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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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Office: TEXAS SERVICE CENTER Date:

MAR 31 2011

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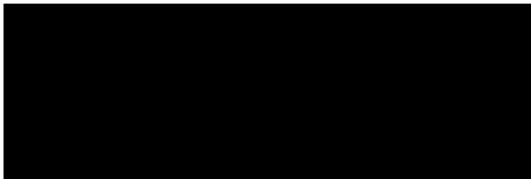
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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.

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is an individual who owns a painting business. It seeks to employ the beneficiary permanently in the United States as a painter. 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 denied the petition, finding that the petitioner did not have sufficient income to pay the beneficiary's wage.

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 February 2, 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 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 at 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 filed and accepted for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage set forth by the DOL is \$11 per hour or \$22,880 per year.

To show that the petitioner has the ability to pay \$11 per hour or \$22,880 per year beginning on April 30, 2001, it submitted copies of the following evidence:

- [REDACTED] individual tax returns filed on Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2007;
- A copy of [REDACTED] title deeds of property;
- A list of [REDACTED] monthly household expenses;
- The beneficiary's Forms 1099-MISC for 2001-2008;
- The beneficiary's IRS Forms 1040 for 2004-2008;
- A letter from [REDACTED] stating that the beneficiary did not work full-time in 2002, 2004, and 2005 and that he had to hire and pay a temporary substitute to replace the beneficiary during the period when the beneficiary was gone; and
- Copies of the Forms 1099-MISC issued to the temporary substitutes for 2002, 2004, and 2005.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship with [REDACTED] as the sole proprietor. On the petition which [REDACTED] signed on August 7, 2007, he claimed to have initially established his business in December 1992, to currently employ 10 workers, and to have a gross annual income and net annual income of \$103,397 and \$92,397, respectively.

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>

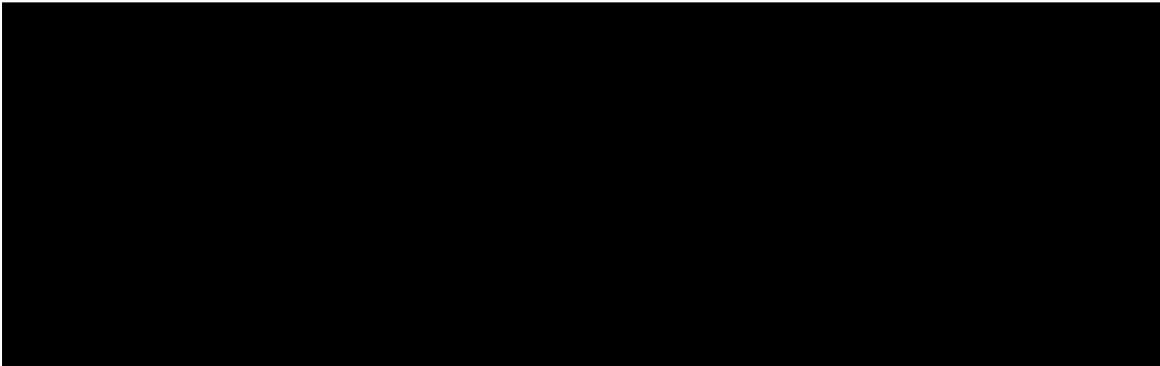
The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as 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).

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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).

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 this case, evidence of record shows that the petitioner has paid the beneficiary as a non-employee since 2001. As noted on IRS Forms 1099-MISC, the beneficiary received the following wages from the petitioner from 2001 to 2008:



Therefore, the petitioner has established that it has the ability to pay in 2001, 2003, 2006, 2007, and 2008. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2002, 2004, and 2005, which is \$9,585; \$11,380; and \$10,910, respectively, through either its net income or net current assets.

If the petitioner chooses to pay the difference between the two wages – actual and proffered – using its net income, USCIS will examine the petitioner's 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, as noted earlier, 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.

On July 23, 2008 the director requested that [REDACTED] submit, among other things, copies of his checking and savings accounts and a list of his monthly recurring household expenses including his house payments (rent or mortgage), food, automobile payments (whether leased or owned), insurance (auto, home, health, life, and so forth), utilities (electric, gas, cable, telephone, internet, and so forth), credit card payments, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

In response to the director's request, [REDACTED] provided the director with a list of his recurring monthly household expenses, as reflected on the table below:

House Payment	\$	1,167
Car Payment	\$	425
Homeowner Insurance (\$824 annual)	\$	69
Auto Insurance (\$1,425 annual)	\$	119
Health Insurance (per month)	\$	345
Electric	\$	325
Gas	\$	86
Cable	\$	123
Telephone	\$	107
Internet	\$	15
Food	\$	1,000
Credit Card	\$	300
Clothing	\$	200
Total Monthly Household Expenses	\$	4,281

During the qualifying period, between 2001 and 2007, [REDACTED] and his spouse filed joint tax returns and claimed five dependent children. In 2007 [REDACTED] and his spouse claimed two parents in addition to his five children, a total of seven dependents.

A review of [REDACTED]'s tax returns reveals the following information about his adjusted gross income (AGI) and his ability to pay the beneficiary's wage, specifically in 2002, 2004, and 2005:

The AAO agrees with the director that the petitioner does not have net income sufficient to pay the remainder of the beneficiary's wage in 2002, 2004, and 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A sole proprietor's year-end current assets are, however, not shown on his or her tax returns. Instead, they are reflected on his or her balance sheets, if any. 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, however. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. Under the same regulation, a sole proprietor petitioner may provide evidence such as his or her personal bank accounts, certificates of deposit, money market, and other liquid assets to demonstrate that he has the ability to pay the proffered wage.

In this case, the petitioner submitted no audited financial statements or balance sheets. Nor did he provide any bank statement or other document showing his net current assets.

Nevertheless, the petitioner through his counsel maintains on appeal that he has the ability to pay the beneficiary's wage. In his letter dated March 4, 2009, [REDACTED] asserts that the beneficiary did not work full time in 2002, 2004, and 2005, and that he had to hire temporary labor to substitute for the beneficiary in those years. As evidence of his assertions, the petitioner submits copies of Forms 1099-MISC of [REDACTED], and [REDACTED]. A review of these Forms 1099-MISC reveals that:

- [REDACTED] was paid \$26,467 by the petitioner in 2002;

<sup>2</sup> The annual household expenses total \$51,372 (\$4,281 monthly household expenses multiplied by 12 months).

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner urges that these wages paid to [REDACTED] in 2002, 2004, and 2005 evidenced his ability to pay the beneficiary's wage.

Essentially, the petitioner contends that the beneficiary could have received amounts in excess of the proffered wage had he worked full time:

- \$39,762 in 2002 (\$13,295 + 26,467);
- \$36,294.50 in 2004 (\$11,500 + \$24,794.50); and
- \$46,602 in 2005 (\$11,970 + \$34,632).

However, the record lacks evidence establishing that [REDACTED] were temporary workers performing the duties of the beneficiary in 2002, 2004, and 2005. The evidence of record does not support that [REDACTED] were working as painters in 2002, 2004, and 2005. To claim substitution or replacement of employees, the petitioner must, at least, show that the substitute employees – [REDACTED] – were not working for the petitioner before the beneficiary left, that they were doing exactly the same job as the beneficiary, and that they were terminated as soon as the beneficiary was back from his temporary leave. The petitioner also cannot simply state that he has been meeting his payroll obligations without providing any supporting documentation. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, the sole proprietor-petitioner also provides copies of title documents showing that he owns outright a couple of real estate properties in Oklahoma.<sup>4</sup>

We decline to accept these documents as evidence of the petitioner's ability to pay. Real property such as the petitioner's residence or a tract of land is not readily convertible into cash. In addition, it is unlikely that the petitioner would sell his home or land to pay for the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, though not raised by counsel on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the

<sup>4</sup> The petitioner [REDACTED] attached a sticky note on each title document; one note said: "this is worth \$150,000," and the other: "this is worth \$75,000."

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 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.

The AAO acknowledges that the petitioner is a viable business and has been in a competitive business since December 1992. A review of the petitioner's schedule C reveals that on the average, the petitioner's annual gross receipts or sales and annual net income from 2001 to 2007 are approximately \$385,000 and \$61,000, respectively. During the same period, the petitioner spent about \$141,000 a year on the average on labor cost.

However, in the instant case, the record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage particularly in 2002, 2004, and 2005. In addition, unlike *Sonogawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1992. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

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.