

(b)(6)



U.S. Citizenship  
and Immigration  
Services



DATE: **MAR 19 2013** OFFICE: NEBRASKA 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

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (director). The petitioner filed an appeal, which was determined by the director to be untimely filed.<sup>1</sup> The director treated the untimely appeal as a motion, granted the motion and subsequently affirmed his prior decision. The petitioner appealed the director's decision and the case is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an auto body repairing business. It seeks to employ the beneficiary permanently in the United States as an auto body repairer. 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 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.

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<sup>1</sup> The Administrative Appeals Office (AAO), not the director, pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over a properly filed appeal in this case. Had the appeal been forwarded to the AAO, the AAO would have rejected the appeal as untimely filed and returned the file to the director to decide whether or not the appeal met the requirements of a motion. As the director granted the motion to reconsider the case, the petitioner has not been harmed by the director's error.

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).

At the outset it is important to establish that the proffered wage is the wage certified by the DOL. In the instant case, the petitioner originally filed a Form ETA 750 on April 30, 2001. This Form 750 was never certified by the DOL. In 2007, the petitioner chose to pursue conversion to the newly established PERM process by filing an ETA Form 9089. The conversion process allowed the beneficiary to retain the April 30, 2001 priority date from the initial Form 750 filing. The proffered wage as stated on the ETA Form 9089 is \$28.10 per hour (\$58,448 per year). The ETA Form 9089 was certified by the DOL on May 25, 2007. Therefore, the petitioner must demonstrate that it had the ability to pay the beneficiary the DOL certified proffered wage of \$58,448 per year from the April 30, 2001 priority date onward.

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>2</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 1999 and to currently employ eight workers. On the ETA Form 9089, signed by the beneficiary on August 8, 2007, the beneficiary does 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).

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<sup>2</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).

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 2001 onwards. The petitioner has submitted Internal Revenue Service (IRS) Form W-2 for the beneficiary for 2008 showing that the beneficiary was paid \$17,803 or \$40,645 less than the proffered wage.

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 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*, 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 has reported monthly expenses of \$2,314 (\$27,768 per year). The proprietor's tax returns reflect the following information for the following years:

<u>Year</u>	<u>Adjusted Gross Income (AGI)<sup>3</sup></u>	<u>AGI minus yearly expenses</u>	<u>Proffered wage less wages paid</u>
2001	\$39,539	\$11,771	\$58,448
2002	\$20,462	\$(7,306)	\$58,448
2003	\$25,269	\$(2,499)	\$58,448
2004	\$47,746	\$19,978	\$58,448
2005	\$2,812	\$(24,956)	\$58,448
2006	\$38,131	\$10,363	\$58,448
2007	\$53,936	\$26,168	\$58,448
2008	No tax returns submitted	No tax returns submitted	\$40,645

In 2001 to 2007, the sole proprietor's adjusted gross income minus yearly household expenses fails to cover the proffered wage of \$58,448. No financial information was submitted for 2008; therefore, the petitioner has also not demonstrated that it had the ability to pay the beneficiary the proffered wage in that year.

On appeal, counsel asserts that the director abused his discretion by not issuing a notice of intent to deny (NOID), in addition to the request for evidence (RFE) that was issued on February 27, 2009, after determining that all required evidence was not submitted with the initial petition. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

*Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage with the petition, and therefore, the director was not obligated to issue a request for evidence, or a subsequent notice of intent to deny. The petitioner was afforded ample opportunity to submit the required documents to establish eligibility.

Counsel further contends that the director did not properly consider the petitioner's bank account statements that were submitted for December 2007 to May 2009. These statements reflect funds in the Bank of America account that is 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. 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 AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage.

<sup>3</sup> Form 1040, line 33 (2001), line 35 (2002), line 34 (2003), line 36 (2004), or line 37 (2005 to 2007).

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, gross receipts varied, and net profit only exceeded the proffered wage in one year out of eight, thus indicating that the figures were not the results of isolated trends or events. Additionally, there are no other factors present in the record such as reputation, uncharacteristic expenditures or losses, or replacement of employees, which would indicate that the financial condition of the petitioner should be given less weight. 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 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.