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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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FILE:

Office: NEBRASKA SERVICE CENTER

Date: MAR 17 2011

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,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied, reopened on motion, and again denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a shoe repair business. It seeks to employ the beneficiary permanently in the United States as a shoe and leather worker and repairer. 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 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 October 23, 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 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 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 April 27, 2001. The proffered wage as stated on the ETA Form 9089 is \$10.17 per hour (\$21,153.60 per year). The ETA Form 9089 states that the position requires 12 months training and 18 months experience as a shoe and leather worker and repairer.

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 indicates that the sole proprietorship was established in 1978. The petitioner indicated on the petition that he currently employs two workers. On the ETA Form 9089, signed by the beneficiary on May 25, 2007, the beneficiary claimed to work for the petitioner since July 1, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 record of proceeding contains a copy of the beneficiary's IRS Forms 1040 for 2005, 2006, and 2007. The tax forms at Schedule C show that the beneficiary's total income from his business for those years was \$10,125.00, \$10,820.00, and \$10,300.00, respectively. Although the beneficiary's tax returns demonstrate income derived from business, there is no evidence to demonstrate that the income was earned from the petitioner. Other than in 2007 when the beneficiary listed his business as shoemaker on Schedule C, the beneficiary does not list his principal occupation, business name or address, and does not attach any Forms 1099-

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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).

MISC or W-2 to his tax returns. Nor does the petitioner submit personnel or payroll records establishing the source of the beneficiary's income. The petitioner's IRS Forms 1040 at Schedule C for 2005, 2006, and at Schedule C for 2007 do not demonstrate that the petitioner paid wages or contract labor during those years. Thus, the AAO will not consider that the self-employment income listed on the beneficiary's tax returns was paid by the petitioner, for purposes of the ability to pay determination.

It is noted that the beneficiary's tax identification number on his Form 1040 for 2005 is [REDACTED] on the beneficiary's Forms 1040 for 2006 and 2007, the beneficiary lists his social security number as [REDACTED] on the Form I-140 filed March 27, 2009 the petitioner lists the beneficiary's social security number as [REDACTED] on the Form I-140 filed July 30, 2007 the petitioner lists no social security number for the beneficiary. These inconsistencies call into question the reliability of the beneficiary's earnings. 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 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).<sup>2</sup>

Even if the AAO were to consider the beneficiary's income for 2005, 2006, and 2007 was paid by the petitioner, the amounts are insufficient to show that the petitioner paid the full proffered wage in those years or paid any wages to the beneficiary in 2001, 2002, 2003, or 2004.

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

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<sup>2</sup> Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution. The following provisions of law deal directly with Social Security number fraud and misuse: **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to

*...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See the website at [REDACTED] (accessed on August 27, 2007).*

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.

The record before the director closed on August 15, 2009 upon receipt by the director of the petitioner's response to the director's request for evidence. At that time, the petitioner's 2008 return was not yet due. The petitioner submitted his complete tax returns for 2005 and 2006. Although the director requested that the petitioner provide copies of his Forms 1040, including all attachments and schedules, the petitioner only provided copies of IRS Forms Schedule C for 2001, 2002, 2003, 2004, and 2007. Because the petitioner did not provide the complete tax return for those years, the AAO is unable to determine the petitioner's filing status or his adjusted gross income for 2001 through 2004, and 2007.

The sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) for 2005 and 2006 as follows:

- In 2005, the proprietor's IRS Form 1040 stated AGI (loss) of (\$406,312.00).
- In 2006, the proprietor's IRS Form 1040 stated AGI (loss) of (\$393,065.00).

If the AAO were to consider that the earned wages of the beneficiary in 2005 (\$10,125.00) and 2006 (\$10,820.00) were from the petitioner, the petitioner's AGI amounts for 2005 and 2006 are

less than the proffered wage by \$414,340.00 in 2005 and \$403,398.60 in 2006. Furthermore, 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 and show that he can sustain himself and his dependents, where applicable. *See Ubeda v. Palmer, supra*. The director requested in the Request for Evidence (RFE) that the petitioner submit a list of his monthly recurring household expenses for all of the relevant tax years. The petitioner responded to the request for evidence by stating "I prefer not to reveal my household expenses and my additional income as a matter of privacy." Without this evidence, the AAO is unable to assess the petitioner's ability to pay the proffered wage. The petitioner has failed to demonstrate his ability to cover his existing business expenses or to sustain himself and any family he may have with any excess funds.

The director requested in the RFE that the petitioner submit copies of his IRS Forms 1040 tax returns, including all schedules, for 2001 through 2007. The petitioner failed to provide the evidence requested for 2001 through 2004 and 2007. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Therefore, the evidence demonstrates that from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 through 2007.

On appeal, counsel asserts that the director erred in his decision, and that the petitioner has provided sufficient evidence to establish his ability to pay the proffered wage.

Counsel asserts that the petitioner's Schedule C for 2006 and Schedule C for 2007 indicate that the petitioner made a net profit in excess of the proffered wage in each year, and that such establishes his ability to pay the proffered wage. Contrary to counsel's claim, sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return and the business-related income and expenses that are reported on Schedule C are carried forward to the first page of the tax return and incorporated as income. The adjusted gross income amount from the first page, not the net profit, is what the AAO considers in determining the petitioner's ability to pay the proffered wage. The net profit amounts are not considered separate from the total income amounts that appear on the first page of the petitioner's tax returns.

The petitioner submitted a profit and loss statement for 2006. However, the petitioner'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.

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 (BIA 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 assessing the totality of the circumstances in this matter, the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonogawa*. The petitioner has not established that 2001 through 2007 were uncharacteristically unprofitable years or difficult periods for its business. The petitioner has also not established its reputation within the industry or whether the beneficiary is replacing an employee or outsourced service. 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. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has one year (12 months) training in the job offered. On the ETA Form 9089 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a shoe and leather worker and repairer. The petitioner submitted a letter from [REDACTED] Cupertino, California, who stated that he employed the beneficiary from June 1988 through December 1994. He also stated that although the beneficiary came to his establishment as an experienced shoemaker, he trained the beneficiary in

using sewing machines, grinding machine, pressing machine and finishing machine at his shop from June 1988 through June 1989. Contrary to the declarant's statement, on the beneficiary's Form I-485, Permanent residence or Adjustment Status application he indicated that he arrived in the United States on March 4, 1996, two years after he stated he completed his training in California. In addition, on the beneficiary's Form G-325A, Biographic Information, dated March 24, 2007, he indicated that he resided at [REDACTED] in Indaparapeo, Michoacan, Mexico from 1985 through 1996. It is also noted that the beneficiary did not list the [REDACTED] as a former employer on the ETA Form 9089 or on his Form G-325A, thus bringing into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho, supra.* Furthermore, the letter does not include a specific description of the training received by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 27, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved.

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