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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: **MAY 31 2012**

Office: NEBRASKA 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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tile business. It seeks to employ the beneficiary permanently in the United States as a painter. 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 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 April 16, 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 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on February 21, 2006. The proffered wage as stated on the ETA Form 9089 is \$9.56 per hour (\$19,884.80 per year). The ETA Form 9089 states that the position requires two 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>

On appeal, counsel submits a brief; copies of the sole proprietor's U.S. Individual Income Tax Return (Form 1040) for 2006, 2007 and 2008; business checking account statements from January, February and March 2009; and copies of pay statements issued to the beneficiary in 2008 and 2009.

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 1992 and currently to employ five workers. On the ETA Form 9089, signed by the beneficiary on or after April 10, 2006,<sup>2</sup> the beneficiary does not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had not earlier supplied his federal income tax returns because of problems associated with his accountant. Counsel asserts that the petitioner pays significant amounts to contractual labor which is indicative of his ability to pay the beneficiary. Counsel also requests that consideration be given to the fact that the beneficiary has a family of six and that they have established roots in the United States, thereby becoming accustomed to life in this country.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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).

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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> Form ETA 9089 was signed by the beneficiary, the petitioner and counsel for the petitioner. However, none of the signatories dated the document. Form ETA 9089 was approved on April 10, 2006 and the parties would have signed it after issuance according to regulation.

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 beneficiary's IRS Forms W-2 for 2008 show compensation received from the petitioner, as shown in the table below.<sup>3</sup>

- In 2008, the Form W-2 stated compensation of \$30,800.00.

The petitioner provided no evidence of having paid the beneficiary any wages in 2006 or 2007. According to the evidence, the petitioner has demonstrated that it paid the beneficiary the full proffered wage in 2008. However, the petitioner has not demonstrated that it paid the beneficiary the proffered wage in 2006 or 2007.

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), *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

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<sup>3</sup> The petitioner supplied copies of pay statements which it issued to the beneficiary in 2008 and 2009. The income reflected on the 2008 pay statements was taken into account since the compensation was identified, in full, on IRS Form W-2. The pay statements for 2009 only account for the period up until May 1. By that date, the petitioner had paid the beneficiary \$10,255.41. The pay statements reflect that the petitioner was paying the beneficiary at a rate which exceeds the proffered wage (\$1,400 bi-weekly), but does not demonstrate that at this point the petitioner had already paid the full proffered wage.

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

- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$19,367.00.
- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income (loss) of (\$65,554.00).

Further, the petitioner supplied a list of recurring, monthly expenses for which he is responsible, the monthly amount totaling \$4,274.10. According to evidence, the petitioner's annualized, personal, expenses are \$51,289.20. The petitioner does not demonstrate sufficient adjusted gross income to be able to support himself and pay the beneficiary for either 2006 or 2007 as his expenses exceeded his reported adjusted gross income leaving nothing left to do so.

USCIS may also consider the sole proprietor's personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. However, the petitioner provided no evidence of such personal assets.

On appeal, counsel asserts that the petitioner has paid considerable sums to contractual labor which when compared against the petitioner's gross receipts demonstrates that it has the ability to pay the beneficiary the proffered wage. Counsel indicates, for example, that in 2006 the petitioner reported gross receipts of \$368,985 and paid \$139,688 to contractual labor.<sup>4</sup>

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

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<sup>4</sup> The petitioner operates a business which provides a service (e.g. tile installation and painting). He only pays contractual labor, having no actual employees. Further, it would not be out of the ordinary for a service enterprise to pay a large proportion of its gross receipts in labor since that is its primary function.

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).

Further, that the petitioner paid or currently pays certain sums to other workers is no guarantee that the petitioner will compensate or is able to compensate the beneficiary. USCIS will consider whether the petitioner has sufficient income or current, personal assets to be able to pay the proffered wage. Alternately, USCIS will consider any wages paid to the beneficiary when determining whether the petitioner has met the burden of proving the ability to pay. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, counsel asserts that the petitioner has made considerable deposits in his business checking account and that this goes toward demonstrating the ability to pay the beneficiary the proffered wage. In support of his assertions, counsel provided the petitioner's business checking account statements for January, February and March 2009.

The funds in the [redacted] checking account are located in the sole proprietorship's business checking account. 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 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 *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 provided financial documentation for three years. According to the evidence, the gross receipts for the petitioner's business have declined in each of the three years, the 2008 gross receipts being almost half of the 2006 figure. Payroll for the petitioner's business declined in a similar manner. The petitioner references the balance in his business checking account, during three months in 2009, as evidence of substantial deposits which are commensurate with his ability to pay. However, based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) 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. The petitioner has not established the historical growth of the business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether 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.

On appeal, counsel requests that USCIS consider approving the instant petition for humanitarian reasons because the beneficiary has a wife and four children, all of whom have become accustomed to life in the United States.

In reviewing the instant matter, the only matter which the AAO is able to consider is whether or not the job offer to the beneficiary is a realistic one. To that end, we must consider only whether the petitioner is able to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence and whether the beneficiary has the educational or experiential requirements which are set forth on Form ETA 9089. *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) and (l).

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.