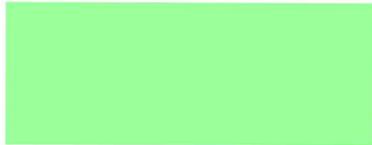




U.S. Citizenship
and Immigration
Services

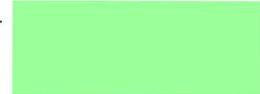
(b)(6)



DATE:

OFFICE: TEXAS SERVICE CENTER

FILE:

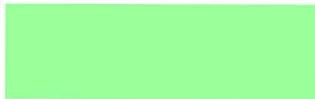


APR 24 2013

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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

The petitioner is a dry cleaning and alteration service business. It seeks to employ the beneficiary permanently in the United States as a tailor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor 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 15, 2011 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 July 7, 2008. The proffered wage as stated on the ETA Form 9089 is \$31,000.00 per year. The ETA Form 9089 states that the position requires 60 months 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.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 1990 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on August 24, 2010, the beneficiary did not claim to have 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 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, or any wages, from the priority date in 2008 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

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).

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.

On January 31, 2013, the AAO sent the petitioner a request for evidence (RFE) for the petitioner to submit its IRS Form 1040, including all schedules, and the petitioner's monthly expenses for 2008, 2009, 2010, 2011, and 2012. The petitioner responded to this RFE on March 15, 2013 and submitted audited financial statements for 2008, 2011, and 2012; a deed and Notice of Tentative Assessed Value for the property in Westbury, New York, which appears to be the sole proprietor's residence; and bank account statements from October 2008 through December 2012. The sole proprietor did not submit its IRS Form 1040 for any of the years in question as requested by the AAO, did not indicate the number of his dependents, and did not provide a copy of his monthly expenses.

The sole proprietor seeks to rely on its audited financial statements for 2008, 2009, 2010, 2011, and 2012, which state the following amounts of net current assets and cost of labor:

Year	Net Income	Net Current Assets	Cost of Labor
2008	\$19,524.00	\$56,829.00	\$76,522.00
2009	\$31,452.00	\$63,843.00	\$39,950.00
2010	\$29,237.00	\$75,438.00	\$40,963.00
2011	\$31,177.00	\$67,849.00	\$38,387.00
2012	\$33,480.00	\$83,817.00	\$40,663.00

This demonstrates that the petitioner did not have sufficient net income to pay the beneficiary's proffered wage for 2008 and 2010. As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.

The AAO notes, as did the director, that the record contains an "Accountants' Review Report" of the sole proprietor's balance sheet from [REDACTED] for 2008 and 2009 which states that it is "substantially less in scope than an audit in accordance with generally accepted auditing standings." In response to the director's April 18, 2011 RFE, the sole proprietor submitted audited financial statements for 2008 and 2009 from [REDACTED] which contained the same balance sheet and income and earnings sheet as the unaudited financial statements provided on June 18, 2010. However, the sole proprietor also submitted audited financial statements for 2009 and 2010, dated June 28, 2011, from [REDACTED] which contains different results from the audit by [REDACTED]

This calls into question the validity of the documents from [REDACTED]. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* In addition to the discrepancies noted above, the Form I-140 states that the sole proprietor employs five workers, but the audited financial statements do not support this, as shown by the low costs of labor. Due to the each of these discrepancies regarding the financial statements in the record, the AAO will not accept these as being probative of the sole proprietor's ability to pay the beneficiary's proffered wage. As the evidence in the record conflicts and is unexplained, the AAO cannot determine which, if either, presents an accurate audit of the petitioner's financial statements.

² The AAO has conducted an internet search on April 17, 2013 of registered certified public accountants as well as a general internet search of [REDACTED] (See [REDACTED], accessed April 17, 2013). Both searches did not return any results. Additionally, these reports are each signed [REDACTED] rather than reciting an individual's signature and name. This further calls into question the validity of the financial statements submitted by [REDACTED]. The sole proprietor must clarify these discrepancies in any further filings.

³ The balance sheet accompanying the [REDACTED] audit indicates the petitioner had \$74,141.00 in current assets in 2009, whereas the audit from [REDACTED] indicated the petitioner had \$71,855.00 in current assets for the same year. Several figures on the balance sheet and on the income and earnings sheet are not consistent.

⁴ The sole proprietor has not explained why the unaudited balance sheet and the audited balance sheet from [REDACTED] for 2008 and 2009 are exactly the same, in light of the differences indicated on the audited balance sheets provided by [REDACTED]

As stated above, 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. As the petitioner did not submit its Forms 1040 and monthly expenses to demonstrate his ability to sustain himself and his dependents, he seeks to rely on the audited financial statements in the record.

The director requested the petitioner's IRS Forms 1040 in his notice of intent to deny (NOID), dated May 31, 2011, and noted as grounds for denial in his decision that the petitioner had not submitted its Forms 1040 or its monthly expenses from the priority date onward. The AAO also requested the petitioner's Forms 1040 and monthly expenses. To date, this evidence has not been provided. 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 petitioner's sole proprietor's expenses are necessary to determine whether the claimed financial information is sufficient to demonstrate the petitioner's ability to pay the proffered wage. See *Ubeda v. Palmer*, 539 F. Supp. 647. As stated above, the sole proprietor has not provided evidence of its Forms 1040 or of its expenses, preventing the AAO from determining whether he can pay the beneficiary's proffered wage. Accordingly, the AAO is unable to determine whether the sole proprietor's adjusted gross income is sufficient to pay the beneficiary's proffered wage of \$31,000.00 per year in relation to his expenses. Therefore, the sole proprietor has not established the ability to pay the beneficiary's proffered wage for 2008, 2009, 2010, 2011, and 2012.

On appeal, counsel asserts that the amounts in the petitioner's monthly bank statements from 2008 to 2012 had an average balance of over \$9,000.00 per month which exceeds the amount necessary to be able to pay the beneficiary the proffered wage. The priority date is July 7, 2008. However, the petitioner only submitted bank statements for October, November, and December 2008. The petitioner must demonstrate its ability to pay the proffered wage from 2008 onward. Therefore, the petitioner has not established its ability to pay the proffered wage by its bank statements for 2008, as it did not provide a complete record of these accounts from the priority date onward. Thus, the AAO will not consider the amounts in the sole proprietor's bank statements toward the ability to pay the beneficiary's proffered wage. 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 *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 Form I-140 states that the petitioner has been in business since 1990 and that it employs five workers. The sole proprietor has not provided its Form 1040 with appropriate schedules or its monthly expenses as the AAO requested in its RFE. As stated above, the AAO cannot accept the audited financial statements in the record as being probative of the sole proprietor's ability to pay the beneficiary's proffered wage because they are in conflict. There is no evidence in the record of any uncharacteristic expenses or losses for any of the years in question. The sole proprietor has not provided any evidence of his 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.

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.