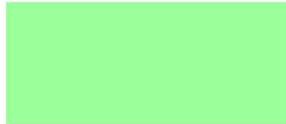




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 02 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is an individual ranch owner and operator. She seeks to employ the beneficiary permanently in the United States as a ranch administrator. 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 she 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 May 22, 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)(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 AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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>

On appeal, counsel submits a brief; a Certificate of Filing of [REDACTED] from the Texas Secretary of State dated September 21, 2007; and copies of the U.S. Income Tax Return for an S Corporation (Form 1120S) for [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006 and 2007. On appeal, counsel asserts that since the petitioner is an individual, her personal assets should be considered in determining whether she has the ability to pay the beneficiary. As evidence of the petitioner's personal assets, counsel refers to her ownership in [REDACTED], a Sub-Chapter S Corporation.

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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).

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, 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 the 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.39 per hour (\$25,771.20 per year). On the Form ETA 750B, signed by the beneficiary on November 5, 2004, the beneficiary claimed to have worked for the petitioner since September 2000.

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 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 beneficiary claims to have worked for the petitioner since September 2000. However, on March 11, 2009, the director issued a

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request for evidence (RFE), asking the petitioner to provide, among other things, copies of IRS Form W-2 which the petitioner might have issued to the beneficiary between 2001 and 2008, in the event that the petitioner employed the beneficiary. In her April 22, 2009 response, the petitioner provided no evidence of wages paid to the beneficiary and stated, “[the beneficiary] will be hired with my Ranch upon approval of immigration paperwork.”

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).

The petitioner provided no evidence of having employed or paid the beneficiary any wages from the priority date in 2001 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff’d*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 owns and operates a cattle ranch. Similar to a sole proprietorship, the petitioner’s adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner’s ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. *See* <http://www.irs.gov/publications/p225/ch03.html> (accessed July 13, 2012). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner 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 petitioner supported a family of two from 2001 through 2007. The petitioner’s tax returns reflect the following information for the following years:

- In 2001, the petitioner's IRS Form 1040, line 33, stated adjusted gross income of \$49,178.00.
- In 2002, the petitioner's IRS Form 1040, line 35, stated adjusted gross income of \$31,413.00.
- In 2003, the petitioner's IRS Form 1040, line 34, stated adjusted gross income of \$31,703.00.
- In 2004, the petitioner's IRS Form 1040, line 36, stated adjusted gross income of \$37,480.00.
- In 2005, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$80,187.00.
- In 2006, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$112,237.00.
- In 2007, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$73,080.00.

The petitioner also claimed the following personal expenses:

- 2001 = \$39,835.00<sup>2</sup>
- 2002 = \$39,835.00
- 2003 = \$39,835.00
- 2004 = \$39,835.00
- 2005 = \$39,835.00
- 2006 = \$39,835.00
- 2007 = \$39,835.00

In 2001, the petitioner reported sufficient adjusted gross income to cover her recurring household expenses but not sufficient both to cover her household expenses and pay the beneficiary the proffered wage. In 2002, 2003 and 2004, the petitioner did not report sufficient adjusted gross income to cover her recurring household expenses. However, in 2005, 2006 and 2007, the petitioner

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<sup>2</sup> In the director's RFE, he requested a list of the petitioner's "monthly recurring household expenses," including but not limited to: 1) mortgage or rent payments, 2) automobile payments, 3) installment loans, 4) credit card payments and 5) other household expenses (e.g. food, gas, insurance, utilities, entertainment expenses, etc.). The petitioner responded by submitting a list which contains numerous business-related items as well as household expenses, the total amount of which is \$153,049.85. In his decision, the director attempted to isolate those items which seemed to pertain strictly to household expenses, to include utilities, land payment, auto, mortgage, insurance and miscellaneous. The annualized amount for these items is \$38,508.15. On appeal, counsel did not dispute this amount. Thus, while the AAO would agree that the items identified by the director pertain to household expenses, there are at least six additional items on the list which appear to be household expenses but which the director did not include in his tabulation of the petitioner's expenses. These items are bank charges, CDs, DVDs, medical, recreation and subscriptions. The total for these items is \$1,327.35. Adding this sum to the total which the director identified yields a sum of \$39,835.00. Further, the director specifically requested an itemization of the petitioner's expenses for each of the years from 2001 through 2008. The petitioner provided one list which identifies expenses for 2008. Since the petitioner provided no other lists, the AAO will consider the amount identified above as applicable to all years.

reported sufficient adjusted gross income both to pay the beneficiary the proffered wage and to cover her recurring household expenses.

On appeal, counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nevertheless, the petitioner is an individual and USCIS would and will consider the petitioner's personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages.

As evidence of the petitioner's personal assets, counsel submits copies of the U.S. Income Tax Return for an S Corporation (Form 1120S) for [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006 and 2007. The petitioner also provided a document from the Office of the Secretary of State for the State of Texas which indicates that the registered agent for [REDACTED] was changed in 2007. These documents show that from 2001 through 2006, the petitioner, [REDACTED] owned 50 percent of [REDACTED]. In 2007, Ms. [REDACTED]'s ownership interest changed to 100 percent.

However, while the petitioner had a 50 percent ownership interest in [REDACTED] from 2001 through 2006 and 100 percent ownership interest in 2007, this ownership does not represent separate personal assets. The Schedule K-1 for [REDACTED] shows shareholder's income which was paid to each of the shareholders for each of the years. The petitioner reported this income or loss on her personal U.S. Individual Income Tax Return (Form 1040) on Line 17 and Schedule E for each year. Therefore, the petitioner had already accounted for any income which would have been received as a result of her ownership in [REDACTED].

On appeal, counsel for the petitioner provided no other evidence of the petitioner's personal, unencumbered liquefiable assets which might have been available to pay the beneficiary 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 (Reg'l Comm'r 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 *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 such 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 petitioner does not indicate the length of time for which she has been operating her ranch. However, the petitioner provided financial documentation for seven years of business operations. During the seven years, the petitioner has reported a net loss from her business in every year. Further, the petitioner's sales and payroll have been consistently marginal throughout all seven years. The petitioner has not established the historical growth of her business, the occurrence of any uncharacteristic business expenditures or losses, her reputation within the industry or whether the beneficiary is replacing a former employ or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that she 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.