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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 18 2012** OFFICE: TEXAS 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:
[REDACTED]

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 be "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a horse farm. It seeks to employ the beneficiary permanently in the United States as a horse trainer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ 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 record shows that the appeal is properly filed 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.

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

As set forth in the director's January 25, 2009 denial, at 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.

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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on 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 \$627.19 per week (\$32,613.88 per year). On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary claimed to have worked for the entity that filed the labor certification. The labor certification was filed by [REDACTED] a sole proprietorship owned by [REDACTED]. This business was purchased by the petitioner in August 2007. The evidence in the record is sufficient to conclude that the petitioner is a successor-in-interest to the entity that filed the labor certification.³

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Further, when the petitioner is a successor-in-interest to the entity that filed the labor certification, the petitioner must establish the predecessor's ability to pay the proffered wage from the priority date until the date of the transaction giving rise to the successor-in-interest relationship; and the petitioner must also establish its ability to pay the proffered wage from the date of the transaction until the beneficiary obtains lawful permanent residence. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

³ A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the 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 (Comm'r 1986).

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 record contains the following Forms W-2, Wage and Tax Statement, issued to the beneficiary by the employer who filed the labor certification:

- For 2001, the Form W-2 states the beneficiary was paid \$16,422.12.
- For 2003, the Form W-2 states the beneficiary was paid \$21,284.12.
- For 2004, the Form W-2 states the beneficiary was paid \$24,316.93.
- For 2005, the Form W-2 states the beneficiary was paid \$23,858.12.
- For 2006, the Form W-2 states the beneficiary was paid \$23,858.12
- For 2007, the Form W-2 states the beneficiary was paid \$21,160.26

The record did not include a Form W-2 for 2002. The record also does not contain any Forms W-2 issued to the beneficiary by the petitioner.

If the beneficiary did not receive a salary at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the 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 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).

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> (last accessed November 17, 2012).

The record only contains federal income tax returns for the predecessor for 2001, 2002 and 2003. The record does not contain the predecessor's tax returns for 2004, 2005, 2006 or 2007. The only tax return in the record for the petitioner is its 2006 return. The record also does not contain any audited financial statements or annual reports for either entity.

On October 6, 2008, the director issued a request for evidence (RFE) in which the petitioner was instructed to submit evidence of its ability to pay the proffered wage from the priority date of April 30, 2001 through the end of 2007. The director noted that the petitioner had provided a federal

income tax return for 2006 and instructed the petitioner to provide federal income tax returns, audited financial statements or annual reports for 2001 through 2005 and 2007.

The petitioner's response included federal income tax returns for 2001, 2002 and 2003 filed by [REDACTED] the sole proprietor who filed the labor certification and owned the farm until its sale in August 2007; a letter from [REDACTED] accountant, [REDACTED] dated June 28, 2005 that states that [REDACTED] has the ability to pay the proffered wage; and copies of account balances from various retirement accounts held by [REDACTED], an owner of the petitioner.

On October 15, 2009, the director issued a second RFE in which the petitioner was again instructed to provide evidence of its ability to pay the proffered wage from the priority date. The petitioner was instructed that the evidence must include federal income tax returns, audited financial statements or annual reports for [REDACTED] and the petitioner from April 30, 2001 through the date on the RFE. The director also requested evidence of wages paid to the beneficiary from the priority date.

In response, the petitioner provided a 2008 Form W-2 and a pay statement from October 2009 for [REDACTED] an owner of the petitioner; a credit union statement of account for [REDACTED] and a 2008 statement from [REDACTED] pension account. The petitioner also submitted Forms W-2 for the beneficiary issued by the predecessor and other forms previously submitted.

However, the petitioner failed to submit the tax returns, audited financial statements, or annual reports requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As is noted above, the petitioner must demonstrate ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

The director's denial stated that the petitioner did not establish its ability to pay because it did not provide federal income tax returns, audited financial statements or annual reports for each year since the priority date. The denial also states that, as a sole proprietorship for tax purposes, the petitioner is required to provide USCIS with a list of monthly expenses to establish its ability to cover those expenses and pay the proffered wage.

On appeal, counsel asserts that the director denied the instant petition merely because the petitioner failed to provide a list of their monthly expenses and that the director failed to consider the totality of the circumstances. Counsel asserts that the petitioner provided evidence that [REDACTED] the petitioner's owner, has an annual income in excess of \$500,000, that her retirement savings alone would cover the beneficiary's wages from the priority date to the present, and that the petitioner's purchase of the home, farm and horse operation of more than \$1 million clearly establishes its ability to pay the proffered wage. Counsel submitted no evidence in support of this claim on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The predecessor was a sole proprietorship until December 2004, when it was converted to a Limited Liability Company (LLC). A sole proprietorship is 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). Therefore a list of monthly expenses is required to determine the predecessor's ability to pay the proffered wage from 2001 through 2004. The record does not contain this required information.

The successor is organized as an LLC. An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Oklahoma law, is considered to be a sole proprietorship for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Because the petitioner is an LLC, the balances in the credit union and retirement accounts of [REDACTED] are personal assets and cannot constitute evidence of the petitioner's ability to pay the proffered wage. The Form W-2 issued to [REDACTED] by her employer represents income that would be considered as part of the petitioner's owner's personal adjusted gross income, but cannot be considered evidence of the petitioner's ability to pay the proffered wage. Therefore, the director's conclusion that the petitioner must submit monthly expenses in order to establish its ability to pay is withdrawn.

Nonetheless, on appeal, the petitioner still failed to submit the tax returns, annual reports or audited financial statements for each year from the priority date as required by regulation to establish its ability to pay the proffered wage.

In summary, a successor-in-interest must establish the predecessor's ability to pay the proffered wage from the priority date until the date of the transaction, and then the successor petitioner must establish its ability to pay from the date of the transaction until the beneficiary obtains lawful permanent residence. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). As is stated above, the petitioner failed to provide required evidence to demonstrate the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Because the petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date, the appeal must be dismissed. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. In addition, the petitioner failed to provide a list of monthly expenses for the predecessor sole proprietor, which is necessary for determining a sole proprietor's ability to pay the proffered wage. *See Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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.