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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: **SEP 28 2012** OFFICE: TEXAS SERVICE CENTER

FILE

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 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a concrete finishing company. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. 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

The petition is accompanied by an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is October 11, 2001.²

The director's October 1, 2008 decision denying the petition concluded that the petitioner did not have the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.³

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

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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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 October 11, 2002. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year.) The Form ETA 750 states that the position requires 2 years of experience as a laborer.

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 1995 and to currently employ 8 workers. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to work for the petitioner since July 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 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 submitted copies of W-2 forms issued to the beneficiary from 2002 through 2011, which purport to establish that the petitioner paid the beneficiary wages during the relevant time period. However, the W-2 forms issued to the beneficiary from 2002 through 2007 have a different social security number for the beneficiary than the W-2 Forms issued to the beneficiary from 2008 through 2011. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing

to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the W-2 Forms will not be considered in the ability to pay analysis, and the petitioner has not established that it employed and paid the beneficiary either partial or the full proffered wage from the priority date in onwards.

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.

In the instant case, the sole proprietor supported a family of 2 from 2002 through 2005; a family of 3 during 2006 and 2007; a family of 5 in 2008; and, a family of 4 in 2009, 2010, and 2011. The petitioner's adjusted gross income for 2002 through 2011 is shown in the table below.

- In 2002, the Form 1040 stated adjusted gross income⁴ of \$66,132.
- In 2003, the Form 1040 stated adjusted gross income of \$61,824.

⁴ In 2002 adjusted gross income is found on Line 35; Line 34 in 2003; Line 36 in 2004; and Line 37 in 2005 – 2011.

- In 2004, the Form 1040 stated adjusted gross income of \$75,400.
- In 2005, the Form 1040 stated adjusted gross income of \$22,469.
- In 2006, the Form 1040 stated adjusted gross income of \$44,979.
- In 2007, the Form 1040 stated adjusted gross income of \$48,567.
- In 2008, the Form 1040 stated adjusted gross income of \$48,320.
- In 2009, the Form 1040 stated adjusted gross income of \$22,752.
- In 2010, the Form 1040 stated adjusted gross income of \$15,100.
- In 2011, the Form 1040 stated adjusted gross income of \$70,873.

Additionally, the petitioner submitted annual expenses, shown on the table below:

- 2002 annual expenses of \$31,859.04
- 2003 annual expenses of \$31,679.04
- 2004 annual expenses of \$31,798.80
- 2005 annual expenses of \$34,619.04
- 2006 annual expenses of \$33,839.04
- 2007 annual expenses of \$34,199.04
- 2008 annual expenses of \$40,799.04
- 2009 annual expenses of \$40,919.04
- 2010 annual expenses of \$38,699.04
- 2011 annual expenses of \$35,999.04

In 2005, 2009, and 2010, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$31,200. It is improbable that the sole proprietor could support his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Additionally, after paying the proffered wage of \$31,200 in years 2006, 2007, 2008, given the expenses submitted, it appears the petitioner could not sustain a family of 3 on the remaining income.

On appeal, counsel asserts the documentation submitted establishes the petitioner's ability to pay the proffered wage. On appeal counsel submitted the following:

- Page 1 of the petitioner's personal bank statement for the time period of March 28, 2012 through April 25, 2012, which shows a regular checking balance of \$9,182.02; a Money Market Savings balance of \$154,998.56; and, a 9 Month risk free CD with a balance of \$26,725.09;
- One page of the petitioner's business economy checking account with [REDACTED] for December for 2002 through 2011 showing the Average Ledger Balance for the prior year.

The AAO will consider this evidence for years 2005 through 2010, the years the petitioner did not establish its ability to pay the proffered wage. 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. The personal account statement submitted is for a one month time-frame in 2012. No evidence was submitted to establish the initial average balance in the petitioner's personal account in 2005 through 2010. As such, the AAO is unable to calculate the average annual balances for the years 2005 through 2010.

The petitioner failed to submit annual statements for the money market savings account or the CD for 2005 through 2010. Therefore, the petitioner has not established its ability to pay based on the balances in its personal checking account, money market account, or CD.

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.

The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's milestone achievements. Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1995. Nor has the petitioner presented evidence of any uncharacteristic business expenses or losses contributing to its inability to pay the proffered wage.

It is noted that the petitioner submitted a copy of one page of the petitioner's business economy checking account with [REDACTED] for December of 2002 through 2011, which shows its average ledger balance for that month. Based on the evidence in the record, the proprietor has failed to establish these funds are not 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 AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage.

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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.