



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: NEBRASKA SERVICE CENTER FILE:

APR 05 2013

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)

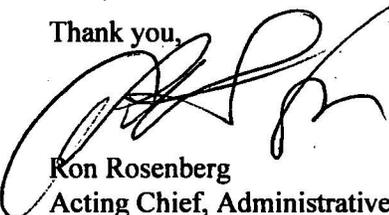
ON BEHALF OF PETITIONER:

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, on July 12, 2009. The matter was then appealed to the Administrative Appeals Office (AAO) on August 11, 2009. On July 12, 2010, the AAO issued a decision summarily dismissing the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v) for failing to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The petitioner filed an appeal of that decision. The AAO's prior decision is vacated and replaced with the instant decision. The appeal is dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a housekeeping aid. 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 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 July 12, 2009 denial, the 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 November 28, 2007. The proffered wage as stated on the ETA Form 9089 is \$9.44 per hour (\$19,635.20 per year). The ETA Form 9089 states that the position requires two years of experience in the proffered position.

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 in 2000 and to currently employ two workers. On the ETA Form 9089, signed by the beneficiary on April 8, 2008, the beneficiary claimed to have worked for the petitioner since February 6, 2004.

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 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 2007 onwards, or at any time for that matter.²

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).

² On March 23, 2009, the director issued a Request for Evidence (RFE) asking that the petitioner provide, in part, copies of the beneficiary's W-2 Forms for 2007 and 2008. The petitioner responded that "... the beneficiary does not have a Form W-2 with the petitioner because the beneficiary is not yet working with the petitioner, and the beneficiary will work only with the petitioner after she

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's 2006³ tax return indicates that he supported a family of two in that year. The 2007 tax return is illegible and it cannot be determined from the document how

obtains her "Permanent Resident Card." This information is in conflict with information provided on the ETA Form 9089 and signed by the petitioner and beneficiary on April 8, 2008 under penalty of law. In that document, it is stated that the beneficiary was employed by the petitioner from February 6, 2004. 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. 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).

³ The petitioner's 2006 tax return predates the 2007 priority date and thus, will be considered only

many dependents the sole proprietor supported in that year. In the director's March 23, 2009 RFE, the director asked that the sole proprietor provide a list of his "estimated monthly recurring household expenses for the years 2007 and 2008" as well as the petitioner's 2007 and 2008 tax returns. The sole proprietor refused to provide that information stating that "a [l]ist of the Monthly Recurring Household Expenses is not necessary because such information is not relevant and superfluous and [an] undue invasion of privacy and/or violation of [the] petitioner's privacy." The AAO does not agree based upon the precedent set forth above. *See Ubeda v. Palmer*, 539 F. Supp. at 650. As the sole proprietor has not provided the information requested in the director's RFE, the sole proprietor's ability to pay the proffered wage cannot be determined in any year and the petition must be denied for this reason, and additional reasons hereinafter set forth. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The proprietor's tax returns reflect the following information for 2006 and 2007:⁴

- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 is \$36,969.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2007 appears to be \$17,954.⁵
- 2008 - Not submitted.

In 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$19,635. The petitioner's 2006 tax return, considered generally as that year predates the 2007 priority date, would state sufficient adjusted gross income to pay the proffered wage, however, as noted above, the sole proprietor must also establish that it can pay the sole proprietor's personal expenses. *Ubeda*, 539 F. Supp. at 650. It is unlikely, however, that the petitioner's 2006 adjusted gross income of \$36,969 would be sufficient to cover the proffered wage (\$19,635) plus the living expenses of two individuals (stated on the tax return).⁶ Also, as stated above, the sole proprietor's refusal to provide his recurring living expenses precludes a finding of his ability to pay the proffered wage and the living expenses of any dependents in any year. The sole proprietor additionally failed to submit its 2008 tax return.

in analyzing the petitioner's ability to pay the proffered wage under a totality of the circumstances.

⁴ In the director's March 23, 2009 RFE, the director asked the petitioner to provide a copy of its 2007 and 2008 (if available) tax returns. The petitioner provided a copy of the 2007 tax return, but stated that the 2008 tax return was not available. The petitioner stated in its April 28, 2009 response to the director's RFE, "[r]est assured though, that once the '2008 tax return' becomes available, the same will be sent immediately to the USCIS." To date, the 2008 tax return has not been provided.

⁵ The director noted in his decision that the sole proprietor's adjusted gross income was indeterminate as the copy of the tax return in the record is illegible. Therefore, it appears the adjusted gross income for 2007 is \$17,954, but absent a legible copy, this is indefinite.

⁶ The sole proprietor's tax return for 2006 shows that the sole proprietor paid \$30,604 in mortgage interest alone in that year without consideration of principal, or other expenses.

On appeal, counsel asserts that the sole proprietor has established his continuing ability to pay the proffered wage from the priority date onward. In support of that assertion the petitioner provided copies of bank statements for January 2007 through December 2008 and states that the petitioner has a line-of-credit which could be accessed to pay the beneficiary's salary if necessary. Counsel further states that the beneficiary's services would eliminate "outside services in the total amount of \$20,218" reflected as food catering expenses, janitorial services and cleaning supplies.

The AAO does not accept the petitioner's statement that the beneficiary would eliminate \$20,218 in outside contracted services identified by the petitioner as food catering expenses, janitorial services and cleaning supplies. The beneficiary's duties are set forth on the ETA Form 9089 as follows:

Clean bathrooms, clean kitchen, wash floors and windows, clean laundry rooms, vacuum and dust, sweep and wash balconies and patios, and remove trash from common areas.

These duties would not appear to include duties included in "food catering expenses, janitorial services and cleaning supplies." Further, as previously noted, the petitioner indicates on the ETA Form 9089 that the beneficiary has been continuously employed by it since February 6, 2004. Thus, her duties obviously do not preclude the referenced expenses incurred by the petitioner in the operation of his business.

A line-of-credit referenced by the petitioner will not establish the petitioner's ability to pay the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting

Reg'l Comm'r 1977). Finally, the petitioner provided no evidence to establish that any such line-of-credit actually exists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner submitted copies of bank statements for 2007 and 2008. Those bank statements are insufficient to establish the petitioner's ability to pay the proffered wage as the petitioner has refused to provide evidence of the living expenses of the the sole proprietor and any dependents. As set forth above, that refusal alone precludes a favorable finding on the petitioner's ability to pay the proffered wage. Further, the funds in the sole proprietor's business checking accounts are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. 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.

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 refused to provide requested information and that refusal precludes a material line of inquiry and the petition must be denied for that reason. Further, the petitioner's 2007 tax return does not state sufficient adjusted gross income to pay the proffered wage alone before even considering the sole proprietor's indeterminate expenses. The petitioner did not submit its 2008 tax return in response to the director's RFE, or on appeal. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date

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onward. The petitioner has provided conflicting statements as to whether the beneficiary actually works for the petitioner, which conflicts with other assertions made by the petitioner as to the effect the beneficiary's services would have on the cost of business operations for the petitioner. 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.