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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services



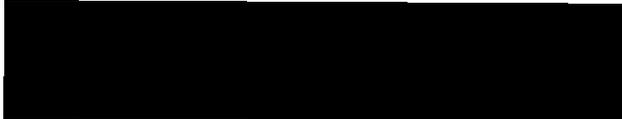
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Date: **AUG 27 2012**

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 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 bookkeeping, real estate, and income tax company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant / manager. 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 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 November 5, 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.

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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$31.32 per hour (\$65,145.60 per year).¹ The Form ETA 750 states that the position requires a high school education and two years of experience as an administrative secretary.

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 structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1993 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary claimed to have worked for the petitioner seasonally as an administrative assistant/tax preparer from January 15, 2003 to October 15, 2003.

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'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 petitioner submitted a 2007 Form W-2 demonstrating that it paid the beneficiary \$42,595.20 in that year. The petitioner also submitted pay stubs demonstrating that it paid the beneficiary \$21,297.60 from January 1 to May 4, 2008. As these amounts are less than the proffered wage, the petitioner must demonstrate its ability

¹ The labor certification indicates that overtime would be paid at the rate of time and a half and indicates that 5 hours of overtime is required. The AAO will base the ability to pay analysis on the prevailing wage without regard to required overtime.

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).

to pay the difference between the actual wage paid and the proffered wage, which in 2007 would be \$22,550.40³ and \$43,848 in 2008.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate from February 2007 to April 2007, according to the language in a memorandum dated May 4, 2004, from [REDACTED]

[REDACTED] regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, Determination of Ability to Pay under 8 CFR 204.5(g)(2), at 2, (May 4, 2004).*

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 24, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2007, when counsel claims it actually began paying the proffered wage rate, but also in 2001, 2002, 2003, 2004, 2005, and 2006. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its continuing ability to pay from the priority date onward.

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), *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

³ The petitioner also submitted payroll statements for 2007. The AAO will utilize the Form W-2, box 1 for 2007 to determine the beneficiary's wages in that year.

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'r 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 (AGI) 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 *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, from 2001 to 2004, the sole proprietor filed her individual taxes as married filing separately. From 2005 to 2007, she filed jointly with her husband. The AAO will consider the sole proprietor's separate IRS Form 1040 to determine the petitioner's AGI from 2001 to 2004. The proprietor's tax returns reflect the adjusted gross income from Form 1040, line 33 for the following years:

	<u>2001</u> ⁴	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
AGI	\$21,362	\$55,345	\$71,154	\$82,487	\$179,469	\$141,312	\$121,527
Est. House Exp. ⁵	\$72,902	\$72,902	\$72,902	\$72,902	\$72,902	\$72,902	\$72,902

In 2001, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$64,729. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 2002,

⁴ If we were to consider the sole proprietor's husband's income also in 2001 and 2002, the combined AGI would be \$54,335 and \$87,154, respectively. Consideration of the combined income of the sole proprietor and her husband in 2001 and 2002 would not affect the outcome of the appeal. The petitioner did not submit her husband's separate tax returns for 2003 and 2004.

⁵ The petitioner submitted expenses only for 2006 and 2007. The figures submitted will be used for previous years in lieu of specific information submitted for those years.

2003, and 2004, the AGI was not enough to cover both the proffered wage and the household expenses.

The only statement of household expenses provided was for 2008. Counsel referred to the bank statements provided in order to determine the household expenses for 2006 and 2007, which indicated an annualized amount of \$72,902 including a mortgage payment, utilities payments, a car payment, and other living expenses. The petitioner's AGI in 2005 and 2006 exceeds the sum of the proffered wage and the household expenses; the sole proprietor has demonstrated the ability to pay the proffered wage in those years alone. The petitioner's AGI in 2007 is sufficient to demonstrate the sole proprietor's ability to pay the difference between the actual wage paid and the proffered wage and meet the household financial obligations in that year alone.

No evidence of household expenses was submitted for 2001 through 2005. Counsel notes that the sole proprietor did not acquire the property for which a mortgage appears on the 2006/2007 statement of household expenses until 2006. Counsel asserts that the same amount of household expenses less the amount of the mortgage should be considered for 2001 through 2005.

The petitioner submitted a property appraisal and a copy of the corresponding mortgage statement, which demonstrates that the sole proprietor has a principal balance on the real property. A home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if 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 (5th 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).

On appeal, counsel asserts that the monthly expenses submitted for 2008 should be diminished for years prior to 2006 because the sole proprietor did not own the property to which the 2008 mortgage applies. The petitioner's individual tax returns reflect home mortgage interest, a Schedule A deduction, in every year from 2001 through 2003 and 2005 through 2007 (the 2004 Schedule A was not provided). The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without a statement concerning rent, mortgage, and all other household expenses for any year that the sole proprietor claims is different from the statement submitted in 2008, we are unable to determine whether the sole proprietor had a sufficient AGI to meet its household obligations and pay the proffered wage.⁶ As noted in the chart above and the corresponding footnote, the AAO has inserted the household expenses figure from 2006-2007 for purposes of the ability to pay analysis from 2001 to 2005 in absences of more reliable proof. We again note that the petitioner's AGI in 2001 was less than the proffered wage.

⁶ Counsel's claims on appeal regarding the ability to pay the proffered wage in 2001, 2002, 2003, and 2004 center around the claim that income in excess of the combination of the proffered wage and household expenses in 2005, 2006, and 2007 could be used to satisfy the wage obligation in previous years. However, evidence of assets held or income earned at a later date cannot be retroactively applied to the wage obligation in previous years.

Similarly, the petitioner submitted certificates of title for two vehicles as well as the Kelly Blue Book internet page assessing value to the vehicles. First, the vehicles' values combined is less than one year of the proffered wage as the assessment provided indicates the value of the vehicles is \$4,085 and \$10,600, respectively. Second, vehicles are fixed assets that would provide a one-time cash infusion upon their sale, so cannot be used to demonstrate the ability to pay the proffered wage over a period of years. The sole proprietor did not indicate in which year she would have been willing to sell her vehicle, so we are unable to attribute the expected sale price to the assets available to pay the proffered wage in any particular year. Third, it is unlikely that a sole proprietor would sell two vehicles to pay the beneficiary's wage without an alternative form of transportation. The record does not indicate how the petitioner would operate her business without at least one vehicle and does not indicate that the sole proprietor or her husband would be willing to sell theirs.

The record of proceeding contains bank statements from two accounts with the Bank of Texas covering a period of January 1, 2006 through June 17, 2006, a letter dated May 2, 2007 from the Bank of Texas with account balances, and a Certificate of Deposit dated August 31, 2004. As in the instant case, where the petitioner has not established its ability to pay the proffered wage from the priority date onward based on its AGI, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The bank statements submitted by the petitioner cover a period well after the priority date and cover years in which the AGI was sufficient to demonstrate the petitioner's ability to pay. These statements are insufficient to demonstrate an ability to pay in any year except for 2006 and 2007. The Certificate of Deposit (CD) statement is dated 2004, but reflects a balance of \$12,000. Even if we were to consider the amount of the CD in addition to the petitioner's AGI, the resulting sum is less than the proffered wage after the petitioner's household expenses are deducted. As a result, it is insufficient to demonstrate the ability to pay the proffered wage in 2004.

We additionally note that 2006 bank statements for a corporation, [REDACTED] were submitted. Although the banker's letter implies that this corporation is controlled by the sole proprietor or her husband, a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Further, the 2006 statement would not show the ability to pay from 2001 to 2005.

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 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 petitioner's AGI in 2001, 2002, 2003, and 2004 was less than the sum of the household expenses and the proffered wage. In addition, the AGI in 2001 was lower than the proffered wage without considering the household expenses. The total amount of wages paid as reflected on Schedule C of the sole proprietor's Form 1040 were less than the proffered wage in every year except 2007. The petitioner submitted no evidence that it had unusual circumstances or suffered from extraordinary circumstances to liken it to the situation presented in *Sonegawa*. Nor did the petitioner submit any evidence of its reputation or standing in the community. 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.