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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

BE

Date: **OCT 06 2011** Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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 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 an individual doing business as a sole proprietor. He seeks to employ the beneficiary permanently in the United States as an interpreter. 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).¹ The director determined that the petitioner had not established that he 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 alleges 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 July 29, 2008 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary 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.

¹ The current beneficiary was substituted for the original beneficiary, [REDACTED] on February 16, 2007. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since the other beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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, Application for Alien 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 Form ETA 750, 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 6, 2004. The proffered wage as stated on the Form ETA 750 is \$18,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in English/Korean literature and one year of experience as a translator/interpreter.

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.²

The evidence in the record of proceeding shows that the petitioner is an individual doing business as a sole proprietor. On the Form ETA 750B, signed by the beneficiary on December 27, 2006, the beneficiary claimed to have the petitioner's requisite qualifications.

The petitioner must establish that his 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'l Comm'r 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'l Comm'r 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 he 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

² 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).

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that he employed and paid the beneficiary the full proffered wage from the priority date on April 6, 2004 and onwards.

If the petitioner does not establish that he 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 an individual doing business as a sole proprietor. Therefore the sole proprietor's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses on their IRS Form 1040 federal tax return each year. Sole proprietors must show that they can cover their existing 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. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner's tax returns reflect that he files taxes as married filing jointly and claims two dependent children. The petitioner's tax returns reflect the following information for the following years:

| Year | Petitioner's Adjusted Gross Income |
|------|------------------------------------|
| 2004 | (Form 1040, line 36): ██████████ |
| 2005 | (Form 1040, line 37): ██████████ |
| 2006 | (Form 1040, line 37): ██████████ |
| 2007 | (Form 1040, line 37): ██████████ |

From the adjusted gross income, the petitioner's expenses must be subtracted. According to the letter submitted by the petitioner on April 30, 2008, the petitioner asserted that his family's expenses each month are ██████████. As part of this figure, the petitioner stated that his mortgage payment is ██████████ a month and his food expenses are ██████████ per month.³ The mortgage figure, however, is inconsistent with the petitioner's mortgage interest deduction on his tax returns. According to Schedule A, line 10, of the petitioner's tax returns, the petitioner stated that he paid the following annually in home mortgage interest⁴:

³ The AAO questions whether ██████████ per month for food is sufficient for a family of four.

⁴ According to the IRS Federal Income Tax Instructions, line 10, "Home Mortgage Interest" states:

| Year | Home Mortgage Interest | Interest Per Month (Figure / 12) |
|------|-----------------------------------|----------------------------------|
| 2004 | (Schedule A, line 10): [REDACTED] | [REDACTED] |
| 2005 | (Schedule A, line 10): [REDACTED] | [REDACTED] |
| 2006 | (Schedule A, line 10): [REDACTED] | [REDACTED] |
| 2007 | (Schedule A, line 10): [REDACTED] | [REDACTED] |

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

The petitioner’s failure to provide reliable figures concerning his monthly expenses in 2007 undermines his credibility with respect to his personal expenses and the AAO’s ability to correctly determine whether the petitioner had the ability to pay the beneficiary the proffered wage.

Even if the AAO were to consider the petitioner’s monthly expenses other than the mortgage payments represented in the letter on April 30, 2008, when combined with the calculated mortgage interest that the petitioner provided on his tax returns, the petitioner would lack the ability to pay the proffered wage. Although the mortgage interest is only a part of the mortgage payment, and not the total monthly mortgage payment, it will be substituted for the yearly mortgage payment for the purposes of this analysis. The other monthly expenses, according to the petitioner’s letter, total [REDACTED]. The expenses in the letter were just for 2007. For purposes of this analysis, we will assume that the expenses in 2007 are the same for the other years as well. When these two figures are combined, the following yearly expenses are induced:

| | Yearly Mortgage Interest | Other Monthly Expenses x 12 | Total Yearly Expenses |
|-------|--------------------------|-----------------------------|-----------------------|
| 2004: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2005: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2006: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2007: | [REDACTED] | [REDACTED] | [REDACTED] |

“A home mortgage is any loan that is secured by your main home or second home. It includes first and second mortgages, home equity loans, and refinanced mortgages.” It is not clear why the home mortgage interest declared on Schedule A from 2004-2007 varied as much as [REDACTED] in a year. In any event, the home mortgage interest deduction on the petitioner’s Schedule A is not [REDACTED] per month as stated on the petitioner’s April 30, 2008 letter outlining his personal expenses. The petitioner either understated his monthly mortgage payment on the list of personal expenses or overstated his mortgage interest deduction on Schedule A of his tax returns.

In the above years, the petitioner's adjusted gross income subtracted by his total yearly expenses fails to cover the proffered wage of [REDACTED]

| | Adjusted Gross Income | Total Yearly Expenses | Total |
|-------|-----------------------|-----------------------|------------|
| 2004: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2005: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2006: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2007: | [REDACTED] | [REDACTED] | [REDACTED] |

Therefore, the petitioner has failed to establish the ability to pay the proffered wage.

Alternatively, even if we used the petitioner's stated mortgage payments [REDACTED] combined with his other stated monthly expenses [REDACTED] the total figures still do not prove that the petitioner has the ability to pay the beneficiary:

| | Adjusted Gross Income | Petitioner's Yearly Expenses | Total |
|-------|-----------------------|------------------------------|------------|
| 2004: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2005: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2006: | [REDACTED] | [REDACTED] | [REDACTED] |
| 2007: | [REDACTED] | [REDACTED] | [REDACTED] |

Although the petitioner could pay the beneficiary's wage and still support himself and his family in 2007, he would have been unable to do so in the prior three years. It is improbable that the petitioner could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, the petitioner asserts that he could have paid the beneficiary's proffered wage. As proof of this, he provided a letter from [REDACTED] a Certified Public Accountant, who listed the monthly ending balances of the petitioner's business bank accounts for his two companies in 2007, and states that the petitioner could have paid the beneficiary's salary.

The petitioner's reliance on the balances in the business bank accounts of his two companies 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 business bank statements somehow reflect additional available funds that were not reflected on his tax returns.

The funds in the [REDACTED] account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

To the extent that the accountant's letter could be construed as a financial statement of the petitioner for 2007, 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. 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. The report of the CPA that the petitioner submitted on appeal is not persuasive evidence. The accountant's letter makes clear that the figures were taken from the petitioner's business bank statements and the accountant does not provide an independent analysis of the petitioner's financial circumstances. As noted above, the business bank account transactions are reported on Schedule C, which total figure is carried forward to page one of the petitioner's IRS Form 1040 to reach the petitioner's adjusted gross income figure. The adjusted gross income figure is utilized to pay the petitioner's household expenses and the beneficiary's wage. Thus, the bank balances in the petitioner's business bank accounts will not be considered separately.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).⁵ USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker 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, there is nothing extraordinary in the record that would parallel the circumstances in *Sonegawa*. The petitioner has been in business as a mortgage company for eight years and

⁵ 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.

employs four people. His schedule C gross receipts during the relevant time period ranges from [REDACTED] in 2004 to [REDACTED] in 2007. He has not shown unusual circumstances in any of those years causing him to earn less money than he would typically have made. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he 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.