

(b)(6)

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: **MAY 22 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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. The petitioner filed an untimely appeal, which was rejected by the Administrative Appeals Office (AAO), and returned to the director who treated it as a motion to reopen or reconsider. The director moved on his own to reopen the matter and upheld his original decision denying the petition. The petitioner appealed once again to the AAO. The appeal will be dismissed.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 denials, 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.

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 April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$11.74 per hour per hour (\$24,419.20 a year based upon a forty-hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered of painter.

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 1989 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on October 21, 2003, the beneficiary did not claim to have worked for the petitioner before the priority date.

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 provided a Form W-2 for 2007 showing it paid the beneficiary \$18,500 in that year. The petitioner has not otherwise established that it employed and paid the beneficiary the full proffered wage from the priority date 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.*

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).

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.

Initially, from 2001 through 2005, the sole proprietor supported a family of four (himself, his spouse, a daughter and his mother). In 2006, the sole proprietor supported a family of three (himself, his wife, and one daughter). Then, from 2007 to 2009 the petitioner again supported a family of four (himself, his wife, a daughter, and his mother). His claimed annual living expenses are \$15,857. The proprietor's tax returns reflect the following information for the following years:

<u>Year</u>	<u>AGI</u>	<u>Available after expenses</u>	<u>After payment of wages</u>
2001	\$58,992	\$43,135	\$18,716
2002	\$26,130	\$10,273	-\$14,146
2003	\$32,453	\$16,596	-\$7,823
2004	\$44,751	\$28,894	\$4,475
2005	\$25,341	\$9,484	-\$14,935
2006	\$15,820	-\$37	-\$24,456
2007	\$29,557	\$13,700	\$7,781 ²

² The petitioner provided a Form W-2 for 2007 indicating it paid the beneficiary \$18,500 in 2007. Therefore, the petitioner must demonstrate its ability to pay the difference between the proffered

2008	\$11,312	-\$,4,545	-\$28,964
2009	\$9,094	-\$6,763	-\$31,182

The petitioner has demonstrated its ability to pay the proffered wage after covering the sole proprietor's annual expenses for 2001, 2004, and 2007. However, in 2002, 2003, 2005, 2006, 2008, and 2009, the sole proprietor's adjusted gross income less his personal expenses failed to cover the proffered wage of \$24,419. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel provided monthly statements from the petitioner's [REDACTED] (June 2003 through October 2009), a checking/money market account (April 2002 through September 2006), the petitioner's Individual Retirement Account (IRA) (April 2003 through December 2009), and [REDACTED] checking account (May 2009 through July 2010).

As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's financial statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary.

The petitioner's personal asset figures are set against the petitioner's liabilities (as shown from the "amount left after payment of wages" column above) to determine if the petitioner had the cumulative ability to pay the proffered wage.³ Based upon these accounts, an average monthly account balance was calculated for each year, as shown in the table below.

wage and wages already paid to the beneficiary in 2007.

³ The petitioner also provided statements from [REDACTED] insurance policies. According to footnotes in both statements, the amount available for withdrawal from those policies is unknown. Additionally, there is not evidence showing an average monthly balance for any time other than the year ending in 2009. The petitioner also provided six months of statements for noncontiguous months from 2005 to 2006 for a savings account. There is not enough evidence to determine an average monthly balance. Thus, the evidence herein cannot be relied upon.

<u>Year</u>	<u>Annual Deficit</u>	<u>Avg. Monthly Acct Balance</u>	<u>Cumulative Balance after Depletion</u>
2002	-\$14,146	\$15,066.77	\$920.77
2003	-\$7,823.51	\$70,903.84	\$48,934.33
2004	\$0	\$72,294.21	\$50,324.70
2005	-\$14,935.60	\$62,395.48	\$25,490.37
2006	-\$24,456.68	\$59,841.75	-\$1,520.04
2007	\$0	\$30,134.80	-\$31,226.99
2008	-\$28,964	\$23,887.50	-\$66,438.29
2009	-\$31,182	\$25,342.59	-\$96,165.20

Thus, the petitioner did not establish it had the continued ability to pay the proffered wage using its various resources from 2006 onward.

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 evidence submitted by the petitioner shows a long term trend of declining available resources. The petitioner failed to establish that it could shoulder the additional burden of the beneficiary's proffered wage. There is no evidence that the petitioner experience an uncharacteristic expenditure or loss, nor did the petitioner provide evidence of growth or an exceptional 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.