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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

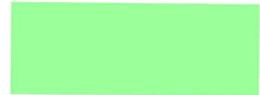


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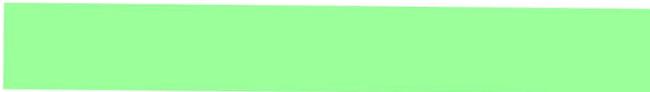
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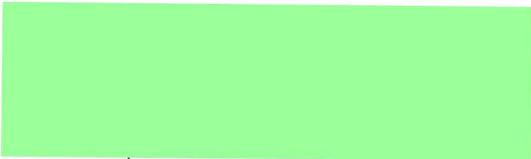
Petitioner:

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

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 Karate school. It seeks to employ the beneficiary permanently in the United States as a Karate instructor. 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 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 February 24, 2009 denial, an 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 labor certification submitted with the instant petition is a copy of the original Form ETA 750A and contains the original tricolor DOL stamp on page 1. No information is provided to explain why all original pages were not submitted. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.31 per hour, which is \$ \$27,684.80 per year based on forty hours per week. The Form ETA 750 states that the position requires two years of training for black belt, one year of experience in the job offered, and a second degree black belt in the art of Kenpo Karate.

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 on April 1, 1990, and to have no employees. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to work for the petitioner since October 2000.

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).

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

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).

petitioner's ability to pay the proffered wage. Although the beneficiary claimed on the labor certification to have been working for the petitioner since October 2000, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 or subsequently.

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).

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 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.

The proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>
Proprietor's adjusted gross income (Form 1040, line 33)	\$11,492
	<u>2002</u>
Proprietor's adjusted gross income (Form 1040, line 35)	\$10,077

	<u>2003</u>			
Proprietor's adjusted gross income (Form 1040, line 34)		not submitted ³		
	<u>2004</u>			
Proprietor's adjusted gross income (Form 1040, line 36)		\$18,794		
	<u>2005</u>	<u>2006</u>	<u>2007</u>	
Proprietor's adjusted gross income (Form 1040, line 37)	\$39,513	\$69,951	\$73,994	

According to the tax returns of record, in 2001 the sole proprietor, [REDACTED] filed his federal income tax return as single and did not list any dependents. In 2002, the sole proprietor filed his federal income tax return jointly with his wife, [REDACTED]. The petitioner did not submit the sole proprietor's 2003 Form 1040. In 2004, 2005, 2006, and 2007, the sole proprietor's Form 1040 reflects that he filed jointly with his wife, declaring one dependent, his daughter [REDACTED].

The sole proprietor's adjusted gross income in 2001, 2002, 2003, and 2004 is less than the proffered wage. Although the sole proprietor's adjusted gross income for 2005, 2006, and 2007 is greater than the proffered wage of \$27,684.80, the sole proprietor must establish that he could support himself, his wife, and his daughter with only \$11,828.20, \$42,266.20, and \$46,309.20 per year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

As mentioned above, a sole proprietor must show that its owner can cover his existing business expenses, pay the proffered wage out of his adjusted gross income or other available funds, and support himself and his dependents. Although the sole proprietor's adjusted gross incomes for 2005, 2006, and 2007 are greater than the proffered wage, the sole proprietor's monthly expenses for those years must be considered in evaluating the petitioner's ability to pay the proffered wage. Counsel provided a monthly household expenses chart reflecting monthly expenses of \$5,403.22, related to mortgage payment, automobile payment, gas, electricity, and phone. Although credit card payments are listed on the chart, the chart fails to provide the amount spent on these payments. Counsel also submitted partial copies of three credit card statements with evidence of payment of the balances in September, October and November 2008. The statements do not show to whom the credit card was issued or whether all statements are for the same account. Based upon the balance of the payments

³ Counsel's brief on appeal states that the petitioner's 2003 tax return is "not available" but provides no further explanation. No evidence was submitted to explain the unavailability of the petitioner's 2003 tax returns. 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).

made in each month, the average monthly credit card payment is \$1,989.56. Including this average monthly credit card payment, the sole proprietor's monthly expenses total \$7,392.78, which is \$88,713.36 per year. The evidence in the record demonstrates that the sole proprietor's annual expenses are greater than his adjusted gross income. Therefore, the petitioner has not established its ability to pay the proffered wage in any of the relevant years.

Counsel asserts on appeal that the proffered wage should be prorated from April 30, 2001 to December 31, 2001, and therefore, in 2001, the petitioner need only show ability to pay \$20,763.60. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The record of proceeding contains the sole proprietor's 2001, 2004, 2005, and 2006 yearly statements from his traditional Roth individual retirement account (IRA). The sole proprietor has not indicated that he would be willing to take withdrawals from the IRA account to pay the proffered wage. Further, withdrawals from a traditional IRA before age 59½ are considered early withdrawals. If an individual takes an early withdrawal from a traditional IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408.

The record also contains statements from the sole proprietor's 2002 and 2003 personal investment account, with average annual balances of \$273,305.27 and \$212,224.17, respectively. As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year, or in any subsequent year, based on its adjusted gross income (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. In the instant case, the initial annual balance of \$14,112.79 in 2001 is less than the full proffered wage. Further, the account's annual balance decreased from \$273,305.27 in 2002 to \$16,951.26 in 2004.

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 has been in business since 1990 and the sole proprietor's adjusted gross income does not show a steady and consistent growth for all relevant years. Further, the petitioner has not established a historical growth since 1990, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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.

Based upon the evidence submitted, the petitioner did not establish 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.