

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

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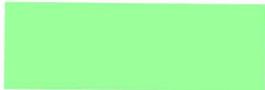


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OFFICE: TEXAS SERVICE CENTER

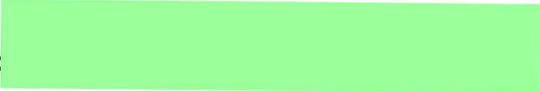
FILE:



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,

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 landscape construction business. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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, 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 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 8, 2007. The proffered wage as stated on the ETA Form 9089 is \$21.73 per hour (\$45,198.40 per year).¹ 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.²

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 one worker. On the ETA Form 9089, signed by the beneficiary on April 20, 2010, the beneficiary claimed to have worked for the petitioner since June 1, 2005.

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.

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

¹ The director's denial incorrectly states that the proffered wage is \$39,549 per year. The Form I-140 indicates that the proffered position is a full-time position; therefore, the annual wage is calculated based on 2080 hours worked in a year.

² 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).

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 (AGI), 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.

The proprietor reports that his monthly expenses are \$1,333 (\$15,996 per year) and his tax returns reflect the following information for the following years:

<u>Year</u>	<u>AGI</u>	<u>Proffered Wage</u>	<u>Proffered wage plus yearly living expenses</u>
2007	\$24,052	\$45,198.40	\$61,194.40
2008	\$28,290	\$45,198.40	\$61,194.40

In 2007 and 2008, the sole proprietor's adjusted gross income fails to cover the proffered wage plus his annual living expenses. The record does not contain the proprietor's tax returns for 2009 or 2010.

On appeal, counsel asserts that the sole proprietor has shown his ability to pay the proffered wage through alternative means. Namely, counsel asserts that the Form I-140 petition was filed with Internal Revenue Service Forms W-2 for the beneficiary for 2007, 2008, and 2009, along with paystubs for 2010. Counsel is mistaken. The records reflects that the petition was filed with IRS Forms W-2 for 2007 through 2009 and 2010 paystubs for an individual named Antonio Mejias and

not for the beneficiary. Therefore, these documents are not considered as evidence of the sole proprietor's ability to pay the proffered wage to the beneficiary.

Counsel further asserts that the sole proprietor's business bank accounts should be considered. The funds in this bank 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. 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.

As an alternative, the AAO may properly consider funds in the personal accounts of the sole proprietor when calculating the ability to pay. The record of proceeding contains statements from the following sole proprietor's personal bank accounts for the following time periods:

<u>Account</u>	<u>Statements submitted</u>
[REDACTED]	August 1, 2008 to June 30, 2010
[REDACTED]	January 1, 2007 to June 30, 2010
[REDACTED]	January 1, 2007 to June 30, 2010 ⁵
[REDACTED]	March 21, 2009 to July 22, 2010

The sole proprietor's personal bank accounts show average annual balances of \$132,631.97, \$120,214.99, and \$243,266.53 for the years 2007, 2008 and 2009, respectively. The average annual balance cannot be calculated for 2010 because the record does not contain statements for the entire year. As in the instant case, where the petitioner has not established its ability to pay the proffered wage plus yearly living expenses in the priority date year or in any subsequent year based on its AGI, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage plus yearly living expenses, in the instant case an amount of \$61,194.40. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage and yearly living expenses. In the instant case, the proprietor has established its ability to pay the proffered

³ The sole proprietor was 63 as of the priority date in 2007 and therefore would not have been liable for early withdrawal penalties if he had used the funds from his IRA to pay the prevailing wage.

⁴ It appears from the record that the account ending in #391 was renamed in 2008 to account #910. The RBC statements from March 2008 to July 2008 list both account numbers and transition to using the #910 account number from August 2008 onward.

⁵ The statements submitted for the IRA account appear to include monthly, bi-monthly and quarterly statements. When a statement covers more than one month, the statement beginning balance will be used as the monthly available balance for any month that is not the last month covered by the statement. For the last month covered in the statement, the statement ending balance is used. (Example: One statement covers October 1, 2009 to December 31, 2009. The beginning balance listed is \$42,627 and the ending balance listed is \$44,296. For our calculations, the balance available on October 31, 2009 and November 31, 2009 is \$42, 627; while the balance available on December 31, 2009 is \$44, 296.)

wage plus his yearly living expenses in 2007 as the average annual balance of his accounts is \$132,631.97 which is greater than \$61,194.40. In 2008, the average annual balance available in the accounts decreased by \$12,416.98. That amount subtracted from the available unused funds in 2007 (\$71,437.57) leaves the proprietor with only \$59,020.59 in available funds to pay the proffered wage and his annual living expenses in 2008. Therefore, the proprietor has not established his ability to pay in 2008 or in any subsequent year.

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 sole proprietorship had a negative net income in the years under consideration and there is no indication in the record that these years represent an isolated event and not a larger trend. The sole proprietor has substantial personal funds at his disposal, but these personal funds have not established his ability to pay the proffered wage and cover the proprietors living expenses. There is no indication in the record of the business' reputation, uncharacteristic business expenses or losses or that the beneficiary is replacing another employee. We also note that although the petitioner's business was established in January 1995; in April 2010 when the Form I-140 petition was signed and submitted, the business only had one employee. 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.

Beyond the decision of the director, the AAO notes additional issues. Part I.e.23 of the ETA Form 9089 asks, "Has the employer received any kind of payment for the submission of this application?" The petitioner answered, "Yes," to this question. Part I.e.23-A of the ETA Form 9089 states, "If yes, describe the details of the payment including the amount, date and purpose of the payment." In

response, the petitioner stated “alien agreed to pay attorney \$5000.00 on 5/10/2007 to prepare and file.”

On December 10, 2012, the AAO sent the petitioner a notice of derogatory information (NDI), notifying the petitioner that having the beneficiary pay the petitioner’s attorney for the preparation and filing of the ETA Form 9089 violates the regulations governing the labor certification process, notably, 20 CFR § 656.12(b) which states:

An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

20 CFR § 656.12(c) further states:

Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under § 656.32, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

In response, counsel states that as the above rule went into effect on July 16, 2007, the May 10, 2007 agreement between the beneficiary and counsel pre-dated the rule. Counsel submits a document entitled “FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and enhancing Program Integrity of May 17, 2007 (PERM Fraud Rule)” (FAQs), highlighting the section entitled “*What should attorneys do who have entered into contracts where payments from aliens for labor certification preparation and filing are either owed after July 16, or owed prior to July 16 but not paid until after July 16?*” The answer states the following:

If the payment obligation accrued, however, prior to July 16, the attorney has the right to seek payment after the effective date and should note on the application, for the record, when the obligation accrued...Attorneys answering “yes” to Question I-23

must be prepared to explain and support the details of such payments. The attorney should describe the payment, explain that the payment was to the attorney and from whom and when appropriate clarify on the application, for the record, that the payment was for an obligation accrued prior to the effective date if this provision.

Stating that an agreement was in place on May 10, 2007 does not constitute evidence that an obligation for payment was accrued prior to the effective date of the rule. The PERM fraud rule was published on May 17, 2007, and became effective on July 16, 2007. The labor certification in the instant case was not filed until November 8, 2007 and the first recruitment step noted on the application occurred on August 5, 2007, three months after the agreement was signed by counsel and the beneficiary. As such, it is not clear from the record that the obligation was incurred prior to the July 16, 2007 cut-off date. The responses in the FAQs clearly state that counsel must be prepared to “explain and support the details of the payment” providing evidence that the obligation was accrued prior to July 16, 2007. In the instant case, counsel has failed to provide evidence of its claims. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.