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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
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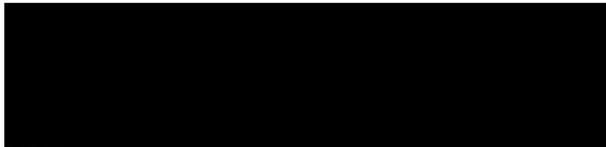
Petitioner:



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 cook. As required by statute, the petition is accompanied by an 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 September 29, 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 June 6, 2008. The proffered wage as stated on the ETA Form 9089 is \$8.85 per hour (\$18,408 per year). The ETA Form 9089 does not require any education, 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

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 1992 and to currently employ four workers. On the ETA Form 9089, signed by the beneficiary on February 17, 2009, the beneficiary claimed to work for the petitioner since April 1, 2007 as a cook.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 in 2008 onwards. The petitioner did, however, submit a W-2 Form stating that it paid the beneficiary \$12,000 in 2008. The AAO notes that the W-2 statement does not list the beneficiary's address in the employee block of the form, only his name. The W-2 Form does not contain any withholdings for state or federal taxes. As most W-2 statements include both the beneficiary's name and address, and contain withholding information, the W-2 Form appears deficient. The petitioner must address this issue in any further filings and submit state filed quarterly forms 941 listing the employees to verify wages paid to the beneficiary. 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 (BIA 1988). Additionally, the ETA Form 9089 states the petitioner's address and location of employment as [REDACTED]. The W-2 statement lists a different address in [REDACTED]. In any further filings, the petitioner must establish that all of the [REDACTED] operate under the same tax

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).

identification number for the wages to be accepted. With confirmation of wages paid, the petitioner's state quarterly Forms 941 in support, and resolution of the federal employer identification number issue, it will only be necessary for the petitioner to establish the ability to pay the difference between the proffered wage and \$12,000 for that year. That sum is \$6,408.

The record closed on June 18, 2009 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the petitioner's 2008 tax return was the most recent return available.

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).

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 (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, the sole proprietor's 2008 tax return indicates that the sole proprietor² supports a family of two, the proprietor and her spouse. The proprietor's tax returns reflect the following information for the following years:

² Additionally, we note that Schedule C lists an address for the business as [REDACTED], [REDACTED]. Although it states the same taxpayer identification number as listed on the Form I-140 and ETA Form 9089, the beneficiary's W-2 Statements, the ETA Form 9089 and Form

- The sole proprietor's adjusted gross income (Form 1040, line 37) for 2008 is \$44,345.

As noted above, the sole proprietor must establish the ability to pay the proffered wage, or difference between the proffered wage and wages actually paid to the beneficiary (in this instance \$6,408 in 2008), as well as the necessary living expenses for the proprietor and her family. The sole proprietor submitted her estimated living expenses for 2008. As stated by the sole proprietor, those expenses amount to \$4,030 per month, or \$48,360 per year. The expenses include mortgage or rent, automobile payments, maintenance and gas, but do not state any amounts for car insurance. The list includes "household expenses," but it is unclear what that consists of, and whether it comprehensively includes food, all utilities, telephone and clothing expenses. The sole proprietor's tax return shows that it owns two other residences that it rents out. As the mortgage interest paid for the two properties totals \$41,155, these would exhibit substantial payments made, which the sole proprietor's monthly estimated expenses does not appear to account for in addition to the sole proprietor's primary residence. Therefore, it is unclear that the list is complete. In any further filings the petitioner should address this issue. Based on the estimate submitted, the sole proprietor must establish the ability to pay the sum of \$54,768 in 2008 (the sole proprietor's personal living expenses, \$48,360 upon verification, plus the difference between the proffered wage and the wages actually paid to the beneficiary, \$6,408 upon verification as noted above). The sole proprietor's adjusted gross income in 2008, \$44,345, is not sufficient to pay that sum and the sole proprietor has not established the ability to pay the proffered wage and necessary living expenses in 2008.

Additionally, USCIS records reflect that the petitioner sponsored three other workers at a different location, which utilized the same tax identification number identified in the instant petition. One of the petitions was filed in March 2008. Thus, the petitioner would be required to establish its ability

I-140, and the tax return list three separate addresses, which suggests that the petitioner has multiple locations. From the record, it is not clear that all three addresses operate under the same tax identification number, and are the same corporate entity. The Schedule C only states gross receipts of \$128,500 which would appear to cover only one location, here, the West Hills address. Additionally, [REDACTED] (accessed March 22, 2011) indicate that "[REDACTED] located at [REDACTED] used to be an incorporated entity and would file its taxes on Form 1120 or 1120S. California records show that the business is suspended. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, if there is no active business, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case. The petitioner must address and resolve this issue in any further filings. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

to pay the proffered wages of both workers in that year. Two other filings reflect earlier priority dates, but it is unclear whether those beneficiaries have adjusted to permanent residence yet. The petitioner would need to establish the continued ability to pay the proffered wage for each respective beneficiary until the date of adjustment. In any further filings, the petitioner must address this issue so that the petitioner's total wage obligation and available resources may be determined.

The sole proprietor asserts that she has social security benefits which should be considered in determining her ability to pay the proffered wage. Specifically, the sole proprietor lists social security benefits of \$17,712 on line 20a of her tax return, with \$7,471 being taxable. It is the sole proprietor's assertion that the difference between those two sums, \$10,241, should be added to her adjusted gross income in the ability to pay analysis. The AAO does not agree.

The portion of the social security benefits not included in the proprietor's taxable income (\$10,241) may, in certain circumstances, be added to adjusted gross income in the ability to pay analysis. Under appropriate circumstances, the proprietor could have \$54,586 available to pay the proffered wage and personal living expenses of the sole proprietor and her family. In any future proceedings, the proprietor should provide evidence that the social security benefits were actually paid to the proprietor, such as a Form SSA-1099 to support the claim. In many occasions social security benefits are direct deposited into personal bank accounts. Thus, there is also the possibility that the benefits may be double counted if considering a proprietor's personal bank records in the ability to pay analysis. Even when including the social security benefits, the proprietor has insufficient income to pay the proffered wage plus undetermined personal living expenses. As stated above, the sole proprietor must establish the ability to pay a greater total sum than the foregoing amount even if the W-2 statement may be accepted and household expenses are verified. The sole proprietor, however, has not provided evidence that the social security benefits were actually paid to her as opposed to her spouse.³ Assuming the available social security wages were those of the sole proprietor's spouse, as they appear to be, nothing in the record establishes that the sole proprietor's spouse is willing to use his social security wages to pay the proffered wage (although they may be used to support household expenses). Further, even if the referenced social security wages were counted, the sums available to the sole proprietor still are insufficient to pay the proffered wage plus applicable living expenses and would not leave any funds to pay the additional sponsored workers.

Counsel also states, on appeal, that the sum of \$4,362 (line 21 of the 2008 tax return), deducted as a net operating loss from a prior tax year, could be reversed which would increase the sole proprietor's total income and adjusted gross income by that sum. The sole proprietor has not, however, filed an amended tax return making such changes or stated that she would be willing to do so. The statements of counsel do not constitute evidence in these proceedings. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

³ The social security number listed on the Social Security Taxable Benefits Worksheet attached to the 2008 tax return is that of the sole proprietor's spouse.

The sole proprietor has failed to establish the ability to pay the proffered wage, or difference between the proffered wage and wages paid to the beneficiary, plus the living expenses of the petitioner and any dependents in 2008 based upon the sole proprietor's 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 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 sole proprietor has not demonstrated sufficient adjusted gross income to pay the proffered wage, or difference between the proffered wage and wages paid to the beneficiary, plus the necessary living expenses of the sole proprietor and any dependents. The record does not contain evidence of any other liquefiable personal assets of the sole proprietor which could be used to pay the required wages and living expenses. The petitioner has sponsored additional workers and must show that it can pay the wages of all its sponsored workers. 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.