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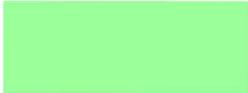
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **DEC 03 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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 wholesale silk screening business. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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, 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 April 14, 2009 denial, the 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 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 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).

Here, the ETA Form 9089 was accepted on June 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$18.17 per hour (\$37,793.60 per year based on 40 hours per week). The Form I-140 was filed on August 17, 2007.

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 employer listed on the I-140 petition and copies of IRS Forms 1040, Schedule C, for 2003, 2004, 2005 and 2007 is [REDACTED] with a federal employer identification number (EIN) of [REDACTED]. The employer listed on the labor certification is [REDACTED] with an EIN of [REDACTED]. The record contains federal quarterly wage reports for 2008 and 2009 and IRS Forms W-2 for 2007 to 2010 for [REDACTED] with an EIN of [REDACTED]. The record also contains an IRS Form 944 for 2010, IRS Forms 1120S for 2008 to 2010, and an IRS Form W-2 for 2010 for [REDACTED] with and EIN of [REDACTED].

A letter dated May 7, 2009 from accountant [REDACTED] was submitted asserting that [REDACTED] operates as a single member limited liability company. The record also contains articles of organization for [REDACTED] indicating that the company was formed December 22, 2005. The letter and articles of incorporation do not include any information to explain the relationship between the petitioner [REDACTED].

On appeal, a letter dated February 11, 2011 was submitted from [REDACTED] president on [REDACTED] letterhead. The letter indicates that [REDACTED] merged with [REDACTED]. Counsel indicates that the merger took place in April 2008. The record indicates that [REDACTED] was the sole proprietor of [REDACTED]. The record indicates that [REDACTED] is owned by [REDACTED]. The letter does not describe the transaction transferring operations of [REDACTED]. The record does not contain any other evidence to describe or document the relationship between [REDACTED]. The record does not contain any evidence to describe or document the relationship between the petitioner, [REDACTED]. Further, it is unclear why [REDACTED] issued IRS Forms W-2 to the beneficiary in 2009 and 2010 if the merger took place in 2008 and the merged entity began doing business as [REDACTED] in 2008.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is a different entity than the petitioner and labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481

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).

(Comm'r 1986). A valid successor relationship may be established for immigration purposes if three conditions are satisfied. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

If [REDACTED] claims to be a successor in interest to the petitioner, [REDACTED] then the evidence in the record does not satisfy all three conditions described above because it does not describe and document the transaction transferring ownership; it does not demonstrate that the job opportunity will be the same as originally offered; and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

If [REDACTED] claims to be a successor in interest to the petitioner, [REDACTED] then the evidence in the record does not satisfy all three conditions described above because it does not describe and document the transaction transferring ownership; it does not demonstrate that the job opportunity will be the same as originally offered; and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

Accordingly, the petition must be denied because a valid successor-in-interest relationship has not been established.

The AAO will further analyze the ability to pay issue. The evidence in the record of proceeding shows that the petitioner, [REDACTED] was structured as a sole proprietorship. On the petition, [REDACTED] claimed to have been established January 1, 2000 and to currently employ 37 workers. According to the tax returns in the record, the fiscal year for [REDACTED] is based on the calendar year. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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'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 Sonegawa*, 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 evidence of wages paid to the beneficiary by [REDACTED] from 2007 to 2010 and [REDACTED] in 2010. As previously discussed, the record does not contain sufficient evidence to establish that [REDACTED] are the successors to the petitioner, [REDACTED]. The names and EINs on the IRS Forms W-2 are inconsistent with the name and EIN of the petitioner on the I-140 and the labor certification.

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

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not contain evidence to reconcile the inconsistencies. Without evidence to reconcile the inconsistencies, it has not been established that the IRS Forms W-2 are evidence of the petitioner's ability to pay. Therefore, the AAO will not consider the IRS Forms W-2 issued by [REDACTED]. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date of June 22, 2007 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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 30, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner has provided copies of the 2003, 2004, 2005 and 2007 federal tax returns for the proprietor of the petitioner, [REDACTED]. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, June 22, 2007. The 2003, 2004 and 2005 tax returns precede the priority date and are not evidence of the petitioner's ability to pay the proffered wage during the given period. The petitioner also provided copies of the 2008 to 2010 federal income tax returns for [REDACTED]. However, as previously discussed, the record does not contain sufficient evidence to establish that [REDACTED] Inc. is the successor to the petitioner, [REDACTED]. Therefore, the AAO will not consider the tax returns for [REDACTED].

² California Limited Liability Company Income Tax Returns were also provided for [REDACTED]

The record indicates that the petitioner, [REDACTED] was 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 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, the sole proprietor supported a family of three in 2007. The proprietor's 2007 federal tax return reflects the proprietor's adjusted gross income³ of \$30,417. The sole proprietor's adjusted gross income in 2007 fails to cover the proffered wage. It is improbable that the sole proprietor could support a family of three on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

Therefore, the petitioner has not established that it had sufficient net income to pay the proffered wage in 2007.

The petitioner submitted a copy of a financial statement for [REDACTED] for 2006.⁴ As previously discussed, the record does not contain sufficient evidence to establish that [REDACTED] is the successor to the petitioner, [REDACTED]. Further, 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 unaudited financial statement submitted with the petition is not persuasive evidence. The accountant's report that accompanied the

[REDACTED]; however, the regulation at 8 C.F.R. § 204.5(g)(2) requires federal tax returns as evidence of a petitioner's ability to pay the proffered wage.

³ The proprietor's adjusted gross income is found on Line 37 of the proprietor's 2007 federal income tax return.

⁴ The statement precedes the priority date.

financial statement makes clear that it was produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Copies of bank statements for [REDACTED] for 2007 were provided. As previously discussed, the record does not contain sufficient evidence to establish that [REDACTED] is the successor to [REDACTED]

Further, the funds in the Saehan Bank account are located in a business checking account. Therefore, these funds are likely shown on the entity's tax return 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).

A list of assets of [REDACTED] was submitted. As previously discussed, the record does not contain sufficient evidence to establish that [REDACTED] is the successor to the petitioner, [REDACTED]

Further, the list of assets includes depreciable assets that an entity uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. In addition, an entity's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the entity's ability to pay 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 petitioner claimed to have been in business since January 1, 2000 and to have 37 employees. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to establish the historical growth of the business. No evidence was provided to document that the beneficiary is replacing a former employee 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 it had the continuing ability to pay the proffered wage.

Further, USCIS records indicate that the petitioner has filed at least three other I-140 petitions since the petitioner's establishment in 2000. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, it is also noted that the beneficiary has not signed the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.