



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

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

MATTER OF TKI-A-R-

DATE: FEB. 15, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an automotive repair business, seeks to employ the Beneficiary as an automotive mechanic. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wage.

On appeal, the Petitioner asserts that the Petitioner can establish its ability to pay based on the totality of its circumstances, including its net current assets, good reputation, and substantial capitalization.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's June 22, 2016, priority date onward. The proffered wage is \$65,000 per year.

The regulation at 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.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, the record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward.

The Petitioner appears to be a sole proprietorship, a business in which one person operates the business in his or her personal capacity.² 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 considered as part of the Petitioner's ability to pay. Sole proprietors report annual income and expenses from their business on their IRS Form 1040, U.S. Individual Income Tax Return. The business-related income and expenses are reported on Form 1040, Schedule C, and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, the sole proprietor supported himself in 2016. The sole proprietor's 2016 tax return reflects an AGI of \$21,905, which is not sufficient to establish the Petitioner's ability to pay the \$65,000 proffered wage in that year. Moreover, deducting the sole proprietor's annual living expenses from the AGI would further reduce the funds available to pay the proffered wage, but the

² The Petitioner listed its federal employer identification number (EIN) on the labor certification and Form I-140, Immigrant Petition for Alien Worker, as [REDACTED]. It submits two 2016 tax returns, one for a sole proprietorship (with the business name and EIN left blank) and one for a corporation (with a different EIN than the one claimed by the Petitioner). Neither tax return lists the Petitioner's EIN. In any future proceedings, the Petitioner must establish its correct EIN with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Petitioner did not provide a list of the sole proprietor's personal expenses.³ Without a detailed list of the expenses, we cannot determine the actual magnitude of the difference between the funds available and the Petitioner's wage obligation. As such, the Petitioner has not demonstrated its ability to pay based on its AGI.

The Petitioner's 2016 Schedule C was prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See Internal Revenue Service (IRS) Publication 538, <https://www.irs.gov/publications/p538/ar02.html> (last visited Jan. 26, 2018). On appeal, the Petitioner appears to claim that its results would have been different if it had used the accrual method of accounting.⁴ However, if revenues are not recognized in a given year on the Petitioner's tax return pursuant to the cash method of accounting, the Petitioner may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year on the tax return, the Petitioner may not shift those expenses to a different year in an effort to show its ability to pay the proffered wage. Thus, the amounts shown on the Petitioner's 2016 tax return shall be considered as they were submitted to the IRS.

The Petitioner further asserts that it may rely on an unaudited balance sheet dated June 30, 2017, listing the assets and liabilities of the Petitioner.⁵ It lists the current value of cars, motorcycles, and boats owned by the sole proprietor, as well as the value of the sole proprietor's land investment in Poland. The record also contains titles and registrations for cars, motorcycles, and boats on that list,⁶ as well as a copy of a deed for the property in Poland. However, the record does not contain documented evidence of the value of these assets, such as appraisals or tax assessments. Without credible evidence of the ownership and value of all of the assets, we cannot determine whether the assets are sufficient to pay the proffered wage. The record also does not establish that the land investment in Poland is a readily liquefiable asset that is available to pay the proffered wage.

³ The sole proprietor's itemized deductions on his 2016 tax return totaled \$19,248, but this total is likely not representative of all of his expenses during that year. If the Petitioner pursues this matter further, it must submit a statement listing the sole proprietor's monthly household living expenses, with supporting documentary evidence, for 2016 onward. Expenses include, but are not limited to: housing (rent or mortgage); food; car payments (whether leased or owned); insurance (auto, homeowner, health, life); medical; utilities (electric, gas, cable, phone, internet); credit cards; student loans; clothing; gardener; house cleaner; and any other recurring expenses.

⁴ Under the accrual method of accounting, revenue is recognized when it is earned, and expenses are recognized when they are incurred. *Id.*

⁵ Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. 8 C.F.R. § 204.5(g)(2). Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the Petitioner must establish its ability to pay the proffered wage from 2016 onward, and the balance sheet is dated in 2017. See 8 C.F.R. § 204.5(g)(2).

⁶ Not all of the titles list the sole proprietor or the Petitioner as the owner. For example, one of the motorcycles is registered to [REDACTED] one of the boats is registered to [REDACTED] one of the automobiles is registered to [REDACTED] and one of the automobiles is registered to [REDACTED]. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The Petitioner also asserts that its bank account balance should be considered and submits a letter from [REDACTED] indicating that the Petitioner had a balance of \$85,911.63 in its account as of July 24, 2017. However, the Petitioner has not demonstrated that these funds were available in 2016, the year in question. Moreover, the funds in the account are located in the sole proprietorship's business account. Any funds that were available in the account in 2016 were likely already shown on Schedule C of the sole proprietor's tax returns as gross receipts and included in the calculation of the Petitioner's AGI, which is insufficient to establish the Petitioner's ability to pay.

On appeal, the Petitioner asserts that it can establish its ability to pay based on the totality of its circumstances, including its net current assets, good reputation, and substantial capitalization. We may consider evidence of a petitioner's ability to pay based on the totality of the circumstances, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In this case, the Petitioner asserts that it was established in 1988 and has only one employee. Unlike in *Sonogawa*, the record contains no evidence of the historical growth of the Petitioner's business; the occurrence of any uncharacteristic business expenditures or losses; or whether the Beneficiary will replace a current employee or outsourced service. Despite its arguments on appeal, the Petitioner does not submit evidence of its reputation in its industry, and as discussed above, the evidence it submits concerning its assets and funds in its bank account are not sufficient to demonstrate the Petitioner's possession of additional funds available to pay the proffered wage. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

III. THE BENEFICIARY'S QUALIFICATIONS

Although not addressed by the Director in her decision, the Petitioner did not establish that the Beneficiary possessed the education and experience required by the labor certification as of the priority date.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires automotive mechanic school (with a major in automotive repair) and 60 months of experience in the job offered of automotive mechanic.

The labor certification states that the Beneficiary qualifies for the offered position based on his

associate's degree (with a major in mechanic-technician) received from [REDACTED] in Poland in 1995; his experience as an automotive mechanic with [REDACTED] in Poland from May 17, 2006, to June 28, 2011; and his experience as an automotive mechanic with [REDACTED] in Poland from May 1, 2000, to May 15, 2006.⁷

The record contains no evidence relating to the Beneficiary's education or experience. Therefore, the Petitioner has not established that the Beneficiary possessed the education and experience required by the labor certification as of the priority date. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The Petitioner did not establish its continuing ability to pay the proffered wage. Further, the Petitioner did not establish that the Beneficiary possesses the required education and experience for the offered job.

ORDER: The appeal is dismissed.

Cite as *Matter of TKI-A-R-*, ID# 986273 (AAO Feb. 15, 2018)

⁷ Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(I)(3).