<sup>th</sup> 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, the sole proprietor supports himself. IRS Forms 1040 from [REDACTED] reflect the adjusted gross income (AGI) as shown in the table below.

- In 2003, the sole proprietor's IRS Form 1040 stated AGI of \$15,353.00.
- In 2004, the sole proprietor's IRS Form 1040 stated AGI of \$38,797.00.
- In 2005, the sole proprietor's IRS Form 1040 stated AGI of \$114,637.00.
- In 2006, the sole proprietor's IRS Form 1040 stated AGI of \$93,380.00.
- In 2007, the sole proprietor's IRS Form 1040 stated AGI of \$81,809.00.

The sole proprietor indicated that his average annual household expenses for 2003 through 2007 were \$37,080.00. The differences between AGI and the sole proprietor's annual household expenses are shown in the table below.

- In 2003, the sole proprietor's AGI minus his annual household expenses equals (\$21,727.00).
- In 2004, the sole proprietor's AGI minus his annual household expenses equals (\$1,717.00).
- In 2005, the sole proprietor's AGI minus his annual household expenses equals \$77,557.00.
- In 2006, the sole proprietor's AGI minus his annual household expenses equals \$56,300.00.
- In 2007, the sole proprietor's AGI minus his annual household expenses equals \$44,729.00.

In 2003 and 2004, the sole proprietor's adjusted gross income minus his annual household expenses fails to cover the proffered wage of \$22,443.20.

On appeal, the counsel asserts that the director erred in his decision in that he relied on the petitioner's income as reflected in his tax return to determine that the petitioner had not established his ability to pay the proffered wage, and failed to request evidence of funds from other sources.

Counsel asserts that the sole proprietor's real income is shown on Schedule E of his IRS Form 1040 tax returns rather than on Schedule C of his tax returns. Contrary to counsel's claim, the proprietor's income or loss from rental real estate and royalties is carried over from Schedule E of the proprietor's IRS Forms 1040, and entered on his IRS Forms 1040, page 1 at line 17. 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. *See Elatos Restaurant Corp. v. Sava, supra*. As is noted in *Ubeda v. Palmer, supra*, the business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Therefore, such income is factored into the proprietor's adjusted gross income (AGI), which amount is correctly considered by the director and the AAO in assessing the petitioner's ability to pay the proffered wage.

The petitioner submits on appeal yearly statements from the sole proprietor's personal checking, savings, money market, CDs brokerage account. The petitioner's investment account statement from [REDACTED] indicates a total account value of \$71,535.94 at the end of 2004. Furthermore, the 2003 [REDACTED] account summary shows that the petitioner bought stocks in January and February 2003 for \$70,000.00. These are the same stocks that the 2004 general statement list, although the value had risen to \$71,535.94. Therefore, since the petitioner had liquefiable assets available which exceed the proffered wage from the priority date in 2003 through the end of 2004, and because the petitioner had sufficient AGI in 2005, 2006, and 2007 (less household expenses) to pay the proffered wage in those years,

the petitioner has established that he more likely than not could pay the proffered wage of \$22,443.20. The decision of the director shall be withdrawn.

However, the evidence in the record does not establish that the beneficiary has the required work experience for the position, and the appeal cannot be sustained.

The petitioner has failed to establish that the beneficiary meets the qualifications set forth on the Form ETA 750. According to the Form ETA 750, the position requires one year of experience as a maintenance and repair worker. In support of this claim, the petitioner submitted a letter from the owner of [REDACTED] who stated that the company employed the beneficiary as a "mason, roofing, painting, plumbing, electrical and carpentry" from February 8, 2000 to June 20, 2001. Although this letter indicates that the beneficiary was employed for more than one year, the declarant fails to specifically describe the beneficiary's job duties. It is further noted that the beneficiary did not list [REDACTED] as a former employer on the Form ETA 750B, that he signed under penalty of perjury. Accordingly, it has not been established that the beneficiary has the requisite one year experience in the job offered. 8 C.F.R § 204.5(g)(1) and (1)(3)(ii)(A). See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976); *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Moreover, the petitioner claims that the beneficiary worked as a seaman mechanic from 1991 until he arrived in the United States, which is claimed in the Form I-140 to have been in June 2002. This would have made employment in the Philippines for [REDACTED] from 2000 to 2001 an impossibility. Again, it is incumbent on the petitioner to resolve inconsistencies in the record with independent objective evidence. *Matter of Ho, supra*.

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 director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision.