



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF P-H-S-

DATE: DEC. 23, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to permanently employ the Beneficiary as a cook under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal. 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 April 13, 2015, denial, at issue in this case is whether or not the Petitioner possessed the ability to pay the proffered wage as of the priority date and continuing until the Beneficiary obtains lawful permanent residence.

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 (labor certification), was accepted for processing by the U.S. Department of Labor (DOL). 8 C.F.R. § 204.5(d).

Here, the labor certification was accepted by the DOL on April 27, 2001. The proffered wage stated on the ETA Form 9089 is \$10.97 per hour (\$22,816 per year).

The Petitioner is a sole proprietorship. On the petition, the Petitioner claimed that the restaurant was established in 1992 and employs six workers. On the ETA Form 9089, the Beneficiary claimed to have worked for the restaurant as a cook since July 1994. In the brief submitted in support of this appeal, the Petitioner claims to have taken over the restaurant in 2009 from the sole proprietor that filed the labor certification.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for the subsequent immigrant petition, 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, the petitioner must establish that it has possessed the financial resources sufficient to pay the beneficiary's proffered wage from the priority date, 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).

Since the Petitioner claims to be a successor to the sole proprietor who filed the labor certification, the Petitioner is still required to establish that the predecessor possessed the ability to pay the proffered wage from the priority date until the change of ownership. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). It is not sufficient to establish ability to pay from the date of change of ownership onwards.

In determining ability to pay the proffered wage during a given period, we examine whether the petitioner (as well as the sole proprietor who filed the labor certification) employed and paid the beneficiary during that period. If the petitioner establishes 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 ability to pay 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, we 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).

A sole proprietorship is 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 IRS 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.

At the outset, we note that 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay the proffered wage "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The Director's decision concluded that annual reports, federal tax returns, or audited financial statements were not submitted for 2001, 2002, 2003, 2009 and 2010. That the Petitioner did not provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish ability to pay the proffered wage, it may not be substituted for evidence required by the regulation at 8 C.F.R. § 204.5(g)(2).

The Director's decision also concluded that the Beneficiary's Forms W-2 established that he had been paid in excess of the proffered wage in 2008, 2009, 2010, 2011, 2012, 2013, and 2014, but not for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009. For 2004, 2005, 2006, 2007, and 2008, the Director also noted that the Petitioner did not submit evidence of monthly personal expenses that are subtracted from adjusted gross income when establishing ability to pay for a sole proprietorship.

In summary, the Director's decision concluded that the Petitioner did not establish its ability to pay in 2001, 2002 (no tax returns, no evidence of personal expenses, and insufficient wages shown on Form W-2); 2003 (no tax returns, no Form W-2, and no evidence of personal expenses); 2004 and 2005 (no Forms W-2 and no evidence of personal expenses); 2006, 2007, and 2008 (no evidence of personal expenses and insufficient wages shown on the Forms W-2); and 2009 and 2010 (no tax returns and no evidence of personal expenses). The Petitioner only established its ability to pay for 2011, 2012, 2013, and 2014.

The Petitioner's brief incorrectly claims that the only years where it did not establish ability to pay were 2001, 2002, and 2003 because the brief did not take into account the Director's finding that the record did not contain the required tax returns and monthly expense summaries for multiple years.

On appeal, the Petitioner does not dispute the Director's analysis of the submitted financial documentation. Instead, the Petitioner claims that requiring him to establish ability to pay from the priority date is an "unfair reading of the regulations" and that our interpretation of 8 C.F.R. § 204.5(g)(2) "leads to absurd and unfair results." The Petitioner cites to *Matter of Chavez-Alvarez*, 20 I&N Dec. 274, 276-277 (BIA 2004) in support of the proposition that the plain meaning of 8 C.F.R. § 204.5(g)(2) must be interpreted to avoid requiring him to establish ability to pay prior to his ownership of the restaurant in 2009.<sup>1</sup>

We disagree with the Petitioner's claim that this is an absurd result. Both the regulation and relevant case law have confirmed that the Petitioner must establish its ability to pay the proffered wage from the priority date of the petition; and that, if the Petitioner is a claimed successor to the person or entity that filed the labor certification, the Petitioner is required to establish that the predecessor possessed the ability to pay the proffered wage from the priority date until the change of ownership. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

Therefore, considering the totality of the circumstances, we concur with the Director's conclusion that the Petitioner did not establish that it and the sole proprietor who filed the labor certification possessed the ability to pay the proffered wage from the priority date until the present.

Beyond the decision of the Director, the Petitioner also did not establish that it is a successor-in-interest to the entity that filed the labor certification in the instant matter. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the Petitioner is a different entity than the labor certification employer, it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In order for there to be a valid successor relationship, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. The evidence in the record does not fully describe and document the transaction transferring ownership of the predecessor and the Petitioner. Accordingly, the appeal must also be dismissed because the Petitioner did not establish that it is a successor-in-interest to the employer that filed the labor certification upon which this petition is based.

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<sup>1</sup> We note that the record includes inconsistencies in the date that the current owner purchased the Petitioner's business. In his brief submitted with this appeal dated June 8, 2015, counsel for the Petitioner states that the current owner "took over the . . . restaurant in 2009 . . ." However, the record includes a letter from counsel dated January 16, 2015 stating that "the current owner of the . . . restaurant purchased the business in October 29, 2012." The record also includes federal tax returns from the Petitioner's prior owners demonstrating their ownership of the business in 2011 and 2012.

*Matter of P-H-S-*

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of P-H-S-*, ID# 14963 (AAO Dec. 23, 2015)