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5 U.S.C. 552a

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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**

B6



Date:

Office: TEXAS SERVICE CENTER

FILE: 

**JUN 22 2012**

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:

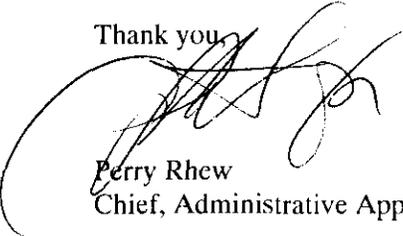


INSTRUCTIONS:

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 with the field office or service center that originally decided your case by filing a 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 21, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$650.00 per week (\$33,800 per year). The Form ETA 750 states that the position requires four (4) years of high school and two (2) years of experience in the job offered.

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2000 and to currently employ 11 workers. On the Form ETA 750B, signed by the beneficiary on July 7, 2007, the beneficiary claimed to have never 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in onwards.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> The AAO acknowledges receipt of Payroll Register Summaries for April through August 2008. These summaries will not be considered evidence that the petitioner paid the beneficiary the proffered wage because the payroll summaries are for a different company at a different location from the petitioner. The beneficiary does not state that he has been employed with the petitioner on Form ETA 750. On Form G-325A filed with the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status, the beneficiary states that he has been self-employed from July 2002 to July 23, 2007 (the date of signature).

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 (7<sup>th</sup> 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 himself only for 2004, and a family of two for 2005, 2006, and 2007. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the sole proprietor did not submit his tax return.
- In 2002, the sole proprietor did not submit his tax return.
- In 2003, the sole proprietor did not submit his tax return.<sup>3</sup>

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<sup>3</sup> The petitioner sought to obtain tax transcripts for these years, however, the transcripts were unavailable based on the date of request. However, 8 C.F.R. § 204.5(g)(2) is clear that the petitioner must establish its ability to pay the proffered wage from the priority date onward, here, April 30, 2001. In the absence of a tax return, the regulation also allows a petitioner to submit an audited financial statement, or annual report. The petitioner, however, did not send any of these, and, therefore, failed to submit the required regulatory evidence for 2001, 2002, and 2003.

- Proprietor's adjusted gross income for 2004:<sup>4</sup> \$40,321.00
- Proprietor's adjusted gross income for 2005: \$37,520.00
- Proprietor's adjusted gross income for 2006: \$48,630.00
- Proprietor's adjusted gross income for 2007: \$40,769.00

The sole proprietor's yearly estimated expenses for the same time period are as follows:

- Proprietor's yearly expenses for 2004: \$47,604.00
- Proprietor's yearly expenses for 2005: \$47,634.00
- Proprietor's yearly expenses for 2006: \$47,634.00
- Proprietor's yearly expenses for 2007: \$49,188.00

Therefore, the sole proprietor's available income (adjusted gross annual income minus yearly expenses) of -\$7,313.00, -\$10,114.00, \$996.00, and -\$8,419 for 2004, 2005, 2006, and 2007, respectively, fails to cover the proffered annual wage of \$33,800.00. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel asserts that since the petitioner is also the owner of another [REDACTED] store, the income from the other store should be included in the calculation as to whether the petitioner has the ability to pay the proffered wage. The net profit (or loss) from the second owned [REDACTED] store would be carried over to page 1 of the sole proprietor's Form 1040 and factored in already to the sole proprietor's AGI, which has been considered above and is insufficient to show the sole proprietor's ability to pay the proffered wage for any year at issue.

Counsel submitted copies of financial summaries for 2004, 2006, and 2007 that were generated by the [REDACTED] System. Counsel's 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 management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also submitted monthly statements from the sole proprietor's personal checking and savings accounts covering the period April 18, 2008 through May 16, 2008, and June 19, 2007 through July 19, 2007, but they do not reflect average annual balances. However, the 2008 statement reflects a "Time Deposit 7 Months" with a balance of \$70,638.00, maturing on June 24, 2009, and a "Time Deposit 12 Months" with a balance of \$72,121.32, maturing on September 9, 2008. Additionally, the 2007 reflects a "Time Deposit 5 Months" with a balance of \$102,376.10,

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<sup>4</sup> The sole proprietor sent tax transcripts for the years ending 2004, 2005, 2006, and 2007, as well as a copy of Form 1040 for the years 2006 and 2007.

maturing on November 24, 2007, and a "Time Deposit 15 Months" with a balance of \$71,106.10, maturing on September 9, 2007. As in the instant case, where the petitioner has not established its ability to pay the proffered wage 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, it is impossible to determine whether the petitioner had the ability to pay the proffered wage based on a review of two months of bank statements. While the sole proprietor did have balances exceeding the proffered wage in the "Time Deposit" accounts for 2007 and 2008 based on the selected months submitted, the lack of bank statements for all years, or the entire time period for 2007 and 2008, as well as the lack of tax returns for 2001, 2002, and 2003, including the information detailed above, precludes the AAO from conducting a full analysis into whether the petitioner had the ability to pay the proffered wage for 2001 to 2007. Thus, the sole proprietor's cash assets as reflected in his checking and savings accounts do not establish the petitioner's continuing ability to pay the proffered wage from the April 30, 2001 priority date continuing onward.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included [REDACTED], 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 failed to submit regulatory prescribed evidence of the petitioner's ability to pay the proffered wage for the years 2001, 2002, and 2003. The regulation allows for alternative sources in the absence of a tax return in the form of an audited financial statement or annual report. The petitioner submitted nothing for these years. The sole proprietor's AGI does not establish the petitioner's ability to pay both the sole proprietor's personal expenses and the proffered wage for 2004, 2005, 2006, or 2007. The petitioner submitted not evidence related to any short term

losses similar to *Sonegawa*, or any evidence regarding the petitioner's reputation in the 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.<sup>5</sup>

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.

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<sup>5</sup> USCIS records indicate that the petitioner filed at least one additional I-140 petition 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).