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U.S. Citizenship
and Immigration
Services

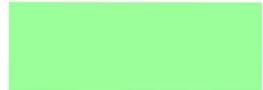


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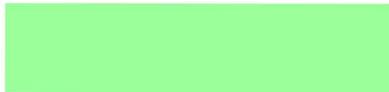
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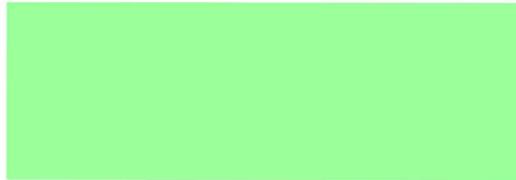
Petitioner:

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 dry cleaner and tailoring business. It seeks to employ the beneficiary permanently in the United States as a tailor. 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 May 5, 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 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).

Here, the Form ETA 750 was accepted on November 18, 2004. The proffered wage as stated on the Form ETA 750 is \$26,042 per year.

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 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 May 15, 1993 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on November 15, 2004, the beneficiary did not claim to work for the petitioner.

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, no evidence was submitted of wages paid to the beneficiary. 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 November 18, 2004 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

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).

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.

In the instant case, the sole proprietor supports a family of four. The proprietor's tax returns reflect the following information for 2004 to 2008:

- In 2004, proprietor's adjusted gross income of \$55,706².
- In 2005, proprietor's adjusted gross income of \$38,750.
- In 2006, proprietor's adjusted gross income of \$39,049.
- In 2007, proprietor's adjusted gross income of \$75,668
- In 2008, proprietor's adjusted gross income of \$51,749.

The proprietor's adjusted gross income exceeds the amount of the proffered wage in each year. However, the sole proprietor's adjusted gross income would also be expected to support his family of four. The difference between the proffered wage and the proprietor's adjusted gross income remaining to support the proprietor's family of four is reflected in the table below:

- In 2004, difference of \$29,664.
- In 2005, difference of \$12,708.
- In 2006, difference of \$13,007.
- In 2007, difference of \$49,626.
- In 2008, difference of \$25,707.

² The sole proprietor's adjusted gross income is located on IRS Form 1040, line 36 in 2004 and line 37 in 2005 to 2008.

The petitioner provided an estimate of monthly expenses to support his family. The estimated monthly expenses were \$2,732.36. Based on that estimate, the proprietor's expenses for a year would be \$32,788.32. That amount exceeds the difference between the prevailing wage and the proprietor's adjusted gross income for 2004 to 2006 and 2008. It is improbable that the sole proprietor could support a family of four on a deficit. Further, the AAO notes that the petitioner's estimate of monthly expenses does not appear to include all of the expenses for a family of four. The proprietor's estimated monthly expenses include:

\$2,192.36	Home Mortgage
\$0.00	Vehicle Payment
\$0.00	Installment Loan
\$0.00	Credit Card Payment
\$124.00	Energy
\$73.00	Utilities
\$66.00	Telephone
\$77.00	Internet Service
\$200.00	Other household expenses
\$2,732.36	Total

The proprietor's estimate did not include taxes. The proprietor's 2007 federal income tax return reflects total federal income taxes of \$11,181. Copies of the proprietor's personal bank statements reflect a recurring monthly payment for "Sec Alarm Monitronics" for what appears to be alarm services. The proprietor's estimate does not include that recurring payment. The petitioner's estimate did not include car insurance, gasoline for his car, car maintenance, health insurance, gifts, clothing or food. Although some of these expenses could be attributed to the general category of other household expenses, it is unclear how all of those expenses could be accounted for by \$200 per month for a family of four. This casts doubt on the petitioner's estimate of monthly expenses.

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

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Thus, the AAO does not accept the proprietor's estimate of monthly expenses.

Copies of unaudited balance sheets were submitted. However, reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of

the proprietor. The unsupported representations of the proprietor are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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.

On appeal, counsel asserts that the certifying officer increased the amount of the prevailing wage on the labor certification on July 23, 2007. Counsel asserts that the petitioner should not have to pay the increased amount prior to the correction and should only have to pay the lower original wage up until July 23, 2007. The petitioner must establish its ability to pay the proffered wage from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The proffered wage is the rate of pay certified by DOL on the labor certification. Counsel provides no legal basis for permitting consideration of a lower wage. The lower rate of pay will not be considered.

On appeal, counsel asserts that the amount of the petitioner's depreciation deduction should be considered and cites to an unpublished AAO decision. First, 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, unpublished 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). The AAO is not bound by the unpublished decision. Further, with respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

Counsel also cites to the seventh circuit court of appeals’ decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner’s ability to pay the proffered wage.³ However, the instant case did not arise in the seventh circuit and, therefore, the AAO is not bound by the decision in *Construction and Design*. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. See *N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987).

On appeal, counsel urges the consideration of the beneficiary’s proposed employment as an indication that the petitioner’s income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. That holding is not binding outside the District of Columbia and, although part of the decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.⁴ Further, in this instance, no detail or documentation has been provided to explain how the beneficiary’s employment as a tailor will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the petitioner’s tax returns.

On appeal, counsel submitted copies of yearly statements from the sole proprietor’s traditional individual retirement account (IRA). Counsel asserts that the sole proprietor would be willing to take withdrawals from the IRA account to pay the proffered wage. However, withdrawals from a traditional IRA before age 59 ½ 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 does not contain evidence to establish the sole proprietor’s age and whether or not he would be responsible for the additional tax

³ The court in *Construction and Design* concurred with existing USCIS procedure in determining a corporate employer’s ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner’s federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

⁴ Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner’s net income and net current assets.

burden and penalties. Further, without taking into account the possible tax burden and penalties for early withdrawals, the average annual balances in the years 2004 to 2008 are not sufficient to cover the full proffered wage.

On appeal, counsel submitted copies of monthly bank statements for the proprietor's personal checking account. The AAO notes that the only copies submitted were the statements for the month of December for 2004 through 2008. Copies of bank statements for the other months of the year were not included. The statements do not include year-end summary information. Without statements for each month of the year or year-end summary statements, the AAO is unable to determine the average annual balances of the bank accounts.

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, 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. Even if the AAO were to accept the December statements alone, the average balance for December 2004 on the statement is \$5,310. Thus, even if the AAO were to accept the December statements alone, the average balance does not exceed the full proffered wage and is not sufficient to cover the full proffered wage. Thus, the sole proprietor's personal cash assets as reflected in his checking accounts do not establish the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner's bank account contained sufficient funds each month to pay the proffered wage. Copies of end of the year bank statements were submitted for 2004 to 2008. However, the funds in the account are located in the sole proprietorship's business checking accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns 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.

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 id.* 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 1993 and has four employees. The petitioner has minimal gross income and paid minimal wages paid to all employees. Although bank statements were submitted reflecting funds in the sole proprietorship's business bank account, based on the evidence in the record, the funds appear to have been included on the Schedule C to IRS Form 1040. The net profit (or loss) from Schedule C is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. 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 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.

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.